

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE**

[2025] NZERA 611
3318741

BETWEEN	CAROLYN O'FALLON Applicant
AND	NEW ZEALAND INSTITUTE OF ECONOMIC RESEARCH Respondent

Member of Authority:	Rowan Anderson
Representatives:	Peter McKenzie-Bridle, counsel for the Applicant Scott Worthy, counsel for the Respondent
Investigation Meeting:	27 May 2025 in Wellington and 19 June 2025 by AVL
Submissions and further information received:	Up to and including 19 June 2025
Determination:	30 September 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Carolyn O'Fallon was employed by the New Zealand Institute of Economic Research (NZIER) as a Senior Economist. She commenced employment with NZIER on or about 30 August 2023 on a part-time, 0.6 FTE, basis.

[2] Ms O'Fallon's employment came to an end following a restructuring process on the grounds of redundancy.

[3] Ms O'Fallon alleges that the dismissal was unjustified, that she was unjustifiably disadvantaged in her employment, and claims that NZIER breached its duty of good faith. She seeks compensation for lost wages and humiliation, loss of dignity, and injury to feelings. She also seeks the imposition of penalties upon NZIER.

[4] NZIER denies the claims and says that the dismissal was justified and was the result of genuine redundancy. It also contends that Ms O’Fallon breached terms in her individual employment agreement (IEA) relating to the alleged disclosure confidential information and seeks the imposition of penalties.

The Authority’s investigation

[5] A case management conference was held on 25 February 2025 and directions put in place relating to the timetabling and conduct of the Authority’s investigation.

[6] For the Authority’s investigation written witness statements were lodged from Ms O’Fallon and her partner Christopher Midgley. For NZIER, statements were lodged from Jason Shoebridge, Chief Executive, and Sarah Hogan, Deputy Chief Executive.

[7] An investigation meeting was held in Wellington on 27 May 2025. The witnesses answered questions under oath or affirmation at the investigation meeting. The investigation was reconvened on 19 June 2025 by AVL for the purposes of oral submissions

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. The Chief of the Authority has decided that exceptional circumstances exist such as to allow this determination to be issued outside of the three month timeframe required by s 174C(3) of the Act.

Issues

[9] The issues for investigation and determination are:

- (a) Was Ms O’Fallon unjustifiably dismissed?
- (b) Was Ms O’Fallon unjustifiably disadvantaged in her employment?
- (c) If NZIER’s actions were not justified what remedies should be awarded, considering:
 - (i) Compensation for humiliation, loss of dignity, and injury to feelings; and/or
 - (ii) lost wages?

- (d) Did NZIER breach its good faith obligations? If so, should any penalty be imposed in terms of s 4A of the Employment Relations Act 2000 (the Act)?
- (e) Did Ms O’Fallon breach cl 24 and/or 20(a) of her IEA? If so, should any penalty be imposed in terms of s 134 of the Act (and paid to NZIER)?
- (f) Should either party contribute to the costs of representation (if any) of the other party?

Background

[10] Ms O’Fallon was employed as a Senior Economist commencing her employment with NZIER on or about 30 August 2023. She was employed on a part-time, 0.6 FTE, basis.

[11] At the relevant time, there were five other Principal Economists employed by NZIER. Those five employees were employed on a full-time basis, with two of them having other responsibilities as part of their roles. Ms O’Fallon and the other Principal Economists performed the same type of work.

[12] NZIER suffered a downturn in demand for its services in early 2024. Mr Shoebridge’s evidence, which I accept, is that the downturn related to both an economic recession and cuts in Government spending implemented following the general election. Various cost saving measures were taken by NZIER, including a pay freeze introduced in April 2024, deferring various capital expenditure, and through natural attrition.

[13] A proposal (the “Proposal”) involving the disestablishment of Ms O’Fallon’s role, dated 5 August 2024, was prepared by Mr Shoebridge.

[14] Ms O’Fallon attended a meeting, by audio visual link, with Ms Hogan and Mr Shoebridge on 5 August 2024. At that meeting, she was advised of the Proposal and that her role might be disestablished with the prospect that she may be made redundant. The only position proposed to be disestablished was Ms O’Fallon’s position, that being what was described as the “part-time Principal Economist” role. Ms O’Fallon was not advised of the purpose of the meeting in advance, nor did she attend with a support person or representative.

