



WorkSafe orchestrated the restructure because of tensions that had developed between him and his employer as a result of various complaints that had been made about him in 2017. He also says that the restructure and termination of his employment was the final part of WorkSafe's campaign of bullying behaviours against him which included using a photograph of him at an away day in a way designed to humiliate him.

[3] WorkSafe denies that Mr Straayer was unjustifiably dismissed or unjustifiably disadvantaged in his employment. It says the decision to terminate Mr Straayer's employment was substantively justified. It says there was a genuine rationale behind the restructure and indeed it engaged an external consultant to advise on the structure of the organisation and what leadership accountabilities would be most effective for WorkSafe going forward.

[4] WorkSafe says that at all material times Mr Straayer managed the CAR team which was made up of two sub-groups, the Hazardous Substance team and the CAR sub-team. The two groups had different focuses and the restructure proposal contemplated the split of the overall CAR team so that each sub-group would move into the appropriate broader functional group. WorkSafe says that the restructure was driven purely by need and was an appropriate business decision open for it to make in the circumstances.

[5] On 12 May 2021 the Authority issued a preliminary determination which dealt with a large number of claims of unjustifiable disadvantage and other claims relating to Mr Straayer's dismissal including breaches of good faith, bullying, disparity of treatment and breaches of contractual obligations amongst others. That determination identified which claims had been withdrawn by Mr Straayer and therefore would not be investigated, which personal grievance claims had been raised within 90 days and would be investigated, and which personal grievance claim were not raised within 90 days and in the absence of leave not being granted or because they were matters post-termination of employment, they would not be investigated.

[6] Mr Straayer says of the 17 claims he raised within the 90 day period, each constitutes an unjustifiable disadvantage in that one or more of his conditions of employment were affected to his disadvantage by an unjustifiable action by WorkSafe.

## **This determination**

[7] 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.

[8] 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 exceptional circumstances existed allowing a written determination of findings at a later date.

## **The issues**

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

- (a) Did WorkSafe follow a fair and reasonable process in terminating Mr Straayer's employment as a result of redundancy?
  - Was the restructure and the decision to disestablish Mr Straayer's position genuine?
  - Did WorkSafe properly consult with Mr Straayer or was the decision to terminate his employment pre-determined?
  - Did WorkSafe provide Mr Straayer with all relevant information?
- (b) Did WorkSafe satisfy its obligations to Mr Straayer concerning redeployment in terms of his employment agreement and in terms of ss 4(1A)(b) and 103A of the Employment Relations Act 2000 (the Act)?
- (c) Did Mr Straayer have the skills and experience for the roles he applied for and could this be established without interviewing him?
- (d) Was WorkSafe obliged to offer Mr Straayer any of the roles without an interview.
- (e) If any of the above results in a finding of unjustified dismissal or unjustified disadvantage, what if any remedies should be awarded.
- (f) Should any remedy be reduced for contribution.

## **The Authority's investigation**

[10] At the investigation meeting I heard from Mr Straayer and in respect of WorkSafe, from Philip Parkes, Nicole Rosie, Julie Brown, Simon Humphries, Michael Hargreaves and Brett Murray. All witnesses gave evidence by oath or affirmation and answered questions from the Authority and the representatives of each side.

### **Background**

[11] Mr Straayer was a former manager at WorkSafe. WorkSafe is New Zealand's primary workplace health and safety regulator and came into being on 16 December 2013. Mr Straayer's employment with WorkSafe commenced on 7 March 2016. He was employed as Manager of the CAR team and his employment was covered by an individual employment agreement dated 26 February 2016. Mr Straayer reported initially to Mr Murray, the General Manager Operations and Specialist Services, and then later to Mr Humphries, Acting Deputy General Manager Investigations and Specialist Services.

[12] The CAR team was part of the Operations and Specialist Services Group which undertook registration, approvals, licencing and certification activities across a range of areas. Mr Straayer had a written position description<sup>1</sup>.

[13] Following a structure change in 2017, a new Chief Operating Officer (COO) role was created as a direct report to the Chief Executive. Mr Parkes took up this role on 5 February 2018. Shortly thereafter he outlined a review process for operations titled "The way forward". As part of planning for the change process, Martin Jenkins interviewed employees from all functional areas of operations and senior management. This was to provide insights on key issues WorkSafe needed to be addressed. Mr Straayer was interviewed.

[14] I am told this led to an analysis and considerations regarding the challenges and accountabilities of operations leadership, which was to inform what skills and attributes were required for such roles in the future, and how such roles and responsibilities now might be structured. These were set out in the document titled "The way forward – operations leadership document dated 18 May 2018"<sup>2</sup>.

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<sup>1</sup> Bundle of Documents (BOD) 2, page 014

<sup>2</sup> BOD Doc 9

[15] Employees, including Mr Straayer, were invited to comment on the document and following this, a change proposal document was presented to the Senior Leadership Team. This was followed by a series of individual meetings with staff potentially impacted by the proposal. Mr Straayer was one of those people and met with Mr Parkes and Ms Katherine Bender, an HR Advisor, on 18 June 2018.

[16] Mr Straayer's role as Manager CAR was one of seven roles proposed to be disestablished. The change proposal document was issued on 18 June 2018 and was open for consultation until 29 June 2018. Mr Straayer provided written feedback on 29 June 2018<sup>3</sup>.

[17] On 10 July 2018 a document titled "Outcome document: The way forward" was presented to staff<sup>4</sup>. The document informed Mr Straayer that his role was to be disestablished and he was informed of this at an individual meeting and later at a CAR team meeting.

[18] On 23 August 2018 Mr Straayer attended a redeployment interview. He faced a panel comprised of Ms Rosie, Mr Parkes and Dominic Blair, a recruitment adviser. Mr Straayer had provided a copy of his CV and an application form for each role he was interested in. The four roles were:

- (i) Head of Specialist Interventions
- (ii) Head of Health and Safety Technical Services
- (iii) Head of Operational Excellence
- (iv) Executive Officer.

[19] Mr Parkes says that the approach taken was to assess whether Mr Straayer was capable of functioning effectively in these roles. If he had been, he would have been appointed. He was not being compared to any other internal or external candidate. He was being given the first run at these roles as a person whose role had been disestablished.

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<sup>3</sup> Vol 1, document 15

<sup>4</sup> BOD 1, Doc 17

[20] Mr Straayer was deemed unsuitable for each of the above roles. This was on the basis that WorkSafe considered Mr Straayer did not have the necessary skills to undertake any of the roles. It says he would have been appointed to a role if he was suitable and had the skills. He did not have to be the best candidate.

[21] At a meeting on 27 August 2018, Mr Parkes conveyed to Mr Straayer that as his role was disestablished and as he had not been reconfirmed, reassigned or redeployed, there was probably no alternative but to terminate his employment. Mr Parkes says he explained that it would be Ms Rosie who would make the decision but he wanted to check with Mr Straayer in case he was aware of any alternatives to termination.

