

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 323
3132635

BETWEEN

DAVID OSBORNE
Applicant

AND

CALLAGHAN INNOVATION
Respondent

Member of Authority: Geoff O'Sullivan

Representatives: David Osborne for self
Peter Chemis and Emma von Veh, counsel for the
Respondent

Investigation Meeting: On the papers

Submissions (and other Information) Received: Up to and including 12 May 2022

Date of Determination: 14 July 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In February 2021 David Osborne filed a statement of problem alleging:

- (a) unjustified actions by Callaghan Innovation to his disadvantage;
- (b) breaches of good faith;
- (c) a failure to act as a good employer;
- (d) breaches of employment agreement;
- (e) unjustified dismissal; and

- (f) breaches of how the Respondent managed and responded to the Applicant's disclosures he made as a protected disclosure.

[2] In reply, Callaghan Innovation denied all the allegations but raised further that the Applicant's claims about how the Respondent managed and responded to a protected disclosure were not within the Authority's jurisdiction under s 17 of the Protected Disclosures Act 2000 (the PDA).

[3] Callaghan Innovation also claimed that in any event, as Mr Osborne had not raised a personal grievance in respect of the protected disclosure issue previously, it was outside the 90-day limitation period and Callaghan Innovation did not agree to waive this requirement.

[4] Delays caused by the Covid lockdown which occurred shortly after the application was filed, have meant that a scheduled date for the investigation meeting was vacated and a new date for the investigation to be scheduled.

[5] This determination deals solely with the issue as to whether the alleged breaches about how the respondent managed and responded to the Applicant's protected disclosure are something the Authority has jurisdiction to deal with and how the allegations should be treated in the substantive investigation.

Background

[6] Both parties filed submissions in respect of this issue. Callaghan Innovation employed Mr Osborne from September 2014 through to August 2018. Callaghan Innovation undertook a restructure in May 2018 and on 15 July 2018 Mr Osborne was given notice of termination. As it transpired, his final day of employment was 10 August 2018.

[7] On 25 July 2018, Mr Osborne provided his employer evidence of a text conversation under circumstances where the parties have considered it to be a protected disclosure. Indeed, Mr Osborne confirmed he was making a protected disclosure on 26 July 2018. On 30 July 2018, Mr Osborne advised his view that his protected disclosure under the relevant policy, was to be to the Board Chair, not the Respondent's inhouse or external lawyers.

[8] There were several emails between the parties regarding the protected disclosure specifically. The Respondent sought further information regarding any allegations. Once matters had been clarified, the Board Chair declined to investigate the protected disclosures

and on 28 August 2018 forwarded the contents, either in part or in full, to the CEO. Mr Osborne's view was that the disclosure of his identity breached the confidentiality requirements of the Protected Disclosures Act.

[9] Mr Osborne therefore claims a number of breaches of the PDA.

[10] Mr Osborne's employment ended on 10 August 2018. This was because he requested an early departure with an alteration to the contractual date of 31 August 2018.

[11] Two issues immediately arise:

- (a) It seems the alleged breach of the PDA occurred after Mr Osborne's employment had ended and accordingly it is difficult to see how they could form part of any personal grievance or breach of the employment agreement.
- (b) Mr Osborne is alleging breaches of the Protected Disclosures Act which would only come under the auspices and jurisdiction of the Authority under the circumstances set out in s 17(1) of that Act. This section deals with any claims of retaliatory action by an employer against an employee who has made a protected disclosure. Mr Osborne does not appear to be alleging that here.

[12] Mr Osborne's four alleged breaches of the Protected Disclosures Act do not fall under the jurisdiction of the Authority.

[13] Issues have also been raised whether, to the extent such breaches of the PDA could constitute personal grievances, those grievances would be out of time in any event. As I have found Ms Osborne's claims in respect of the Protected Disclosures Act do not fall within the Authority's jurisdiction or occurred after his employment ended, I do not need to consider the out of time aspect.

Conclusions

[14] Mr Osborne cannot raise personal grievances relating to his alleged breaches of the Protected Disclosures Act.

[15] Mr Osborne's protected disclosure was raised during his employment. I see no reason why any concerns Mr Osborne's has in respect of how his employer responded to his protected disclosure whilst not capable on current pleadings of creating personal grievances, could not be part of the factual matrix.

[16] Costs are reserved and will be dealt with once investigation into Mr Osborne's substantive claims has been completed.¹

Geoff O'Sullivan
Member of the Employment Relations Authority

¹ www.era.govt.nz/assets/UPLOADS/practice-note-2.pdf