[15] Various issues were discussed at the 5 August 2024 meeting, including whether other costs saving measures had been considered, whether Ms O’Fallon might become a contracted “Associate”, and a potential waiver of Ms O’Fallon’s restraint of trade. Mr

Shoebridge requested that Ms O’Fallon provide her feedback to the Proposal by 9 August 2024 and contends that she was not required to provide any response to the Proposal at the meeting itself.

[16] Mr Shoebridge says he spoke to Ms O’Fallon about confidentiality at the meeting, his evidence being:

I assured Carolyn it was our preference that this process remain confidential and reassured her that we would not be talking about this stuff to other staff until a final decision was made to protect Carolyn’s privacy.

[17] A copy of the Proposal was sent to Ms O’Fallon by email following the meeting.

[18] Ms O’Fallon emailed Mr Shoebridge on 6 August 2024 advising she, at that stage, was not challenging the Proposal, requesting other staff and clients be appraised of the Proposal and timeframes, and raising matters relating to the handover of projects she had been working on. Mr Shoebridge responded the same day as follows:

...
I appreciate your prompt response on this. Until we reach a final decision we do remain in a difficult position legally making the news of the process public, despite you waving your confidentiality for us. If you are not going to challenge the proposal are you happy for us to conclude the consultation process. We can then come back to you with a final decision and agree on a leaving date. We can then announce it all together. One issue for the marketing meeting this morning is that I will not be their [sic] as I have an external meeting. However, as soon as we have a final decision, we can agree a date and I can come back to you with the wording of an email announcement...

[19] Mr Shoebridge followed up later the same day:

...I am following up the email below. Given you don’t wish to challenge the proposal can we now conclude the consultation period? You can take some more time to think about it if you wish?

[20] Ms O’Fallon responded on 7 August 2024 stating that, while not challenging the decision to disestablish her role, she intended to provide some feedback which she would send through. Mr Shoebridge responded confirming that was fine and offering to assist with anything she might require in order to provide the feedback.

[21] Ms O’Fallon’s representative emailed Mr Shoebridge on 9 August 2024 advising that the deadline for providing feedback could not be met and advising that they anticipated providing feedback on 12 August 2024. The email included a request for a copy of information relied upon by NZIER in justifying the Proposal. Mr Shoebridge confirmed the extension and responded stating that all of the information relied upon was in the Proposal.

[22] A personal grievance alleging unjustified disadvantage was raised with NZIER on 12 August 2024. The correspondence noted that Ms O’Fallon was one of six employees employed in the role of Principle Economist. In summary terms, the concern raised was that it was unclear why only Ms O’Fallon was impacted by the Proposal. Issue was also taken with Ms O’Fallon not being advised she could have a support person at the initial meeting and with being isolated because of being prohibited from speaking with her colleagues.

[23] Mr Shoebridge responded to the personal grievance notification on 14 August 2024. That correspondence noted that he did not accept Ms O’Fallon had a valid personal grievance, referred to the Proposal as containing the rationale for the proposed changes, and that Ms O’Fallon had not made a request to discuss the Proposal with her colleagues. Mr Shoebridge asserted that there was no requirement to advise Ms O’Fallon she could have a support person in relation to the initial meeting given no response was expected of her at that meeting. The response concluded advising that NZIER were prepared to extend the deadline for any further feedback to 15 August 2024.

[24] On 15 August 2024 Ms O’Fallon’s representative advised that she had no further feedback. The email referenced the notification of a personal grievance claim for unjustified disadvantage, and a possible claim for unjustified dismissal should Ms O’Fallon’s employment be terminated.

[25] On 16 August 2024, Mr Shoebridge wrote to Ms O’Fallon advising of a preliminary decision to proceed with the Proposal. The letter sought any feedback on the preliminary decision by 19 August 2024.

