IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2025] NZERA 655
3132635

	BETWEEN	DAVID OSBORNE Applicant
	AND	CALLAGHAN INNOVATION RESEARCH LIMITED Respondent
Member of Authority:	Geoff O'Sullivan	
Representatives:	David Osborne as Applicant in person Peter Chemis and Nikita Raman for the Respondent	
Investigation Meeting:	24 March 2025 in Wellington	
Submissions Received:	Up to and including 15 April 2025	
Determination:	17 October 2025	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] David Osborne was employed by Callaghan Innovation Research Limited (Callaghan) from September 2014 to August 2018. At the time of the restructure Mr Osborne was the Team Leader IT Applications. He claims the termination of his employment was an unjustified dismissal because he was wrongly made redundant. Further, he says he was unjustifiably disadvantaged by a predetermined and flawed process leading up to his redundancy. He says he suffered inconsistent treatment and there were no valid grounds for redundancy. He claims Callaghan breached its duties of good faith to him. Mr Osborne seeks lost wages and benefits, compensation for hurt and humiliation, compensation for loss of career progression, and compensation for any limitation on his future earning capacity. He also claims interest.

[2] Callaghan denies Mr Osborne's claims. It says that there were genuine business reasons for the restructure it carried out. It says that all along Mr Osborne engaged in

the process and that there was a significant exchange of views and information. Callaghan says that eventually Mr Osborne chose not to engage with it in respect of redeployment opportunities and after asking to leave early, resigned before the redeployment process was finished. It says that there were a number of suitable positions that Mr Osborne could have filled, but he chose not to apply for those positions.

This determination

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law and expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[4] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4), the Chief of the Authority has decided that exceptional circumstances exist that allow a written determination of findings at a later date.

The issues

[5] The following are the issues for investigation and determination:

(a) Was the restructure and the decision to disestablish Mr Osborne's position genuine?

(b) Did Callaghan provide Mr Osborne with all relevant information in respect of the restructure?

(c) Did Callaghan properly consult with Mr Osborne?

(d) Was the decision to terminate Mr Osborne's employment predetermined?

(e) Did Callaghan satisfy its obligations to Mr Osborne concerning redeployment?

(f) If any of the above results in a finding of unjustified dismissal or unjustified disadvantage, what if any remedies should be awarded?

The Authority's investigation

[6] At the investigation meeting I heard from Mr Osborne and Esther Livingston who at the termination of Mr Osborne's employment, was the General Manager People and Capability. The People and Capability team was responsible for advising on and helping to manage human resources and employment relations matters within Callaghan. This included providing managers with restructuring proposals and processes when they arose.

Background

[7] Mr Osborne's complaints relate to the restructuring process Callaghan commenced on 21 May 2018, proposing to merge its Information Technology/ Information Systems team with its Optimisation team.

[8] On 21 June 2018, following the restructuring process, Mr Osborne was advised that his position was to be disestablished. The communications with Mr Osborne at this time were through Megan Firkin, who at that time was the Head of Optimisation and was also Acting General Manager of the IT/IS team. Ms Firkin left Callaghan some time ago and was not available to give evidence before the Authority.

[9] On 5 July 2018, Mr Osborne was given notice that his position would be disestablished at the close of business on Friday 31 August 2018. He was further advised that if no redeployment opportunities were identified prior to that date, or if Mr Osborne was unsuccessful in applying for other roles within the organisation, his employment would end on the basis of redundancy.

[10] Between 5 July 2018 and 31 August 2018, Callaghan identified redeployment opportunities that might become available. It says, for instance, Document 1A at the outset identified that a possible option for Mr Osborne would be a proposed new role of Senior Web Developer.[1]

[11] Mr Osborne however did not take an active role in the redeployment process in that although roles were identified, he did not apply for any of them.

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[1] Page 18 of Bundle.

[12] On 7 August 2018, Mr Osborne had made alternative employment arrangements and asked to leave early. This was agreed to and Mr Osborne's employment ultimately ended on 10 August 2018.

Evidence

David Osborne

[13] Mr Osborne's evidence was that through the restructuring process he repeatedly and proactively attempted to engage with Ms Firkin regarding redeployment opportunities. He says he never intentionally disengaged from the redeployment process.

[14] In respect to the restructure itself, Mr Osborne's evidence was that he is not challenging Callaghan's right to restructure its business. Rather, he says the restructuring process used was demonstrably flawed and unfairly executed. His first point is that there was no genuine business need to restructure. The restructure disestablished 23 out of 24 roles, but there was no cost benefit analysis, no performance assessments, nor any reason given as to why roles were no longer needed.

