

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2024] NZEmpC 116
EMPC 251/2022**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN DAVID OSBORNE
 Plaintiff

AND CALLAGHAN INNOVATION
 Defendant

Hearing: 22 May 2024
 (Heard at Wellington)

Appearances: Plaintiff in person
 P Chemis and E von Veh, counsel for defendant

Judgment: 2 July 2024

JUDGMENT OF JUDGE K G SMITH

[1] David Osborne started working for Callaghan Innovation on 1 September 2014. In mid-July 2018, Callaghan Innovation advised him that his position was facing redundancy. His employment ended on 10 August 2018.

[2] On 14 August 2018, Mr Osborne raised a personal grievance with Callaghan Innovation alleging he was unjustifiably dismissed. He is now pursuing that personal grievance in the Employment Relations Authority. This challenge arises from the Authority's preliminary determination which addressed Mr Osborne's allegation that Callaghan Innovation breached the Protected Disclosures Act 2000 (PDA) and its own

policy about protected disclosures.¹ The Authority held that, while the protected disclosure was raised during his employment, he could not pursue a personal grievance for alleged breaches of the PDA because they arose after his dismissal.²

[3] Mr Osborne challenged the Authority's determination seeking to set it aside.

[4] Callaghan Innovation succeeded in striking out part of Mr Osborne's claim, but two causes of action survived.³ One cause of action alleged an intentional breach of confidentiality and included a claim that Callaghan Innovation did not adhere to its own policy on protected disclosures. The other cause of action was a claim that the Chair of Callaghan Innovation intentionally lied to Mr Osborne intending to deceive him when stating that no confidentiality breach had occurred.

[5] Both pleadings claimed that the alleged conduct breached the duty of good faith in the Employment Relations Act 2000 (the Act). Mr Osborne sought findings that the breaches occurred, a contribution to his costs, and penalties. During the hearing he informed the Court that financial compensation was not being pursued.

[6] Callaghan Innovation maintained that it did not breach its policy, or the PDA, and denied that Mr Osborne was lied to by its Chair, Peter Hodgson.

The Protected Disclosures Act 2000

[7] During Mr Osborne's employment by Callaghan Innovation the PDA applied.⁴ The purpose of the PDA was to promote the public interest by facilitating the disclosure and investigation of serious wrongdoing.⁵ Employees who made disclosures of information about serious wrongdoing were given certain protection.⁶

[8] An employee could disclose information in accordance with the PDA if:⁷

¹ The Protected Disclosures Act 2000 was repealed on 1 July 2022 by s 41 of the Protected Disclosures (Protection of Whistleblowers) Act 2022.

² *Osborne v Callaghan Innovation* [2022] NZERA 323 (Member O'Sullivan).

³ *Osborne v Callaghan Innovation* [2023] NZEmpC 209.

⁴ See above n 1.

⁵ Protected Disclosures Act, s 5(a).

⁶ Section 5(b).

⁷ Section 6.

- (a) the information was about serious wrongdoing in or by that organisation; and
- (b) the employee believed on reasonable grounds that the information was true or likely to be true; and
- (c) the employee wished to disclose the information so that the serious wrongdoing could be investigated; and
- (d) the employee wished the disclosure to be protected.

[9] An employee wanting to make a protected disclosure was required do so in a manner provided for by an organisation's internal procedures.⁸ If there were no internal procedures, a disclosure was to be made to the head or deputy head of the organisation.⁹ Public sector organisations were required to have an appropriate internal procedure for receiving and dealing with information about serious wrongdoing. Those procedures had to comply with the principles of natural justice and identify the persons in the organisation to whom a disclosure was to be made.¹⁰

[10] The PDA defined serious wrongdoing, and it included:¹¹

- (a) an unlawful, corrupt or irregular use of funds or resources of a public sector organisation; or
- (b) an act, omission, or course of conduct that constitutes a serious risk to public health or public safety or the environment; or
- (c) an act, omission, or course of conduct that constitutes a serious risk to the maintenance of law, including the prevention, investigation, and detection of offences and the right to a fair trial; or
- (d) an act, omission, or course of conduct that constitutes an offence; or
- (e) an act, omission, or course of conduct by a public official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement;—

whether the wrongdoing occurs before or after the commencement of [the PDA].