[22] Ms Rosie then wrote to Mr Straayer on 6 September 2018 advising:

After careful consideration my decision is to terminate your employment on one month's notice (your employment will end on 6 October 2018). This means that the redundancy provisions of your employment agreement will apply.<sup>5</sup>

[23] Ms Rosie's letter went on to say:

I have noted the comment in your email yesterday that you are distressed and took the day off to attend counselling. I believe it is important to not compound the situation by requiring you to work out your full notice period. We are able to manage the workload without needing you to do that. Our decision is that your last day of work in the office will be Wednesday 12 September 2018. This will give you some time to attend work to complete any handover and farewell your colleagues.

## **Evidence**

### *Adrian Straayer*

[24] Mr Straayer has had a long career working in public sector organisations, retiring from Police in 1997 after 22 years. He has had over 10 years' experience in leadership roles. Indeed, the position description for his position at WorkSafe is Manager, Certifications, Approvals and Registrations, under the heading of "Person Specification" listed "proven leadership skills including demonstrated ability to engage and motivate staff".<sup>6</sup>

[25] In December 2017, the General Manager of the Operations and Specialist Services Group, Mr Murray resigned. The Group was, in Mr Straayer's words, informally split

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<sup>5</sup> BOD Doc 47.

<sup>6</sup> BOD Doc 2 (p 019).

with the assessments team becoming a standalone group and the specialist services component forming another group under a temporary position of Deputy General Manager Investigations and Specialist Services. The Manager of Technical Programmes and Support, Mr Humphries, was appointed to this informal position in an acting capacity from 15 December 2018. Mr Straayer says this was an informal arrangement because WorkSafe had no documentation establishing the position or showing Mr Humphries was appointed to it.

[26] Mr Straayer says he was disadvantaged in his employment and treated unfairly. His evidence was that he had gotten off-side with Mr Parkes for three reasons. First he had criticised performance of a manager and her team. Secondly he had fallen out of favour with Mr Parkes' sister-in-law who was one of his staff. And finally, Mr Straayer had indicated at a manager's forum he was not convinced with Mr Parkes' direction of travel and was perceived to not to be "on the bus".

[27] Mr Straayer states he also fell out of favour with Ms Rosie as a result of Mr Parkes' sister-in-law making a complaint to Ms Rosie about the way the CAR team was being managed. Mr Straayer conceded that WorkSafe denied there was any improper motive behind the disestablishment of his position, or his redundancy and emphatically denied that Mr Straayer's position had been disestablished for personal reasons. Mr Straayer says he does not accept the denials because Mr Parkes was not able to provide any business reason for the disestablishment of Mr Straayer's role.

[28] Mr Straayer also believed that the Chief Executive, Ms Rosie, had predetermined that his employment needed to end, because she had been convinced that Mr Straayer was misogynistic.

[29] Mr Straayer felt he was being subjected to bullying behaviours. He says that following Mr Humphries appointment to Acting General Manager Investigations and Specialist Services, in December 2017, there was a sudden decrease in information being provided to him.

[30] He says that following Mr Parkes' appointment to the COO role in October 2017, he was no longer being included on steering groups, advisory groups or working groups. He also noted that the COO's work desk was some 30 metres from him and his team, yet

it took over three months before the COO crossed the floor to speak to him. Mr Straayer was also upset because emails were sent to his staff without him being copied in.

[31] Mr Straayer says that a dismissive attitude towards him developed and this was demonstrated by the process followed when the decision to terminate his employment was made. He says his termination letter was sent when he was on sick leave and attending an appointment with an EAP Psychologist. Mr Straayer listed a number of examples where he said he had been subject to gaslighting and that there had been a failure to investigate claims involving bullying by senior managers.

[32] However, during the investigation meeting, Mr Straayer conceded that it was only in hindsight that he felt he could say he had been subjected to gaslighting and bullying as he had not complained at the time because he did not identify the behaviour for what it was at the time.

[33] Mr Straayer was adamant that the restructure was a sham aimed at him. He said splitting the CAR team did not make sense. Therefore, the redundancy was also a sham and unjustified. Whilst he does not dispute the legitimacy of the restructure of the Operations Senior Leadership team positions, and the establishment of new positions, he disputed the legitimacy of splitting the CAR team and thus the disestablishment of his role. He noted no other teams were split and other managers at his level simply had their reporting lines changed. He felt he should have been treated the same. He says the reasons for splitting the CAR team were not robust or legitimate.

[34] Mr Straayer's evidence was that when he requested a justification for the splitting of the CAR team, the COO advised him the rationale was contained in pages 10 and 11 of the consultation document. Mr Straayer points out that those pages simply outline changes the restructure is seeking to achieve. He also says that the other CAR sub-team (Hazardous Substances) remained intact with a name change to Hazardous Industries (Authorisations). A new manager role was created which had responsibility for functions which Mr Straayer says made it similar to his prior role.

[35] Mr Straayer says that consultation undertaken with him, as ultimately the only person made redundant, was deficient and not genuine. He bases this on the proposition that he submitted six pages of submissions regarding the restructure of the CAR team and

says it was never properly explained to him why the options he put forward were not acceptable or valid.

[36] Mr Straayer says that he asked for copies of all the submissions other staff members had made but he was refused the information on the basis that other staff members had provided the submissions under a promise of confidentiality. He accepts, however, that a summary of the feedback received, was given to him.

[37] Mr Straayer says that WorkSafe did not take sufficient steps to find him a place in the new structure. He says he was unjustifiably disadvantaged by the reassignment/redeployment process. Without any consultation he was told there were no reassignment options because the positions were too dissimilar to his current one. He says he was unjustifiably disadvantaged through the assessment process and as he was the only manager facing redundancy, he felt there should be no necessity for him to undergo a formal interview process to assess suitability for reassignment or redeployment.

[38] He notes that the process for selection involved a formal interview for the four roles he had applied for all at the same time. He says that the 75 minutes available did not allow him sufficient time to answer questions. Mr Straayer was also upset with the makeup of the interview panel which consisted of the Chief Executive, the COO, and a recruiting advisor. Mr Straayer's view was that the recruiting advisor on the panel had no experience in assessing answers to role capabilities and would have been strongly influenced by Ms Rosie and Mr Parkes.

[39] Mr Straayer also felt that the panel interview of him was unfair. He was not given sufficient information to properly engage and felt that as an existing employee WorkSafe should have been aware of his capabilities. He noted the panel had a long list of candidates for positions provided to it by a recruitment company which was likely to have influenced the panel's decision but which was not at any time disclosed to him. He says he was being treated as if he was a new applicant applying for a position in WorkSafe rather than an existing employee who should have been reassigned or redeployed without the need to be interviewed. He felt there had been a failure to take his previous performance with WorkSafe into account and was assessed only against answers he gave at the interview and against his CV.

[40] In late September 2018, the Manager TP&S position became vacant when Mr Humphries was appointed to the Head of Intervention Services. Mr Straayer says a comparison of the two position descriptions shows that this was a suitable role for which he would have skills and experience to perform. The position was available for reassignment/redeployment prior to his employment ending on 12 October 2018, but Mr Straayer was unaware that the position was available. Indeed, Mr Straayer did not find out about its availability until he received information in mid-October 2018 showing that Mr Humphries had been appointed to one of the new roles. He says WorkSafe would have known in advance that this was likely to happen. Certainly WorkSafe would have known prior to Mr Straayer's employment ending.