[26] On 20 August 2024, NZIER communicated a final decision to proceed with the Proposal, including stating:

Your position is disestablished with effect from end of day 20 August 2024.
As discussed with you, we cannot identify any suitable alternative positions to which you could be redeployed. Therefore your employment with NZIER is terminated from that date by reason of redundancy.

[27] Ms O’Fallon was advised her employment was being terminated at 9.55am and she was paid four weeks in lieu of notice at 2.09pm. She agreed to be paid out in lieu of notice and for her restraint of trade to be waved. At 2.50pm she emailed her colleagues advising she had been made redundant and attached a copy of the Proposal

to the email. She had also, prior to the final decision being made, advised two of NZIER's clients that she was likely to be made redundant.

Was Ms O'Fallon unjustifiably dismissed from her employment?

[28] Section 103A of the Act sets out the test for justification. The Authority must consider, on an objective basis, whether NZIER's actions, and how NZIER acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.¹

[29] Justification requires the consideration of both substantive and procedural fairness. The onus is on NZIER to justify its actions. Section 103A of the Act requires the Authority to consider the factors set out at s 103A(3) and also the requirements of good faith set out at s 4(1A) of the Act.

[30] Mr Shoebridge gave evidence as to the background and reasons for initiating the restructuring process. That evidence included detailing the asserted consequences of an economic downturn in early 2024. Mr Shoebridge's evidence was that there was a significant reduction in demand for NZIER's services attributable to "a significant downturn in demand as a result of the economic recession and the cuts in Government Spending implemented by the National-led coalition government after it took power in December 2023".

[31] Mr Shoebridge's evidence was that there were some savings based on natural attrition, two staff reducing their hours, a salary freeze was implemented, by deferring capital expenditure, and that a range of discretionary costs were cut. He said the financial situation and measures taken to that point were discussed with staff. Those measures were said to have saved \$500,000 compared to the previous year. Mr Shoebridge said that, in light of the above, he began to focus on how to reduce costs without the need to restructure.

[32] Despite the other measures taken, Mr Shoebridge said that it became apparent by July 2024 that NZIER would not likely return to surplus. He said the management team then discussed what further savings could be made and that, given the other measures, the only remaining option was to review the staffing structure. He said there was a meeting about that on 22 July 2024.

¹ Employment Relations Act 2000, s 103A.

[33] Mr Shoebridge's evidence was that while costs were a factor, so too was maintaining capacity. He said that reducing headcount would reduce NZIER's capacity, including in terms of being able to respond in the event of an upturn in business. It was necessary he said, "...to balance that by ensuring as far as possible that current or future revenue would not be impacted". He said he talked through the financial situation with the Board, who authorised him to prepare a restructuring proposal.

[34] The proposal was limited to the disestablishment of the part-time Principal Economist role, that being Ms O'Fallon's role. Mr Shoebridge said that the rationale was explained in the proposal, that being to preserve sufficient capacity in the short term, and to balance cost savings while minimising lost revenue.

[35] The proposal included a timeline for decision making and consultation, advised further information could be sought by Ms O'Fallon, and recorded that it was Mr Shoebridge's expectation that Ms O'Fallon not discuss the proposal with any other NZIER staff or associates. Ms O'Fallon was invited to provide feedback on the proposal and advised that she would be given an opportunity to respond to any preliminary decision that might be made.

[36] I accept Mr Shoebridge's evidence as to the relevant impacts and factors leading to the Proposal and the basis on which the Proposal proceeded. His evidence was supported by information as to the financial impact, decline in relevant work, and expected medium term impacts of the drop in demand for NZIER's services. I accept that there was a genuine reason to seek cost savings in light of the impacts to the operations and decreased demand.

[37] It was submitted for Ms O'Fallon that she and five others performed the same roles, that the roles or individuals were interchangeable, and that a selection process should have been used. Further, that there was a failure to engage other staff in consultation and that other measures were demonstrably available. It was also submitted that while it had been asserted a balancing approach was required, that there was no evidence of what the right balance was, no analysis of what capacity needed to be retained, and that it rested simply on Mr Shoebridge's subjective views.