⁸ Section 7.

⁹ Section 8.

¹⁰ Section 11.

¹¹ Section 3.

[11] The PDA provided that where a person suffered retaliatory action, a personal grievance under s 103(1) of the Act could be pursued.¹² Further, the person making the disclosure was protected from civil or criminal liability or any disciplinary proceeding by reason of having made or referred the disclosure of information.¹³

[12] The aspect of this legislation that most concerns Mr Osborne's challenge is in s 19 of the PDA. Under that section, every person to whom a protected disclosure was made or referred was required to use his or her best endeavours not to disclose information that might identify the person who made the disclosure. There were exceptions where:

- (a) the person consented in writing; or
- (b) the person who acquired knowledge of the protected disclosure reasonably believed that disclosure of identifying information:
 - (i) was essential to the effective investigation of the allegations; or
 - (ii) was essential to prevent serious risk to public health or public safety or the environment; or
 - (iii) was essential having regard to the principles of natural justice.

Callaghan Innovation's policy

[13] At all relevant times, Callaghan Innovation operated a protected disclosures policy. The policy stated that it would comply with all relevant legislation. The purpose of the policy was to facilitate the disclosure and investigation of serious wrongdoing and to protect those who disclose information. The scope of the policy was reasonably broad because it was stated to apply to all current and former employees, contractors, secondees and members of the Board.

¹² Section 17.

¹³ Section 18.

[14] The policy repeated what constituted serious wrongdoing from the PDA. Anyone who became aware of serious wrongdoing in the course of working was encouraged to raise it with that person's manager in the first instance. It also provided for situations where the report to the person's manager might be inappropriate or the employee was unsure about whether serious wrongdoing had occurred. In such situations the policy provided that the matter might be raised informally in discussion with a member of the People and Capability Team.

[15] Aside from providing for informally raising a protected disclosure, the policy dealt with making formal reports in writing. In the first instance, the policy directed such a disclosure to be made to the General Manager People and Capability (General Manager). However, the policy provided for some exceptions to that reporting line. Where the report was about the General Manager, it was to be made to the Chief Executive. Where the report was about the Chief Executive or a member of the board, it was to be made to the Board Chair. If the report was about the Chair, it was to be made to an appropriate authority, in which case the employee was directed to s 3 of the PDA.

[16] The policy specified what ought to be included in a written protected disclosure report:

- (a) the nature of the incident;
- (b) the names of those involved;
- (c) dates and locations;
- (d) the reporter's name;
- (e) a clear statement that a protected disclosure is being made; and
- (f) any other relevant information.

[17] The policy informed a person making a written disclosure that advice may be sought from Callaghan Innovation's legal counsel and/or external sources to determine whether an investigation would be required.

[18] Mr Osborne was familiar with the policy and its tiered reporting structure. He considered that the substance of his report and the employees it concerned necessitated making his disclosure to the Chair, Mr Hodgson.

What happened?

[19] In late July 2018, Mr Osborne approached the General Manager to make what she subsequently characterised as a protected disclosure. On 25 July 2018, he sent her a brief email asking to discuss a text message conversation which seems to have been attached. In the email Mr Osborne confirmed the conversation was authentic and asked her to keep the source of it confidential under Callaghan Innovation's protected disclosures policy.

[20] The General Manager responded to Mr Osborne the following day and sought clarification from him that the disclosure was related to the conversation in those text messages. She asked what the nature of the disclosure was and whether he intended to make a disclosure about something else. He was asked what serious wrongdoing was being alleged. The General Manager confirmed that, in accordance with the protected disclosure policy, his confidentiality would be maintained.

[21] The same day Mr Osborne provided the requested clarification, including describing the nature of the matter he wanted to raise as grossly improper mismanagement. He attributed this conduct to the manager who was responsible for the redundancy that affected him. In providing this clarification Mr Osborne informed the General Manager that he considered she was involved and that information had come to light about the behaviour of the Chief Executive. Consequently, he stated his preference to escalate the disclosure to the Chair. Mr Osborne made clear that he would take that step to comply with Callaghan Innovation's protected disclosures policy and that he was looking to get the matter sorted out before his employment ended.