[41] Mr Straayer was also unhappy with the way his employment ended. He says he was not allowed to leave with dignity and his employment was effectively terminated on 11 September 2018 when the Chief Executive locked him out of his employment by close of business on that day. On 11 September he received an email from the Chief Executive stating:

Adrian, further to my recent email. I continue to be very concerned about your behaviour and have asked the team to cease your access to WorkSafe email and systems from today.<sup>7</sup>

[42] Mr Straayer says there was no consultation with him and he was given no chance to explain or hear what behaviour the CEO was concerned about. He was not given the opportunity to say farewell to his staff and WorkSafe has not provided any information justifying the decision. He says the CEO's decision was based on alleged behaviour that was never put to him for response.

[43] In his amended statement of problem, Mr Straayer sought reinstatement, lost salary until reinstatement (Mr Straayer later decided not to pursue a claim for reinstatement) or lost salary through to the time he obtained other employment, based on a salary of \$150,000 per annum. Mr Straayer asked, that if the Authority determined he should have been reassigned or redeployed, then he wanted any lost salary to be calculated against the salary of the position he should have been reassigned or redeployed to. His claims also included a claim for any performance increases that would have been applicable for the time period between his dismissal and his reinstatement. He also

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<sup>7</sup> Doc 53.

claimed use of money interest on lost remuneration under the Interest on Money Claims Act 2016 and compensation for hurt, humiliation, loss of dignity, reputational damage and injury to feelings in the sum of \$75,000.

*Philip Parkes*

[44] Mr Parkes joined WorkSafe in 2015 and became the General Manager Operational Policy, later renamed to General Manager Better Regulation. He took up the role of Chief Operating Officer (COO) in February 2018 and became the Chief Executive of WorkSafe in February 2020. Mr Parkes confirmed he initiated the restructuring process (during 2018) which ultimately led to Mr Straayer's employment being terminated on the grounds of redundancy.

[45] Mr Parkes says there was genuine business need for the restructure and that he believes the consultation, redeployment, and redundancy process followed was robust and fair. Mr Parkes says shortly after commencing the role he considered the reporting structure of the operational groups. Four roles reported to him. He decided he needed to listen to staff to help him fully understand the issues with operations so went on a countrywide tour, visiting all 16 of WorkSafe's offices.

[46] He says he wanted access to independent advice and expertise on what structure and other leadership accountabilities would be the most effective for WorkSafe and after discussions with the then Chief Executive, Ms Rosie, he engaged the services of Martin Jenkins. He wanted them to speak to staff so what they said could be as candid as possible and confidential. Mr Parkes was deliberately not involved in Martin Jenkins' meetings with staff because he wanted staff to feel they could speak frankly and confidentially.

[47] Martin Jenkins suggested a framework for the development of a new structure and operating model titled "The way forward". The first part of the way forward meant that there needed to be a settled Operations Senior Leadership Team (OSLT) in place ready to support the next stages. The plan was then to develop a new high level operating model, defining how operations would look and feel. As Mr Parkes put it: "What we do and how we do it – an agreed way of working". Mr Parkes said the plan was then to put in place the necessary detailed arrangements to make the new model work.

[48] On 14 May 2018 Mr Parkes forwarded a document called “Themes and Insights” to everyone in operations for their feedback. This included Mr Straayer. He says Mr Straayer did provide feedback, although not until 30 May 2018.

[49] Mr Parkes worked on the change proposal and on 18 June 2018 he sent this out to staff. It took into account the work relating to OSLT structure and included the feedback from staff as well as Mr Parkes’s own insights.

[50] Mr Parkes’ view was that the current leadership and team arrangements did not easily enable visibility of, and sufficient focus and resource allocation to, important areas. He wanted to align WorkSafe functions and services to how they were thought about by external stakeholders. He noted that the CAR team function was based on internal groupings of activity which were not aligned with a particular set of duty holders.

[51] The proposal provided for the disestablishment of seven roles. Mr Parkes proposed to split the CAR team so that its constituent parts would move into different teams. All this meant that if the proposal proceeded, Mr Straayer’s role would be superfluous as his staff would be moving into other teams. It was for this reason that the proposal included the disestablishment of his role.

[52] Mr Parkes says that he had a series of individual meetings with staff who were potentially directly impacted by the proposal and Mr Straayer was one of those people. He outlined the proposal to Mr Straayer and recalls Mr Straayer simply accepting the information provided. He says Mr Straayer did say he would provide feedback on the proposal in due course. He says that Mr Straayer was calm at the meeting and engaged constructively. The change proposal document was sent to all staff on 18 June 2018.<sup>8</sup>

[53] Mr Parkes acknowledged the Martin Jenkins review did not mention splitting the CAR team but says that the purpose of this review was not to assess whether the teams would fit inside each type of grouping or whether the sub-groups within it were suitably aligned, thus there was no reason for Martin Jenkins to comment on the split.

[54] Mr Parkes explained on 29 June 2018 Mr Straayer provided written feedback.<sup>9</sup> He notes there had been a number of other submissions on the change proposal.

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<sup>8</sup> BOD Doc 13.

<sup>9</sup> BOD Doc 15.

Mr Straayer's feedback showed he did not believe splitting the CAR team was appropriate. His reasons for this were spelt out in detail. Mr Parkes says he did not agree with Mr Straayer's points but that he had carefully considered his feedback. He said that for WorkSafe to meaningfully address risks with Hazardous Substances, for instance, the relevant skills needed to be embedded across the Operations group and such it made sense that the Hazardous Substances Team would move to the new HHEPS team which managed major hazard facilities.

[55] Mr Parkes says that it therefore made sense for the team leader CAR (Mr Steele) and all his direct reports to move into the new Health and Technical Services Group. This was because that team covered the asbestos function which was a critical cause of harm relating to longer term health issues as well as acute or one-off harm.

[56] Mr Parkes' proposal also provided that the Senior Advisors Audit and Investigations would move into the Specialist Interventions Group (SIG). Mr Parkes says he received significant feedback in relation to the proposed split of the CAR team. However, that feedback did not support any particular solution or outcome but largely related to the future locations of the functions and roles.

[57] The final outcome document<sup>10</sup> confirmed the disestablishment of six roles. Mr Straayer's role of Manager CAR was disestablished and not reassigned because there was no role in the new structure in relation to which reassignment would have been appropriate.

[58] On 5 July 2018, Mr Parkes met with the Chief Executive, the General Manager People and Culture, and the Business Partner, People and Culture. The feedback was discussed and following the meeting Mr Parkes drafted a memorandum to the Chief Executive recommending that they proceed with most elements of the proposal, including the disestablishment of Mr Straayer's role.<sup>11</sup>

[59] The Chief Executive was given the endorsed memorandum dated 9 July 2018 together with the draft outcome document which contained a summary of feedback which had been provided on the proposal. Mr Parkes says that in effect, the Chief Executive was provided with an executive summary of all feedback received, even though it did not

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<sup>10</sup> BOD Doc 17.