[38] NZIER's position is that while cost savings were a factor, retaining capability to meet operational demands was also a significant consideration. It was submitted for NZIER, in relation to the part-time and full-time roles not being comparable, that a part-time employee has less capacity to carry out work and that "...in turn limits the roles' ability to meet operational demands at the same level as a full-time position." It was submitted for NZIER that, given the fundamental differences between part-time and full-time roles, a fair and reasonable employer could determine that the use of selection criteria was not required.

[39] Ms O'Fallon's counsel referred to the Authority's determination in *Craig v St George International Group Ltd*² as an analogous example of a redundancy proposal being unjustified on the basis of it being targeted. I don't consider the circumstances of that case are analogous. Such as the determination in that matter deals with the correct selection pool, it proceeds on the basis that all of the relevant employees were employed in the same position to do the same job. Here, while the job descriptions and arguably roles were the same, there is a point of difference in the contractual hours of work.

[40] Counsel for Ms O'Fallon also referred to the Authority's determination in *New Zealand Merchant Service Guild v Real Journeys Ltd*,³ and the Employment Court's judgment⁴ on challenge as to the appropriate selection pool. In the circumstances of that case, the Authority, and then Court, concluded that the selection pool should have included six launch masters employed, in whole or part, to operate on Milford Sound. In the Authority, the applicants were pursuing a dispute in circumstances where a review process was said to have isolated three permanent Milford launch master roles while excluding three summer launch master roles. The three isolated were members of the Guild. The Authority found that all six should have been included in the selection pool, despite the respondent's basis for the pool being that the summer-only launch masters were redeployed in winter and paid from a different budget.

[41] The Employment Court's judgment dealt with the plaintiff's assertion that all launch masters employed by the company in Fiordland, approximately 19 of them in total, should have been included rather than just the 6 working on Milford Sound. The Court held that a fair and reasonable employer would have made the selection for

² *Lyndsey Craig v St George International Group Limited* [2012] NZERA 297.

³ *New Zealand Merchant Services Guild and oths v Real Journeys Limited* ERA Christchurch CA74A/09, 5 October 2009, 2009 WL 3298123.

⁴ *David Bourne and oths v Real Journeys Limited* [2011] NZEmpC 120.

redundancy from the six launch masters whose work included engagement at Milford sound. I don't consider either case of particular assistance here. What I am satisfied of is that NZIER's decision to focus on the part-time role was justifiable having regard to its business considerations and the distinction between the part-time and full-time positions. The distinction was real and was not one that was only marginal.

[42] NZIER referred to the Employment Court's judgment in *Glenfield College Board of Trustees v Anderson*⁵ in submitting there is a fundamental distinction between full-time and part-time roles. In that case the Court noted that the replacement of a full-time position of Director of International Students with a part-time role resulted in the full-time employees position being made redundant.

[43] I consider it likely that if one of the other Principal Economist roles hours were reduced by almost 50 per cent, as was the case in *Glenfield College*, that the role would have been found to have resulted in redundancy. However, I don't consider the judgment can be used in the broad manner seemingly asserted by NZIER as establishing a cut and dry distinction between part-time and full-time roles in all cases. However, there are of course differences between part-time and full-time roles and here that distinction was not insignificant.

[44] An employer might well decide that a single role is surplus to requirements. Ultimately the question is whether the process used was one that was open to NZIER acting as a fair and reasonable employer. Counsel for Ms O'Fallon submitted that there must be some logical connection between the selection pool and the rationale for the redundancy proposal. As a general proposition I don't disagree.

[45] It is correct that NZIER's Proposal raised general economic concerns. I do not consider that means that all staff should have been in the selection pool as suggested in submissions for Ms O'Fallon. An employer is entitled to restructure its operations to save costs and to focus the operational changes in areas where it considers those savings can be achieved having regard to its genuine business interests. Here, there was specific information considered as to reduction in demand for NZIER's services and the decline in government work available.

⁵ [2024] NZEmpC 226 at [66].

[46] Ultimately the question here is whether NZIER's approach and selection of one position was substantively and procedurally justifiable. This is not a case of inappropriate selection criteria being applied, for example through the use of subjective criteria to manufacture an outcome. I consider NZIER has established that it had genuine commercial reasons for taking the approach it did. The changes were precipitated by a drop in demand for its services and it took a view that was open to it, as a fair and reasonable employer, to focus its restructure on the part-time Principal Economist role in order to maintain capacity.