[22] On 30 July 2018, the General Manager wrote to Mr Osborne summarising information he had supplied over the preceding days. She explained aspects of the protected disclosures policy and reminded Mr Osborne that, in the first instance, the report was to be made to her. She pointed out that, despite Mr Osborne's email suggested wrongdoing on her part, he did not specify what the alleged conduct was. She reminded him that, under the disclosure policy, advice might be sought from Callaghan Innovation's lawyers and/or external sources to determine whether an investigation was required. He was informed that, bearing in mind his unspecified concerns about her, she had asked Callaghan Innovation's Chief Legal Advisor to work with its external lawyers to determine whether an investigation was required.

[23] The General Manager's email was copied to the Chief Legal Advisor and Callaghan Innovation's external lawyers, Buddle Findlay. Subsequently, Mr Osborne wrote to the Chief Legal Advisor and repeated his earlier request for the Chair's contact details at the same time instructing her not to investigate or to disclose his identity.

[24] In the Chief Legal Advisor's response she informed him that, since advice was sought from her about whether the disclosure should be investigated, she intended to continue with that course of action. She advised him that there would be an investigation if she, and the external lawyers, considered one was needed. She went on to tell Mr Osborne that both she and the external lawyers did not agree that the Chair was the correct person to make the disclosure to. He was asked to provide other relevant information after which she proposed to decide whether to investigate.

[25] Mr Osborne did not accept such a course of action was appropriate. In his response, on 31 July 2018, he quoted a portion of the policy showing the tiered reporting structure that applied. He repeated his previous statement about the alleged involvement of certain senior managers and his intention to make the disclosure to the Chair. Additional but unspecified allegations were said to be part of the disclosure he was going to make.

[26] Mr Osborne received Mr Hodgson's contact details and on 12 August 2018 sent an email to him which served two purposes. Mr Osborne introduced himself and

stated that he had been asked to disclose information under Callaghan Innovation's policy. In this email Mr Osborne said that the information related to the behaviour of "ELT members": a shorthand reference to the manager responsible for the redundancy process, the General Manager and the Chief Executive. Mr Osborne asked Mr Hodgson to confirm his position as Chair, which was done by return email. That confirmation was followed on 18 August 2018 by Mr Osborne sending a covering email attached to which was the protected disclosure in 14 documents.

[27] On 22 August 2018, Mr Hodgson conveyed to Mr Osborne his conclusion that no investigation was warranted. That decision followed considering the documents supplied and measuring them against the criteria for serious wrongdoing. Mr Hodgson concluded that the criteria was not met, going so far as to say in his email to Mr Osborne that the disclosure provided did not even approach or approximate the criteria. While Mr Hodgson declined to investigate, he reminded Mr Osborne of his right to have recourse to the Ombudsman or to any Minister of the Crown.

[28] Mr Osborne did as suggested and took up matters with the Ombudsman. It is correspondence with that office that has prompted this litigation. Based on correspondence between Callaghan Innovation's Chief Executive and the Ombudsman's office, Mr Osborne concluded that Mr Hodgson must have disclosed his identity to the Chief Executive and therefore breached the policy which provided for confidentiality. He reached that conclusion because in an email to the Ombudsman the Chief Executive commented about Mr Hodgson's view that the report made to him was not a protected disclosure. In the same email the Chief Executive commented that Mr Hodgson had asked her some questions as he investigated the claims made by Mr Osborne.

The issues

[29] The issues in this case are:

- (a) Was there a breach of Callaghan Innovation's protected disclosure policy and, if so, when did that occur?

- (b) If there was a breach does it give rise to a personal grievance or breach of contract claim? If so, what remedies (if any) are appropriate?

Was there a breach?

[30] Callaghan Innovation accepted that its protected disclosure policy applied to Mr Osborne while he was employed and after his employment ended. It did not accept that there was any breach.

[31] The lynchpin of Mr Osborne's case, as it progressed throughout the hearing, was his belief that Mr Hodgson disclosed his identity to the Chief Executive. The difficulty facing this claim was that there is no evidence to support it.