[15] Mr Osborne refutes the notion that the restructure was a simple merger of two teams. He says that the Optimisation team was a newly created team consisting of two permanent roles and some temporary contractors. He notes that the IT and IS departments were long established and says they had clear, well known responsibilities across the organisation.

[16] Mr Osborne also notes that the merger resulted in all but one role in the IT/IS teams being disestablished with Optimisation team members and new external contractors transitioning easily into the new roles created.

Esther Livingston

[17] Ms Livingston's evidence was that Ms Firkin consulted her regarding the proposed changes that affected Mr Osborne. Ms Firkin was the Head of Optimisation and also Acting General Manager of the IT/IS team. Ms Livingston says she and her team assisted Ms Firkin as she prepared their consultation document (Doc 1) and following the consultation process, reviewed feedback and worked alongside Ms Firkin to confirm the outcomes.

[18] Ms Livingston's evidence was that prior to the restructuring, Callaghan's IT/IS team was divided into four subgroups, namely:

- IT Operations Management;
- IT Applications;
- Research Libraries; and
- Records.

[19] Her evidence was that the restructure was a traditional IT team structure focused on supporting existing IT functions. She confirmed that Mr Osborne was the team leader of the IT Applications team, responsible for supporting corporate applications and web environments at Callaghan.

[20] Ms Livingston says that despite Mr Osborne's view, there was a proper rationale for the restructuring. She said that there was a need to help the organisation focus on activating innovation and accelerating commercialisation in an environment of rapid technological change. There were big changes occurring in digital technologies and as the Government's innovation agency, Callaghan needed to be seen to be using and deploying some of these technologies. Her evidence was that Callaghan's systems were generally legacy based, had not been invested in for some years and were in need of a major overhaul.

[21] Her evidence was that the Optimisation team was focused on developing and deploying new ideas, mainly in the digital space. That team had skill and business analysis, project management, process development and reporting, and had a focus on what future technologies and solutions could look like. The IT/IS team were at the time more focused on day-to-day operations and had technical skills which the Optimisation team did not have.

[22] Ms Livingston says a number of discussions were held about how best to structure and operate the IT/IS and Optimisation teams. She says she was part of these conversations, but most took place between Ms Firkin and Callaghan's CEO, Mr Korn. These discussions were all held prior to preparing the proposal document.

[23] Ms Livingston says that Callaghan reached a view that having two distinct teams was not optimal and not best suited to deliver what was needed. Callaghan felt it needed to have its digital and IT capability under one leader and one structure so that it could effectively operate on a day-to-day basis whilst preparing and then progressing Callaghan for the future. She refers to the consultation document (Doc 1). She says there was a lack of experience in strategic technology, security and architecture capabilities which she felt were necessary to support Callaghan in the future. Her view was that there was a need to join the capabilities of the two teams together and reshape the overall team.

[24] Her evidence was that as a result of the more informal discussions, which she confirmed did not involve Mr Osborne, the proposal structure document was developed (Doc 1).

[25] Ms Livingston says that the proposal affected 23 permanent or fixed-term roles in the IT/IS and Optimisation teams along with one contractor. Of those 24 roles, 12 had no clear or certain redeployment path. The thinking was that Callaghan would conduct a contestable process to ensure that no-one was disadvantaged and to enable affected individuals to identify and seek employment into roles they thought best aligned with their capabilities and desires.

[26] Ms Livingston gave evidence of her knowledge of the consultation process followed. She said it involved the significant exchange of views and information through detailed correspondence and various meetings with employees. In terms of a timeline, her evidence was that:

(a) On 21 May 2018, all affected staff were notified of the proposed restructuring and process to follow. She acknowledged that Mr Osborne was on sick leave that day but says attempts were made to get in touch with him.

(b) On 22 May 2018, the consultation document was sent to all affected staff via email and provided that those staff could provide feedback by 1 June 2018.

(c) On 23 May, 24 May and 25 May 2018, meetings were held with the IT/IS team so that they could provide verbal feedback and discuss the

proposal with Ms Firkin. Ms Livingston's evidence was that Mr Osborne attended those meetings.

(d) On 29 May 2018, the IT/IS team were provided with a copy of the feedback together with Callaghan's responses (Doc 3).

(e) Ms Livingston says some of this feedback was from Mr Osborne.