[47] The position was identified as being surplus to NZIER's requirements. A characteristic of that position was that it was part-time in nature. Aside from being part-time, the duties involved were, at least more or less, the same as those involved in the full-time Principal Economist roles. However, NZIER were not obliged to include the full-time roles as being subject to restructuring, nor was it obligated to include the full-time Principal Economists in a selection pool. The focus on the part-time role was supported by genuine business grounds; it was not a case of weighing the attributes of individuals performing the same role.

[48] I accept there was a genuine basis for the restructuring and ultimately for the dismissal on grounds of redundancy. A legitimate consideration for NZIER was the retention of capacity to preserve its position in the event of a turnaround. It was not obligated to include the other Principal Economists in its consultation as to the Proposal where it had no intention for those roles to be impacted.

[49] Mr Shoebridge acknowledged NZIER had consultation obligations. He said that the issues addressed in the feedback from Ms O'Fallon had already been considered but denied that the result was predetermined. It was put to Mr Shoebridge in cross examination that sharing the Proposal with others may have validated the basis for the Proposal and may have led to others proposing alternatives. It was put to him that there was no information in the Proposal as to the 'balance' said to have been required. His response was that a judgement call was required, and that the Proposal set out the relevant considerations. In reply questioning, Mr Shoebridge confirmed that there was no contractual redundancy compensation, the implication being there was no incentive for voluntary redundancy.

[50] NZIER did not consult with any of the other Principal Economists. However, it was not proposing to make a decision that would, or would likely to have an adverse effect on the continuation of employment on those individuals in terms of s 4(1A)(c) of the Act.

[51] In terms of ulterior motives, I am not satisfied that any have been established. I do not consider any of the evidence establishes that Ms O'Fallon was targeted based on her gender. There was some limited evidence as to Ms O'Fallon's working from home arrangements as having been a point of consideration or discussion previously. Mr Shoebridge and Ms Hogan disagreed with any suggestion that a factor in the redundancy was Ms O'Fallon's gender. Both also maintained that the reasons for the restructuring and redundancy were genuine. I accept that evidence and I am not satisfied that was in any way a motivation for the approach taken or dismissal.

[52] It was submitted for NZIER that it would be expected that alternatives would be considered prior to proposing redundancy and that is what occurred. In response to questioning at the investigation meeting, Mr Shoebridge said that NZIER considered all other positions and considered asking for volunteers for redundancy. He said that they subsequently, after Ms O'Fallon's dismissal, asked for volunteers and six showed an interest. However, NZIER decided against accepting those as it was not sustainable. He also said a broader reduction of FTE, for example a reduction of 0.1 FTE across each of the Principal Economists was not feasible.

[53] I conclude that NZIER were justified in terms of the procedural elements relevant to the dismissal. That includes NZIER providing Ms O'Fallon the relevant information as to its Proposal, affording her an opportunity to consider that information and to provide feedback, and by engaging with her representative. I do not consider the absence of a support person or representative at the initial meeting amounts to a procedural flaw and Ms O'Fallon was not required to provide a response at that meeting. In any event, she sought representation who engaged with NZIER before any final decision was made.

[54] I do not consider NZIER's actions through Mr Shoebridge were predetermined. While there was evidence that various potential alternatives had been considered prior to Ms O'Fallon being informed of the Proposal, I do not consider that it itself to be problematic. I accept the submission for NZIER to the effect that the consideration of

alternatives at an early stage should be encouraged. Having regard to Mr Shoebridge's response and preliminary decision of 16 August 2024, I conclude that NZIER considered and responded to Ms O'Fallon's feedback, that an open mind was maintained during consultation, genuine reasons were provided where feedback was not adopted, and that the approach taken was justifiable.

[55] I conclude that the dismissal was substantively and procedural justified. Ms O'Fallon's claim that she was unjustifiably dismissed is unsuccessful.

Was Ms O'Fallon unjustifiably disadvantaged in her employment?