<sup>11</sup> BOD Doc 16.

ascribe that feedback to any particular person. Mr Parkes was adamant that at that stage the Chief Executive had sufficient information to make an informed decision as to whether or not to proceed with the restructure.

[60] Following the Chief Executive's confirmation, the outcome document was finalised, which included a specific section on the changes which would be implemented in relation to the CAR team.<sup>12</sup> That document also included the feedback summary.

[61] On 10 July 2018, Mr Straayer was advised of the changes and he was given a letter outlining what was discussed at the meeting.<sup>13</sup>

[62] Mr Parkes confirmed that Mr Straayer had emailed him on 12 July 2018 asking for all staff feedback. Mr Parkes says after discussing the matter with Ms Brown from the People and Culture team, he said that the feedback sent in by employees was sent with an assumption of confidentiality as to their names and explained to Mr Straayer it would be against WorkSafe's good faith obligations to then pass that information on. Mr Parkes says he did encourage Mr Straayer to look at the summary of the submissions received. He felt that there was more than enough information in that to understand the tenure of the submissions, although accepted in cross-examination Mr Straayer would have to take his word that the summary was accurate. Mr Parkes explained that the summary of submissions was analysed and reviewed not only by himself, but also by the HR Business Partner.

[63] Mr Parkes recalled Mr Straayer suggesting at a meeting on 12 July that he had a target on his back and that his role was disestablished due to personal reasons. Mr Parkes says he reacted strongly to that assertion during the meeting and again when giving his evidence, making it clear his view that decisions made did not relate to Mr Straayer's performance, nor were they personal in any way.

[64] On 23 August 2018, Mr Parkes met with Mr Straayer to discuss redeployment. The meeting was also attended by the Chief Executive and a recruitment advisor. The meeting participants had been provided with a copy of Mr Straayer's CV and the meeting focused on Mr Straayer's suitability for the Head of Health and Technical Services, Head of Specialist Interventions, Head of Operational Excellence, and Executive Officer roles.

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<sup>12</sup> BOD Doc 17.

<sup>13</sup> BOD Doc 21.

These were the roles that Mr Straayer had expressed interest in. Mr Parkes says the approach taken was to assess whether Mr Straayer was capable of functioning effectively in these roles. If he had been, he would have been appointed. Mr Parkes was adamant that they were not comparing him to any other internal or external candidate.

[65] In discussing Mr Straayer's interview, Mr Parkes says that given the leadership qualities required in the four roles were the same, it was appropriate to hold one redeployment interview with Mr Straayer. The interview lasted for 75 minutes during which Mr Straayer's capabilities for each of the four roles was considered. Mr Parkes noted that Mr Straayer took a full part in the meeting and gave a good account of his skills and experience. When questioned, Mr Parkes confirmed his view was that the interview was Mr Straayer's chance to make his case. Its purpose was to assess the information Mr Straayer presented to the panel on the day.

[66] Following the meeting, Mr Parkes said that they did not consider that Mr Straayer had demonstrated he could carry out the roles.<sup>14</sup> Mr Parkes said that there were particular gaps in Mr Straayer's leadership capabilities and he could not give examples of the leadership attributes identified in the position descriptions. Mr Parkes said that the roles required strong agile leadership and Mr Straayer could not demonstrate how to drive collaboration across teams and his examples indicated he was implementing the leadership directions set by others. Mr Straayer was marked across seven categories in respect of the roles. In one role he received his highest mark of 14.5.

[67] Mr Parkes says that WorkSafe's view was that the successful appointee would be required to score above 20 and it was not considered that Mr Straayer would be able to carry out any of the additional roles, even with additional training and support. Mr Straayer's experience was centred around narrow technical abilities rather than the broader collaborative leadership focus which the restructuring proposal document called for.

[68] Mr Parkes stated that after the meeting, he and the Chief Executive considered whether there were other roles available which Mr Straayer could be appointed to but could not identify any. He met with Mr Straayer on 27 August with Ms Brown and

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<sup>14</sup> BOD Doc 14, pp 2 and 3.

explained to Mr Straayer he was not going to be redeployed into any of the four roles because he was assessed as not having the necessary skills and abilities.

[69] Mr Parkes in his evidence addressed other claims of disadvantage Mr Straayer had raised, especially in relation to bullying. He states that Mr Straayer's complaints are simply not accurate. He says that when a co-worker raised concerns about Mr Straayer's conduct, he was not privy to any information about it at all. He recognised the potential to create a conflict of interest as he was in the Senior Leadership Team but was not told any of the details and had no part to play in the managing of the relationship or of Mr Straayer's complaint. He strongly rejected any suggestion he had started a bullying campaign in the hope that Mr Straayer would leave WorkSafe. He reiterated no allegations of bullying had been raised against him at the time.

[70] Mr Parkes says he was very surprised and upset that Mr Straayer had made bullying allegations against him. He points out that the bullying allegations now made related to events which preceded Mr Straayer's request that he carry out a performance review.<sup>15</sup>

*Nicole Rosie*

[71] Ms Rosie was the Chief Executive of Workplace at the time Mr Straayer's employment ended by way of redundancy. Her evidence confirmed that Mr Parkes was responsible for carrying out the restructure process, including consultation with employees on the proposal.

[72] Ms Rosie confirms that on 5 July 2018 she met with Mr Parkes, Ms McNaught and Ms Julie Brown and discussed the rationale for the restructure and the process that Mr Parkes had followed. She also gave evidence that she discussed the summary of feedback submissions before the meeting and that the discussion was detailed.

[73] Ms Rosie held a further meeting on 9 July 2018 to discuss Mr Parkes' recommendation with the Senior Leadership Team (SLT). Having been satisfied there was a good business case for the restructure to proceed, Ms Rosie says she approved the restructure. In doing so, she says she was aware that there were people, including Mr Straayer, who did not consider that splitting of the CAR team was sensible. However,

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<sup>15</sup> BOD Doc 88, page 1.

she was satisfied with Mr Parkes' approach, considering it had a strong alignment with WorkSafe's strategic direction.

[74] Throughout July and August 2018, Mr Straayer sent numerous emails to herself and others, all in relation to concerns about the process that was followed. Ms Rosie considered them all including, for example, a 20 July 2018 email<sup>16</sup> where Mr Straayer set out a concern that the authorisation memorandum was not signed and did not provide sufficient information for Ms Rosie to make an informed decision, a 2 August 2018 email setting out Mr Straayer's concerns with the process,<sup>17</sup> 10 August 2018 email asking Ms Rosie to reconsider the decision regarding the CAR team,<sup>18</sup> and the 30 August 2018 email asking her to reconsider the decision not to redeploy him.<sup>19</sup>

[75] Ms Rosie considered each of those emails, plus others, but was comfortable with the process that was being followed.