[27] Ms Livingston's evidence was that Mr Osborne had a number of opportunities to provide feedback. She acknowledged that on 30 and 31 May 2018 Mr Osborne wrote to Ms Firkin, raising concerns about the restructuring process and asking for further information. She was critical of the request, saying that his questions were about the rationale and substantive justification for changes, and he wished to know the stated goals of the proposed changes. She says Mr Osborne's questions were repetitive and very general relating to the reasoning for the restructure. She was of the view this had already been provided to him and that it was difficult to provide answers to his general questions.

[28] Ms Livingston says she was aware that Ms Firkin responded:

> So that I can help you, can you please clarify what information you need – please be specific.

[29] Ms Livingston states to her knowledge Mr Osborne did not respond.

Discussion and analysis

The restructure

[30] Mr Osborne has argued that the restructure was not genuine because there was no business case and no rationale behind the restructure. It was a merger of two teams and the restructure had no legitimacy.

[31] In assessing whether or not Callaghan's decision to restructure was fair and reasonable, the Authority must have regard to s 103A of the Act. There must be an assessment as to whether what was done by Callaghan and how it was done were what a fair and reasonable employer could have done in all the circumstances.

[32] In *Grace Team Accounting Limited v Brake* the Court reinforced the notion that the focus has to be on the objective standard of a fair and reasonable employer.[2]

[2] [2014] NZCA 541.

Callaghan's decision to restructure and how it carried out its business by merging the IT/IS Teams and the Optimisation Team was a decision open to it. Mr Osborne's evidence showed he strongly disagreed with Callaghan's business judgment, however, it is not for the Authority to substitute its judgment for that of the employer.[3] However, Mr Osborne's evidence was that there was no proper engagement with him and therefore no robust consultation process for him to participate in before the decision to enter into the restructure was carried out.

[33] Mr Osborne's first criticism was that there was no business case. He pointed to Document 1, the IT and IS Optimisation Proposed Changes Consultation Pack. Mr Osborne questioned how Callaghan could arrive at a strategy in the absence of any obvious prior analysis. Document 1 indicates that Callaghan was proposing a new structure, namely the merging of the IT and IS and Optimisation teams but had done so in isolation, namely, it had not included Mr Osborne or others in his team at the early stage of the process – rather, later, when the Consultation Pack was prepared and circulated. It is clear that Mr Osborne had no real idea, even at the investigation meeting, of the analysis and reasoning behind the rationale for change. The document did, however, propose that Mr Osborne's role would be disestablished and listed possible options for alternative positions.

[34] It is fair to say, however, that Mr Osborne made his concerns known. Document 12 (page 208 of the Bundle) gave examples of feedback, including feedback from Mr Osborne. He complained that the process had been poorly run and badly communicated. Whilst he also complained the consultation was not genuine or in good faith, I find there is insufficient evidence to reach such a conclusion. Mr Osborne's complaint about communication, however, does have merit. Perhaps the genesis of Mr Osborne's complaints can be seen in the same document with Ms Firkin's response to Mr Osborne's complaints when she replied:

> I would have loved to have conversations with you all in advance but I could have opened myself up to a PG – unless I met with every one of you, and that would have been questionable in itself.

[35] Although Ms Firkin was not available to give evidence, the clear inference from her comment is that rather than having one on one conversations with anyone, she chose to have to have none. The evidence shows a lack of clarity about what people did and

[3] Innovative Landscapes (2015) Limited v Popkin [2020] NZEmpC 40.

who was responsible for what. Mr Osborne said it was impossible for genuine consultation to continue because in an earlier meeting, Ms Firkin had accused everyone at the meeting of being litigious and threatened to curtail communications if questions continued. I find that the level of consultation with Mr Osborne and the engagement with him is problematic. As indicated earlier, I accept Callaghan had a genuine reason for proceeding with their change proposal but the reasons for it had never properly been explained to Mr Osborne and they should have been. Further, the way the restructure was conducted meant that Mr Osborne believed there was an ulterior motive and felt left out of the discussions.

[36] The way the restructure was introduced and progressed, disadvantaged Mr Osborne in his employment.

Redeployment/dismissal

[37] Whilst Callaghan's restructure is genuine, as set out above, there were procedural deficiencies. However, Callaghan now faces the same s 103A justification requirement in respect of how it carried out its redeployment process. This is because ultimately Mr Osborne's employment ended with Mr Osborne saying he was unjustifiably dismissed.