[56] I have already outlined the test for justification. The onus is on the NZIER to show that its actions, and how it acted were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.

[57] Ms O'Fallon's unjustified disadvantage claim relates to what was said to be a 'singling out' of Ms O'Fallon in terms of the process that led to her dismissal. The claim relates to the process leading to the dismissal and I have already dealt with the relevant aspects of the claim elsewhere.

[58] Ms O'Fallon's claim of unjustified disadvantage is unsuccessful. As Ms O'Fallon's claims are unsuccessful, and I do not need to consider the issue of remedies.

Did NZIER breach its duty of good faith, and if so, should penalties be imposed?

[59] I am not satisfied that NZIER's actions were in breach of its duty of good faith having regard to the findings I have otherwise made. Ms O'Fallon's claim for penalties is unsuccessful.

Did Ms O'Fallon breach the obligations under her IEA, and if so, should any penalties be imposed?

[60] NZIER claims that Ms O'Fallon breached clauses and 20(a) and 24 of her IEA. It seeks the imposition of penalties upon Ms O'Fallon for those claimed breaches and seeks that any penalties be paid to NZIER.

[61] Clause 20(a) provides that Ms O'Fallon would comply with all lawful and reasonable instructions provided by NZIER. Clause 24 goes to the use of confidential information:

24. Confidentiality

It will be expected of you that you exercise reasonable judgment on matters of confidentiality to the organisation. This includes during the term of your employment, and after the termination of this agreement. You agree that you will not use, or disclose to any third party, any information about the business, or our clients, employees, contractors, intellectual property or trade secrets, except to the extent necessary to perform your duties under this agreement or as required by law. Confidential information protected by this clause shall include the terms of this agreement but not any information that has entered the public domain, other than as a result of a breach of this clause.

You agree to take all reasonable steps to prevent the improper use or disclosure of any confidential information of the nature described above and will immediately advise us of any instance of unauthorised use or disclosure of confidential information of which you become aware.

[62] Mr Shoebridge's evidence was that he assured Ms O'Fallon that the process would be kept confidential and that he told her he expected that she would not discuss the proposal with other NZIER staff or associates. The instruction, even if lawful and reasonable, was premised on the basis that any confidentiality was for Ms O'Fallon's benefit.

[63] Ms O'Fallon's email on 20 August 2024 to the other staff was unremarkable. While noting her position had been disestablished, and attaching a copy of the Proposal, the email is not critical of NZIER and otherwise reads as a sincere but brief farewell email. The information provided in the email, including the data contained in the Proposal, was not genuinely confidential in that Mr Shoebridge made much of NZIER's sharing of such information with its staff in the context of the cost saving measures he says were implemented.

[64] No draft announcement was sent to Ms O'Fallon at the time of being advised of the preliminary or final decisions. Mr Shoebridge's evidence was that he did not get a chance to provide a draft and that one would have been produced after 3.00pm on Ms O'Fallon's final day. He was unable to point to any substantive damage as a result of the alleged breach.

[65] Ms O'Fallon says that she used her discretion to advise two key clients that she was being made redundant, she did so because it was good business practice and to maintain their confidence in her and in NZIER, and that she did so only when she was certain she was being made redundant. I am not satisfied that any truly confidential information was disclosed by Ms O'Fallon.

[66] I find that the information disseminated by Ms O'Fallon regarding her impending dismissal was not confidential and that Ms O'Fallon did not breach the terms of her employment agreement. Regardless of any communication from Mr Shoebridge declining a waiver by Ms O'Fallon, the disclosure and other actions by Ms O'Fallon were not such as would give rise to a penalty. Further, even if there had been a breach, Ms O'Fallon's conduct in no way suggests that the imposition of penalties would be appropriate.

[67] NZIER's claim that Ms O'Fallon breached the terms of her IEA is unsuccessful.

Conclusion

[68] Ms O'Fallon's claims are unsuccessful, as are NZIER's counterclaims.

Costs

[69] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. My preliminary view is that costs should lie where they fall having regard to the unsuccessful claims and counterclaims.

[70] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the relevant party claiming costs may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the other party will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

Rowan Anderson
Member of the Employment Relations Authority