[76] Ms Rosie confirms that on 23 August 2018 the interview was held to assess Mr Straayer's capabilities for the four roles he had expressed an interest in. Ms Rosie says she was one of the panel members, along with Mr Parkes and a recruitment advisor, Dominic Blair. She was involved in the interview process and wanted to ensure a strong focus on leadership capabilities in building a strong talent pipeline for the organisation and for senior executive roles through the change process.

[77] Ms Rosie said the panel was considering Mr Straayer for all of the roles, with the key issue under consideration being leadership capabilities. Ms Rosie reinforced that she believed very strongly that internal people should be considered first for roles in redeployment situations and should be given a genuine and full opportunity to be considered for positions. Accordingly, she approached the redeployment meeting with an open mind.

[78] Following the meeting, Ms Rosie did not consider Mr Straayer had the necessary skills and capabilities to be redeployed into any of the roles. The same conclusion was reached by the other panel members. She agreed with Mr Parkes' analysis of the

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<sup>16</sup> BOD Doc 24, page 3.

<sup>17</sup> BOD Doc 34.

<sup>18</sup> BOD Doc 34.

<sup>19</sup> BOD Doc 34.

necessary marking to be redeployed into one of the roles, namely Mr Straayer would need to score 20-plus to be considered and he fell short of that.

[79] Ms Rosie says she also considered whether or not Mr Straayer could perform the roles if he was given additional training and support, but concluded that even with additional training and support he would not be able to perform any of the new roles he had expressed interest in.

[80] Ms Rosie confirmed a recruitment company, Jackson Stone, had prepared a listing of candidates which included Mr Straayer although apparently he was not interviewed by them.<sup>20</sup> Ms Rosie agreed with the comment by Jackson Stone when it referred to him saying “This would be a step up role and we wonder if his background is too narrow considering the innovative/strategic thinking required for this position”. Ms Rosie confirmed to the best of her knowledge that comment wasn’t given to Mr Straayer prior to the interview.

[81] Ms Rosie confirms that Mr Straayer emailed her on 30 August 2018 asking her to reconsider the decision not to redeploy him. She arranged to meet with Mr Straayer on 4 September, however, for various reasons Mr Straayer was not able to attend.

[82] By early September, Ms Rosie says she considered WorkSafe had explored Mr Straayer’s concerns sufficiently and he had been provided with ample time to identify any other redeployment opportunities. She was concerned about the impact the process was having on Mr Straayer as he had expressed concerns about that in a number of his emails to her. On 6 September 2018, she provided Mr Straayer notice that his employment would conclude on 6 October 2018 by reason of redundancy. She considered it appropriate that he not be required to work out his notice period.

[83] Ms Rosie stated that Mr Straayer was open in expressing his concerns and this was having a negative impact on his colleagues, causing stress not only to them but also to Mr Straayer. For that reason she decided that Mr Straayer’s last day of work in the office would be 12 September 2018. Ms Rosie says this was to give Mr Straayer time to attend work to provide any handover and farewell his colleagues, and that he would be paid until his notice period expired on 6 October 2018. She says that Mr Straayer asked

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<sup>20</sup> BOD p 722.

to be considered for a couple of other roles but rather than attending an interview he asked to have his suitability assessed by the selection panel for these other roles, reviewing his applications to the roles he had recently been interviewed for as well as considering his CV and his position description.<sup>21</sup>

[84] On 7 September 2018, Mr Straayer raised a personal grievance<sup>22</sup> and requested a meeting to discuss his grievance. Ms Rosie responded to Mr Straayer stating she was happy to meet but would not be discussing any aspect of his personal grievance other than those that related directly to the termination of his employment.

[85] Ms Rosie asked the team to cease Mr Straayer's access to WorkSafe email and systems from 11 September 2018 because of concerns she had for his health and wellbeing and concerns for the health, wellbeing and security of those around him, together with WorkSafe. She confirmed there was no engagement with Mr Straayer regarding the decision to cut his access from WorkSafe's systems early.

[86] Ms Rosie also addressed the other complaints made by Mr Straayer regarding having been targeted in the redundancy because of Mr Parkes' relationship with his then sister-in-law who had raised issues about Mr Straayer. Ms Rosie gave evidence that this issue had nothing to do with the decision to restructure or the selection of Mr Straayer as a person affected. Ms Rosie states her last action was to respond to Mr Straayer, counselling him to make good use of his HR business partners and informing him that she would leave it to him to discuss any issues with HR. Ms Rosie had no further involvement in the matter and states that she was aware that Mr Parkes did not get involved in the matter at all.

#### *Julie Brown*

[87] Ms Brown was an HR Business Partner (People and Culture) for WorkSafe. She dealt with Mr Straayer through the restructuring process. She gave evidence regarding Mr Straayer's request for individual staff members' feedback. Ms Brown said that WorkSafe had always operated on the basis that feedback from individual staff members would be treated confidentially in the sense that their identity would not be revealed either by disclosing their name or any identifying content. She confirmed that names were

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<sup>21</sup> BOD Doc 66.

<sup>22</sup> BOD Doc 49.

redacted, along with individual content. The submissions were presented to the Chief Executive as a summary of all the individual submissions made. She says, however, that the feedback section was detailed.<sup>23</sup> Most were simply copied and pasted verbatim, but some was reorganised. Some feedback was summarised or paraphrased; however, Ms Brown was adamant that the feedback appropriately reflected the feedback received from individual staff.

[88] Ms Brown gave evidence regarding the position of Operations Support Manager (High Hazards). On 24 September 2018, Mr Straayer had asked her for the banding of the Operations Support Manager role in High Hazards.<sup>24</sup> She responded to him confirming amongst other things that they were not recruiting to the role. This was because the incumbent had only just resigned and the Chief Inspector for High Hazards was concerned that there was not really a role there. He wanted to look into combining that role with another role that supported the external Board of Examiners that had been established to perform statutory functions relating to the competency requirements of workers in the extractives industry. The Chief Inspector had recommended a new combined role be created and in early 2019 that role was established (Manager Operational Support and Board of Examiners). It was advertised in January 2019 and an external candidate was appointed.

[89] Ms Brown confirmed that a meeting to discuss alternatives to termination was scheduled with Mr Straayer for 4 September 2018. The purpose of the meeting was also to discuss the concerns raised in Mr Straayer's 30 August email. Ms Brown confirms that Mr Straayer was not able to attend the meeting and there was a follow-up exchange about staff that had resigned.

[90] Ms Brown said that WorkSafe's view was that the current vacancies did not appear to be a match to his skillset. However, Mr Straayer was advised that if he disagreed and he was interested in any of the roles listed, he should let Ms Brown know and she would send a position description. Ms Brown states that Ms Rosie advised her she was concerned about the impact on Mr Straayer of further delaying the process and the impact on the wider organisation, including other employees.

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<sup>23</sup> BOD Doc 17.

<sup>24</sup> BOD Doc 55, page 3.