[38] The Court noted in *New Zealand Steel Limited v Hadad* that the proper approach for employers when considering redeployment is that, when considering whether to dismiss an employee after their position has been made redundant, an employer must consider whether to redeploy the employee.[4] When considering redeployment, the employer must comply with the good faith obligations in s 4 of the Act and in particular, must consult with the employee in accordance with s 4(1A)(c). Finally when deciding whether to redeploy the employee, the employer must be active and constructive in maintaining the employment relationship, including being responsive and communicative.

[39] In referring to *Gafiatullina v Propellerhead Limited*, the Court noted:

> An employer's assessment of suitability for redeployment is not to be conducted unilaterally outside of the restructure consultation.[5]

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[4] [2023] NZEmpC 57 at 84.
[5] [2021] NZEmpC 146 at 111.

[40] Mr Osborne's terms and conditions were set out primarily in an employment agreement he signed on 11September 2015. The agreement talked about redundancy and redeployment.[6] It provided:

> If for the reasons outlined above we cannot continue to employ you in your position we may, if a suitable position is available, elect to redeploy you to that position. A suitable position for the purpose of this agreement is one which you are reasonably able to perform and your total remuneration package is unchanged, and there is no significant change in the terms and conditions of your employment conditions as set out in this agreement. Where Callaghan Innovation elects to redeploy you to a suitable position this will not constitute a redundancy situation and no redundancy compensation will be payable.

[41] Whilst it is apparent that there were roles Mr Osborne could have applied for but didn't, I accept his evidence that the purpose of the roles and the pay were never explained to him. Mr Osborne accepted Callaghan's evidence that his pay would not be reduced should he be redeployed. However, Mr Osborne says without full details of positions being provided, including salary ranges, he found it difficult to properly consider alternatives. He felt they were not genuinely being offered to him. The parties have different views as to how the redeployment process was playing out. It is clear, however, that during the consultation process Callaghan identified redeployment opportunities that may become available and opportunities suitable for Mr Osborne were proposed. Callaghan says Mr Osborne decided to play no part in the redeployment process. It is true that Mr Osborne did not apply for positions he may well have got. However, it is significant that on 7 August 2018, whilst the redeployment process still had time to run, Mr Osborne asked to leave early on the basis he had another opportunity.

[42] Callaghan agreed with this and Mr Osborne's employment ended on 10 August 2018 at his own volition. This is not a situation where it could be said the resignation was a constructive dismissal. Mr Osborne was distrustful of the process and considered that in respect of suitable roles to be redeployed to, he had insufficient information. Nonetheless, the process still had time to play out and I find Mr Osborne left his employment with Callaghan at his own volition and for his own reasons.

Conclusions

[43] Mr Osborne has not shown that the restructure resulting in a merger of teams was not genuine, nor has he shown any breach of good faith on the part of Callaghan.

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[6] Page 169 of the Bundle.

Nonetheless, there were flaws in the way Callaghan carried out its restructure. This meant Mr Osborne did not have all the information he needed to properly and fully engage in the consultation process. Whilst I find the reasons for the restructure were genuine and there was no ulterior motive, the shortcomings in the consultation process affected Mr Osborne to his detriment. I consider a sum of $15,000.00 as compensation for hurt and humiliation suffered by Mr Osborne as a result of Callaghan not properly engaging with him in the consultation process to be the appropriate figure.

[44] No deduction from the remedies awarded is to be made under s 124 of the Act. In respect of the consultation process I consider Mr Osborne did his best to engage and shortcomings in providing him with information were with Callaghan and not with him.

[45] The redeployment process conducted by Callaghan seemed to be a robust process and whether or not Mr Osborne fully engaged in that process is to a large extent by the by. Certainly, there were opportunities he could have applied for. If it had transpired that Mr Osborne had waited until 31 August 2018, and his employment ended by way of redundancy, there would be questions as to whether or not that termination of employment constituted an unjustified dismissal. However, by leaving earlier than that and on his own volition, it cannot be said that Mr Osborne's employment ended by way of dismissal. Accordingly, his claim of unjustified dismissal is unsuccessful.

Summary of orders

[46] Callaghan Innovation Research Limited, within 28 days of the date of this determination, is to pay Mr Osborne the sum of $15,000.00 as compensation for injury to feelings, loss of dignity and hurt and humiliation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[47] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[48] If the parties are unable to resolve costs, and an Authority determination on costs is needed, David Osborne 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 Callaghan 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.

[49] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.[7]

Geoff O’Sullivan
Member of the Employment Relations Authority

[7] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1