[32] First and foremost, I accept Mr Hodgson's emphatic evidence that he did not disclose Mr Osborne's identity, or any of the disclosed materials, to the Chief Executive. Mr Hodgson said, and again I accept, that the Chief Executive already knew Mr Osborne intended to make a disclosure. It was the Chief Executive who told Mr Hodgson to expect a disclosure from Mr Osborne. Given the hierarchical nature of the policy, I infer it must have been clear to her that, since Mr Osborne intended to make his disclosure to the Chair, at least some part of the report would be about her.

[33] I am not prepared to place any weight on emails the Chief Executive wrote to the Ombudsman's office. She did not give evidence to explain them and the conclusions invited to be drawn from them stand diametrically opposed to Mr Hodgson's unequivocal evidence that he did not disclose Mr Osborne's identity or any part of the disclosed documents to her. From the Chief Executive's emails, she clearly knew Mr Osborne's name and that he had contacted Mr Hodgson. That is not surprising given that she was aware before 18 August 2018 what Mr Osborne planned to do and, in fact, she was responding to Ombudsman's correspondence that named him. It remains unclear how the Chief Executive became aware of Mr Osborne's identity, but it would be wrong to draw an adverse inference based on the material available to the Court.

[34] The closest the evidence came to supporting Mr Osborne's case was an email Mr Hodgson sent to the Chief Legal Advisor on 28 August 2018, informing her that

the matter was closed. In writing that email, Mr Hodgson forwarded to her the email he sent to Mr Osborne six days earlier declining to investigate. The 28 August 2018 email was copied to Buddle Findlay and the Chief Executive. That meant Mr Hodgson's email disclosed Mr Osborne's name to all of them. However, I do not consider that sending the email could be characterised as a breach of confidentiality given that its recipients already knew from other sources that Mr Osborne intended to make a disclosure.

[35] There is a further difficulty with this aspect of Mr Osborne's claim. The policy does not ensure absolute confidentiality and could not realistically do so. It may not be possible, for example, to investigate a protected disclosure without involving the person who made the report.

[36] For completeness, the PDA does not guarantee confidentiality. Section 19 imposed an obligation on Mr Hodgson to use his best endeavours not to disclose information that might identify Mr Osborne, but even that comes with exceptions. The subject matter of a protected disclosure may have required the person making the report to be named in an investigation.

[37] The first cause of action is unsustainable. The second cause of action, alleging Mr Hodgson lied to and deceived Mr Osborne, is also unsustainable; I am satisfied that Mr Hodgson did neither of those things.

[38] In the absence of a breach of the policy or the PDA, Mr Osborne's claim cannot succeed and it is therefore not necessary to consider the remaining issues.

[39] In case I am wrong in that analysis, however, it is necessary to consider two submissions by Mr Chemis for which Mr Osborne had no satisfactory response. They were about when the protected disclosure was made and consequently the remedies able to be claimed.

[40] The first submission was that the absence of an employment relationship at the time the alleged breach was said to have occurred was fatal to a claim for employment-related remedies. The submission was that the duty of good faith relied on was the

statutory duty in s 4 of the Act and could only apply during an employment relationship.

[41] Mr Osborne's causes of action both depended on establishing that Mr Hodgson breached his entitlement to confidentiality. The conduct he relied on post-dated his employment ending on 10 August 2018. He made the disclosure to Mr Hodgson eight days later. Self-evidently, the employment ended before the disclosure was made and any possible breach by Mr Hodgson could have occurred. It follows that he could not have succeeded in claiming a breach of the duty of good faith. The claim is not saved by the fact that Mr Osborne stated his intention to make a disclosure to the General Manager and Chief Legal Advisor while still employed. The proceeding was confined to allegations about a disclosure by the Chair. There were no pleadings alleging a breach by the General Manager or Chief Legal Advisor.

[42] It follows that Mr Osborne cannot obtain relief under the Act. Other remedies under the PDA might be available to him but they would need to be pursued elsewhere.

[43] The second submission confronting Mr Osborne's challenge was that, if he intended to pursue a personal grievance (as distinct from a penalty action), the PDA provided for the remedy of a personal grievance but only where the employee suffered some retaliatory action. He did not plead and gave no evidence to the effect that any retaliatory action took place.

Outcome

[44] The challenge is unsuccessful.

[45] Callaghan Innovation is entitled to costs. If they cannot be agreed memoranda may be filed.

K G Smith
Judge

Judgment signed at 11.30 am on 2 July 2024