[91] Despite not having met as originally scheduled, Ms Rosie advised Ms Brown that Mr Straayer had provided a lot of information and there was nothing further for her to review. Accordingly, the decision was made to terminate Mr Straayer's employment on notice on 6 September 2018 with Mr Straayer's employment to end on 6 October 2018, with the proviso that he would only be required to work until 12 September 2018.<sup>25</sup>

[92] In respect of Mr Straayer's complaint he had been locked out a day early, Ms Brown stated it was common for employees at WorkSafe to have their access to the system removed with effect from their final day in the office. She said there was nothing sinister or unreasonable about this. It is noted that this contrasts with Ms Rosie's evidence that her reasons for denying Mr Straayer's access to the system were motivated by concerns not only about Mr Straayer's health but also about other people's safety. Ms Brown also addressed complaints made by Mr Straayer regarding potential motives on behalf of Mr Parkes to select him for redundancy. Ms Brown rejected any suggestion that Mr Straayer had a target on his back or that he was selected for redundancy for any improper motive.

*Simon Humphries*

[93] Mr Humphries was the Head of the General Inspectorate at WorkSafe. Mr Humphries' evidence was that he moved to WorkSafe in 2014 and took up a 12 month fixed term role as Establishment Manager for the CAR team. He was appointed as the CAR team permanent manager in mid-2015. He says that when a vacancy arose for Manager Technical Support Service, which later became Technical Programmes and Support (TP&S), he first acted in that role and then was appointed as its permanent manager. Mr Straayer then applied for and was appointed as Manager CAR in March 2016.

[94] Mr Humphries says that during the restructure which affected Mr Straayer's role, he applied for and was appointed to the Head of Specialist Interventions and started that role in October 2018.

[95] Mr Humphries says he became aware of Mr Straayer's allegations of bullying after Mr Straayer had left WorkSafe. Mr Straayer was a direct report from 2017 until he

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<sup>25</sup> BOD Doc 47.

left in October 2018. Mr Humphries rejects Mr Straayer's claims and notes that none of them were raised whilst Mr Straayer was employed by WorkSafe. Specifically, Mr Humphries denied any plan to isolate and freeze Mr Straayer out. Mr Humphries says that he finds the allegation difficult to respond to because Mr Straayer has simply asserted this as fact without any evidence or specific examples to back up his claim.

*Michael Hargreaves*

[96] Mr Hargreaves was the General Manager Regulatory Effectiveness and Legal Group at WorkSafe. His evidence concerned an external review into concerns regarding Mr Straayer's CAR team, which related to an investigation carried out by the team into the approval of a compliance certifier. Mr Hargreaves initiated the review into the complaint. He says on 13 July 2018 he met with Mr Straayer and informed him that an external review had been proposed. Mr Straayer believed the approach being taken, i.e. the appointment of an external reviewer, was unusual and was evidence of a campaign against him.

[97] Mr Hargreaves said this was simply not the case. He noted that the report<sup>26</sup> did not identify any particular misconduct. He did not consider any further action was needed to be taken in respect of WorkSafe employees dealing with the matter.

[98] For the sake of completeness, I note that Mr Murray also gave evidence but was not able to comment on the genuineness of the restructure as he was not the decision maker, nor was he involved in any way. Indeed, Mr Murray was not employed by WorkSafe at the time the restructure was carried out.

[99] Darren Handforth also submitted a brief of evidence but his evidence touched on Mr Straayer's then claim for reinstatement. As Mr Straayer by that stage of the proceedings was no longer seeking reinstatement, the evidence was no longer necessary.

**Analysis**

*The restructure*

[100] Mr Straayer has argued the restructure was not genuine and he was unfairly targeted. In essence his evidence was that he was targeted right from the beginning by

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<sup>26</sup> BOD Doc 92.

Mr Parkes because a tension had developed between the Operational Policy Team and Mr Straayer when Mr Parkes was the General Manager of that group. Further, Mr Straayer argued when Mr Parkes' then daughter-in-law raised complaints about Mr Straayer, Mr Parkes retaliated with the restructure. During the investigation meeting, Mr Straayer conceded that he had no real evidence to prove this allegation, other than his clear disagreement with the rationale provided for the restructure. Each of Mr Straayer's allegations are answered in the evidence. For instance, Mr Parkes gave strong evidence that in a meeting on 12 July 2018 when Mr Straayer suggested he had a target on his back, Mr Parkes immediately contradicted the assertion.

[101] WorkSafe, particularly through Ms Rosie and Mr Parkes, gave strong evidence that there was a genuine rationale behind the restructure. This included engaging an external consultant. The evidence before the Authority showed a clear business rationale supporting the restructure.

[102] Whilst it was clear Mr Straayer, as he was entitled to, had an entirely different view regarding the business case and disputed the legitimacy of disestablishing his role. He noted no other teams were split and believed he was not being treated equally.

[103] In assessing whether or not WorkSafe's decision to restructure was fair and reasonable, the Authority must have regard to s 103A of the Act. The Authority must assess whether what was done by the employer and how it was done were what a fair and reasonable employer could have done in all of the circumstances.

[104] 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.<sup>27</sup> I find that WorkSafe's decision to restructure how it carried out its business, was a decision open to it. As indicated earlier, Mr Straayer strongly disagreed with WorkSafe's "business judgment". However, it is not for the Authority to substitute its business judgment for that of the employer.<sup>28</sup>

[105] However, WorkSafe's position was that there was a robust consultation process which Mr Straayer participated in. Indeed, as Mr Straayer emphasised when giving evidence, he submitted six pages of submissions setting out his view. The significance

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<sup>27</sup> [2014] NZCA 541.

<sup>28</sup> *Innovative Landscapes (2015) Limited v Popkin* [2020] NZEmpC 40.

of this, is that WorkSafe was well aware of the tenor of Mr Straayer's objections to the restructure prior to proceeding with its proposal. WorkSafe did not have to agree with Mr Straayer's view. Mr Straayer has not been able to show that the decision to restructure was anything other than genuine or that there was an improper motive to it.

#### *Redeployment/dismissal*

[106] Notwithstanding the finding that WorkSafe's restructure up until (and including) the disestablishment of Mr Straayer's position, was a process open to a fair and reasonable employer, WorkSafe face the same s 103A justification requirement in respect of how it carried out its redeployment process, its decision to end Mr Straayer's employment by way of redundancy and how it went about it.

[107] The Court noted in *New Zealand Steel Limited v Haddad*, 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.<sup>29</sup> When considering redeployment, the employer must comply with the good faith obligations in s 4 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 in accordance with s 4(1A)(b), including being responsive and communicative.

[108] In referring to *Gafiatullina v Propellor Head Limited*, the Court noted: "an employer's assessment of suitability for redeployment is not to be conducted unilaterally outside of the restructure consultation."<sup>30</sup> Where there is a breach of redeployment obligations, the fairness of the entire redundancy process will be affected.<sup>31</sup>

[109] Mr Straayer's terms and conditions of employment were set out primarily in the individual employment agreement he signed on 26 February 2016.<sup>32</sup> On page 9 of the bundle, Mr Straayer's employment agreement provided that:

During the notice period, subject to the provisions of the State Sector Act 1988 (or its amendments), both WorkSafe New Zealand and you shall make

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<sup>29</sup> [2023] NZEmpC 57 at 84.

<sup>30</sup> [2021] NZEmpC 146 at 111.

<sup>31</sup> *NZ Steel* at [85].

<sup>32</sup> BOD document 1.

reasonable efforts to locate suitable alternative employment for you in the following areas:

- (a) within the public service or;
- (b) within any other part of the state sector (which terms shall include Crown entities, Crown companies and state-owned enterprises); or
- (c) in the organisation acquiring some or all of the business of WorkSafe New Zealand whether or not that organisation is within the state sector (where the position ceases to exist due to the part of the WorkSafe New Zealand's business in which the employee's position is situated being sold or transferred).

[110] The agreement also provided that WorkSafe and Mr Straayer could agree to any other arrangement as an alternative.

[111] Ms Brown as the HR business partner was involved in the restructuring process resulting in Mr Straayer's redundancy. On 9 August Ms Brown emailed Mr Straayer saying she was sorry he was confused about the redeployment process. Ms Brown then set out the process WorkSafe was following.

[112] Ms Brown explained what WorkSafe considered what was meant by the terms "reassignment and redeployment". Mr Straayer was advised by Ms Brown that WorkSafe had assessed that there were no reassignment options for him in the current structure. This was because there were no roles which were the same or substantially similar to Mr Straayer's current role of Manager CAR.

[113] There is no evidence of proper consultation or engagement with Mr Straayer over that assessment. The evidence from WorkSafe seemed to be that there was no need because this could be assessed by simply comparing Mr Straayer's current role to newly created roles or other roles.

[114] Mr Straayer should have been included in that assessment. Roles change over time and assessing Mr Straayer's current position and deciding that reassignment was not an option, would be difficult to do without input from Mr Straayer. His position as described in his position description may well have changed.

[115] Ms Brown explained that the next step therefore was to consider whether or not Mr Straayer was suitable for redeployment into any of the new four roles created. Her email explained to Mr Straayer that his interview with the panel was his opportunity to demonstrate that he had the capabilities to undertake one of the roles. He was advised if

the panel considered he did have the capabilities for one or all of those roles, he would be offered redeployment and could decide whether he wished to take up a role or not. She explained to Mr Straayer he did not have to try and establish that he was the best person for the role. He needed to demonstrate that he had the capabilities to undertake the role and the panel would consider his previous performance as part of his capability assessment. The questions asked would be based upon the position description for the role and designed to allow him to bring up relevant experience and examples of how he would perform in such a role.

[116] Mr Straayer was the only WorkSafe employee to be facing redundancy under the restructure. WorkSafe needed to take care that it did all it could to preserve his employment. However, Ms Brown would have been unaware at that time of the long-list briefing provided by Jackson Stone. That long-list contained a query that could be seen as negative towards Mr Straayer at a time when he was heading into an interview to decide whether or not he was suitable for a role. The recruitment company's statement was "... This would be a step-up role and we wonder if his background is too narrow considering the innovative/strategic thinking required for this position."

[117] Mr Straayer continually complained or at least signalled in his emails that he was not happy with the redeployment process. He was concerned that WorkSafe may be using inaccurate information. He had asked for a copy of the redeployment process document WorkSafe were following.<sup>33</sup> If Mr Straayer had been aware of the comment made by Jackson Stone, it is likely he would have queried or at least have been better prepared to focus on a comment that his background was too narrow and that the position required innovative/strategic thinking. At the very least, one could imagine Mr Straayer would have asked for clarification. It seems someone clearly explained to the recruitment company, what the role required. It seems, however, the same courtesy was not extended to Mr Straayer.

[118] WorkSafe gave conflicting evidence. Mr Parkes seemed to be saying that the panel would assess information received on the day. It is true that other evidence suggested that WorkSafe would consider Mr Straayer's time at WorkSafe. Mr Straayer had been at WorkSafe for some time. WorkSafe should have been aware of the work he

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<sup>33</sup> BOD Doc 33, p 244.

had carried out during his employment and should not have only been relying on statements made by Mr Straayer at the redeployment meeting. Further the negative comment contained in the long-list briefing, conflicts with Mr Straayer's skills and experiences as listed under the heading 'person specification' in his position description.<sup>34</sup> Under the heading of 'Person Specification', a person carrying out Mr Straayer's position had "a proven track record of success in the development and implementation of innovative and successful regulatory/compliance-related strategies, systems and processes" along with proven leadership skills including demonstrated ability to engage and motivate staff.

[119] The Court in *Grace Accounting* noted that s 4(1A) of the Act creates a duty on the parties to an employment agreement to deal with each other in good faith, and this is wider in scope than the implied common law duties, mutual obligations of trust and confidence. There are now explicit requirements for the disclosure of information and consultation. Mr Straayer at the time of the redeployment interview, was an employee of WorkSafe. He was the only employee facing termination of employment. It was incumbent on WorkSafe to do everything it could to retain him. The panel had in front of it the Jackson Stone assessment. Mr Straayer was unaware of it. The panel therefore knew precisely what area of "leadership" it wished to focus on. Whilst it had taken some steps prior to the interview to assist Mr Straayer, it did not give him information which was likely to have assisted Mr Straayer in demonstrating to the panel he was suitable for at least one of the positions, and this included the negative comment.

*Was there another position which could have been offered to Mr Straayer?*

[120] There were two roles where it seems an opportunity to redeploy Mr Straayer into were potentially missed. The Operations Support Manager role was certainly a redeployment option, if not a reassignment one. WorkSafe's evidence, through Ms Brown, was that this wasn't considered because it was being rescoped. No mention however of the role was made to Mr Straayer who remained blissfully unaware. Bearing in mind the obligation on WorkSafe to be active and constructive in maintaining the employment relationship, it needed to include Mr Straayer in its thinking regarding that role. This is especially so when WorkSafe should have ensured no stone was left unturned when considering Mr Straayer's redeployment. The fact that the role may have been

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<sup>34</sup> BOD Doc 2, p 019.

under consideration for re-scoping by WorkSafe, does not excuse it from at least advising Mr Straayer of its thinking and allowing him to have input into it.

[121] The TP&S role was also one that may well have been suitable for reassignment or redeployment. Again, Mr Straayer was unaware that a vacancy in that regard existed. WorkSafe did not tell Mr Straayer it may be a possibility. Again, through Ms Brown, WorkSafe's rationale was that it was not vacant at the time it was considering Mr Straayer for redeployment. However, WorkSafe's own evidence showed that WorkSafe was aware the incumbent would be vacating the role. It knew where that incumbent was moving to. In order to discharge its obligations of good faith, it needed to advise Mr Straayer of the potential that role would soon be available and consider him for it.

[122] As noted in *New Zealand Steel Limited* referred to above, where redeployment obligations are breached, the fairness of the entire redundancy process will be affected. It follows therefore that WorkSafe did not give Mr Straayer all the information he needed to engage fully with the redundancy process and protect his employment. It wasn't being responsive and communicative in respect of redeployment options and opportunities, or in maintaining the employment relationship. It failed to meet the obligations imposed by s 4(1A) of the Act.

[123] It follows therefore that Mr Straayer's dismissal on the grounds of redundancy was unjustified. He was not treated fairly and reasonably in relation to redeployment.

## **Conclusion**

[124] Mr Straayer has not made out his disadvantage claims in respect of bullying. The primary reason for this, is that Mr Straayer did not raise these allegations during his employment and confirmed this in answer to questions by the Authority and in cross-examination. He says this was because he did not know that such alleged behaviour constituted bullying until after the termination of his employment. The problem with that approach is that, if WorkSafe was unaware of the allegations, it would generally not have a duty to investigate them. In respect of the issue regarding the use of a photograph, Mr Straayer withdrew that claim during the investigation.

[125] Ms Rosie's decision to finally dismiss Mr Straayer without meeting with him was not the action of a fair and reasonable employer. She had told Mr Straayer she would

reschedule the meeting but did not. That said, this may have disadvantaged Mr Straayer in his employment because it eroded what little trust and confidence Mr Straayer still retained in his employer. If an employer promises to do something, then it should do it.

[126] Likewise, the decision to lock Mr Straayer out of the network, was not a decision open to a fair and reasonable employer. Ms Rosie's justification was that Mr Straayer's behaviour was having an adverse effect on other staff and on himself. Whether or not that was the case, is unknown because Ms Rosie took the action with a total lack of process. Mr Straayer was not consulted and Ms Rosie's actions were based on a unilateral decision she made with no input.

[127] The decision to disestablish Mr Straayer's position did follow a fair and reasonable process and was a decision open to WorkSafe to make. However, the decision not to redeploy Mr Straayer on the basis no positions existed that were suitable, did not follow a fair and reasonable process and was unjustified. WorkSafe's actions have disadvantaged Mr Straayer. Having reached these conclusions, Mr Straayer is entitled to a consideration as to remedies.

## **Remedies**

### *Lost earnings*

[128] Mr Straayer has sought lost earnings, annual performance increases and interest from 7 October 2018 to the date of the determination.

[129] Mr Straayer decided not to pursue his claim for reinstatement. Accordingly, I consider the proper way to assess the basis of any salary loss is based on the salary Mr Straayer was on immediately prior to his dismissal. I understand that to be \$150,000.00 per annum. It would not be appropriate to base Mr Straayer's loss on a salary of some other position he may have had hypothetically. Further, it is not appropriate to include any annual performance increases when Mr Straayer has of course not been at WorkSafe and it would be speculative as to whether or not such increases were included. As Mr Straayer has no unpaid salary, it would also be inappropriate to add interest on to any amount awarded under this heading.

[130] Mr Straayer gave evidence of the attempts he had taken to mitigate loss. The starting point for assessing that loss that an employee who has been unjustifiably

dismissed is entitled to is the lesser of a sum equal to their lost remuneration or to three months ordinary time remuneration.

[131] Section 128(3) of the Act gives the Authority the discretion to pay a greater sum, although in no circumstances can that sum be greater than the actual loss. Whilst I accept Mr Straayer took steps to mitigate his loss especially after the first three month period had passed, I have no documentation before me as to the precise steps taken. Mr Straayer's evidence also indicated a number of his applications for alternative employment were for positions at WorkSafe.

[132] In its submissions, WorkSafe wants me to take account of the fact that Mr Straayer declined the opportunity to attend interviews for two principal advisor roles. I do not consider it appropriate to do so. The roles were redeployment opportunities to which WorkSafe were already aware of Mr Straayer's working background. It also had his CV and job description. Mr Straayer did not say he was not interested in the roles, he simply asked WorkSafe to consider him on the material it already had. Further, WorkSafe's attempt to find other work outside the entity for Mr Straayer comprised a one-off email, albeit to a number of potential employers. It did not, however, advise the Public Service Commission or check with them regarding any other opportunities.

[133] At the time of the hearing, Mr Straayer had been out of work for some four years. I am also cognizant of the fact that Mr Straayer was focused on reinstatement up until approximately day eight of the investigation meeting. He had also previously unsuccessfully sought an interim injunction for reinstatement after some two years had passed since the termination of his employment. It is possible that focus on reinstatement had some impact on Mr Straayer's efforts to find alternative employment.

[134] Nonetheless, Mr Straayer is entitled to lost wages caused as a result of his grievances. I consider six months' lost wages to be appropriate.

#### *Hurt and humiliation*

[135] Mr Straayer has asked for a sum of \$75,000 by way of compensation for humiliation, loss of dignity and injury to feelings. Mr Straayer did give evidence regarding the impact his dismissal had on him. I have found that the restructure itself and the decision to disestablish Mr Straayer's position were actions open to a fair and

reasonable employer. I recognise that the restructure, however, did have a significant impact on Mr Straayer because he felt that he had been targeted and could not understand the rationale for the consequent disestablishment of his position. However, he is not entitled to compensation for matters that arose out of that.

[136] Mr Straayer is, however, entitled to compensation for humiliation, loss of dignity and injury to feelings arising out of the failure by WorkSafe to properly consider him for reassignment or redeployment. There were failings on WorkSafe's part in that regard. Taking guidance from the Court, and taking into account Mr Straayer's evidence, I consider an award of \$25,000.00 as appropriate. That award also recognises how Mr Straayer must have felt about WorkSafe not honouring its agreement to meet with him prior to the date of his termination being advised, despite its promise to do so. It also takes into account the hurt Mr Straayer suffered when the CEO unilaterally decided to block his access to WorkSafe's systems because of un-investigated complaints and without any process.

#### *Contribution*

[137] Section 124 of the Act requires me to consider whether or not remedies should be reduced because of contributory behaviour by Mr Straayer. WorkSafe asked me to consider that the fact that Mr Straayer chose not to be interviewed for some roles and sent an inflammatory email causing the Chief Executive to decide he should finish working a day earlier than expected, should be taken into account as relevant contributory factors to the redundancy. WorkSafe acknowledged that the starting point where employment is terminated by way of redundancy, is that it is a no-fault analysis. I do not accept that Mr Straayer contributed to his dismissal. In respect of the email WorkSafe refers to, the difficulty it faces is that the issue was not raised with Mr Straayer, and the decision to lock him out of WorkSafe's systems a day earlier than expected, was a unilateral decision made by the Chief Executive. Under the circumstances I do not consider a reduction in remedies is appropriate.

#### **Orders**

[138] WorkSafe New Zealand is ordered to pay Adriaanus Straayer the following within 28 days from the date of this determination:

- (a) Six months' lost salary, based on the salary Mr Straayer was on immediately prior to the termination of his employment (less PAYE);
- (b) A sum of \$25,000.00 in terms of s 123(1)(c)(i) of the Act, as compensation for humiliation, loss of dignity, and injury to feelings as a result of the unjustified disadvantages Mr Straayer suffered during his employment, together with his unjustified dismissal.

### **Costs**

[139] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. The Authority is aware that costs in respect of the prior two interlocutory matters were reserved.

[140] If the parties are unable to resolve costs, and an Authority determination on costs is needed, either party 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.

[141] 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.<sup>35</sup>

Geoff O'Sullivan  
Member of the Employment Relations Authority

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<sup>35</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)