

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 492
3132154

BETWEEN

BOURHANE KADMIRY
Applicant

AND

**CALLAGHAN INNOVATION
RESEARCH LIMITED**
Respondent

Member of Authority: Nicola Craig

Representatives: Kam Bailey, advocate for the applicant
Peter Chemis and Hana Khan, counsel for the
respondent

Investigation Meeting: 12 August 2021

Submissions [and further Information] Received: At the investigation meeting from both parties

Date of Determination: 8 November 2021

DETERMINATION OF THE AUTHORITY

- A. Dr Bourhane Kadmiry's claims are not established.**
- B. Costs are reserved and a timetable set.**

What is the Employment Relationship Problem?

[1] Dr Bourhane Kadmiry is a highly qualified scientist and engineer. He worked for Callaghan Innovation Research Limited (Callaghan Innovation or the organisation) until he was made redundant in early 2021.

[2] Callaghan Innovation is a Crown Agency providing a range of innovation and research and development services. It is funded by government grants and also generates commercial revenue.

[3] Dr Kadmiry challenges the genuineness of his redundancy and the process used to by Callaghan Innovation. The organisation says it made a genuine decision based on a change of focus in the business and used a fair and reasonable process.

[4] Dr Kadmiry initially applied for interim reinstatement. The application was declined. An interim non-publication order was made at that time but Dr Kadmiry no longer pursues non-publication.

[5] An investigation meeting was held on 12 August 2021. I heard evidence from Dr Kadmiry, his wife, Christopher Thomson (Group Manager, Advance Manufacturing Group) and Paul Linton (General Manager, R&D Solutions).

[6] As permitted by s 174E of the Act, this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

What are the issues?

[7] The claims to be investigated are:

- (a) Was Dr Kadmiry unjustifiably dismissed?
- (b) If so, what remedies (if any) should he receive, including consideration of reinstatement?
- (c) Did Callaghan Innovation breach the duty of good faith and/or the employment agreement by refusing to go to mediation?
- (d) If so, should a penalty be imposed?

What is Dr Kadmiry's background?

[8] Dr Kadmiry has doctoral qualifications in engineering (artificial intelligence and robotics) and science (computer science) as well as having a number of other qualifications and certificates of professional education. In Europe he had worked for Swedish and French universities, as well as consulting for a variety of companies.

What is Dr Kadmiry's work history in New Zealand?

[9] In 2012 Industrial Research Limited offered Dr Kadmiry a role as Senior Mechanical Researcher. He and his family moved to New Zealand from Sweden, with assistance from his new employer. Dr Kadmiry started work on 1 November 2012. When Industrial Research Ltd became part of Callaghan Innovation in 2013 Dr Kadmiry was transferred to the role of Senior Research Engineer.

[10] Dr Kadmiry describes his role as to do research and collaborate with industries and academia.

[11] In 2016 following a restructuring, Dr Kadmiry's position was retitled Senior Research Engineer and transferred to sit within the Robotics and Automation Team of the Advance Manufacturing group.

What was the background to the restructuring proposal?

[12] From around 2016 Dr Kadmiry had a sense of Callaghan Innovation staff being encouraged to do more commercial work. He accepts that over a period this was mentioned to staff many times although there was no quota or the like on how much commercial work was expected.

[13] In July 2019 Callaghan Innovation revised its strategy for its research and technical services (RTS) to move from early-stage research and development activities to more commercially driven projects. This included a target of reducing the time spent on strategic initiative funding (SIF) capability development projects and increasing the time spent working directly with frontier firms. Senior level restructuring occurred, with managers, including Mr Linton, having to apply for roles in a new structure. Group Managers began to shift their teams' attention from early-stage research to more commercially driven projects.

[14] The strategy covered the Robotics and Automation Team (RA Team) Dr Kadmiry was based in. Although there was some dissemination of the new strategy within the organisation, the extent to which the change would impact on particular roles was not immediately apparent to Dr Kadmiry and possibly others. He did receive occasional short presentations about what was happening.

[15] Over time Dr Kadmiry became aware of increased references to commercial projects. He felt that his manager continued to encourage him to undertake SIF work, which was not commercial.

[16] In March 2020 Callaghan Innovation received a Letter of Expectation from the Minister of Research, Science and Innovation that instructed it to implement the new RTS strategy and deliver a model that provided better value within current funding.

What restructuring process did Callaghan Innovation adopt?

[17] Mr Thomson considered that Dr Kadmiry's role was heavily focused on early-stage research activities for internal development purposes, which was SIF work. He discussed his thoughts and proposal to make the role redundant with Dr Kadmiry's manager several times and concluded that the proposal should be progressed. A draft of the proposal was provided to Dr Kadmiry's manager before it was finalised.

[18] Mr Thomson's role reported to Mr Linton, although Mr Linton was on leave for a couple of months from mid-November 2020.

[19] On 12 November 2020 Mr Thomson and a human resources representative met with Dr Kadmiry to present Callaghan Innovation's proposal document. The proposal included the disestablishment of Dr Kadmiry's role. Mr Thomson outlined the process and sought any initial feedback from Dr Kadmiry. Dr Kadmiry did speak at length, as did Mr Thomson, with the meeting lasting over 45 minutes.

[20] Dr Kadmiry sought out his manager. They met for about 45 minutes on 19 November. Dr Kadmiry recorded the conversation as he often did, due to English not being his first language. However, it appears he did not seek his manager's permission to do that. The manager indicated that Dr Kadmiry needed to provide feedback to the proposal that the manager had directed and assigned Dr Kadmiry's work. The manager suggested that Dr Kadmiry provide feedback about R&D work done which contributed to industries. He also said that the majority of Dr Kadmiry's work was on SIF, which Dr Kadmiry agreed with.

[21] Dr Kadmiry instructed a representative, Kam Bailey. On 23 November 2020 she requested further information and an extension of time for feedback. Further information

was provided on 2 December 2020. This included that there were three senior positions in the RA Team sharing the same generic title. Dr Kadmiry's role was said to be distinguishable from those held by the other two. Callaghan Innovation confirmed that there were no financial drivers associated with the change proposal.

[22] Dr Kadmiry's feedback was provided through Ms Bailey on 9 December 2020. At the same time concern was expressed about the extent of information provided to support the rationale for change and how it related to the organisation's statement of intent. A request to attend mediation was made.

[23] On the same day Dr Kadmiry directly conveyed in an email to his manager that he felt marginalised and set up for the disestablishment of his role.

[24] A meeting was held by video conference in 11 December 2020 between Dr Kadmiry, Ms Bailey, Mr Thomson, the HR representative and Callaghan Innovation's lawyer Peter Chemis, to obtain Dr Kadmiry's feedback.

[25] Then Mr Thomson consulted with the chief operating officer and the chief executive (as she was acting in Mr Linton's role in his absence). They were comfortable about the process proceeding.

[26] On 16 December 2020 a lengthy letter responding to Dr Kadmiry's feedback was provided. It set out Callaghan Innovation's preliminary decision to proceed with the proposal and disestablishment of Dr Kadmiry's role. The organisation maintained that it was comfortable with the change proposal focusing on Dr Kadmiry's role only and to expand the proposal would be stressful and disruptive for the entire team.

[27] Ms Bailey provided some feedback and requested mediation by emailed letter on 17 December 2020.

[28] Mr Chemis on behalf of Callaghan Innovation wrote to Dr Kadmiry via Ms Bailey on 21 December to tell him of its final decision to proceed with the proposal. This was done on the basis of an understanding that Ms Bailey's 17 December letter provided Dr Kadmiry's feedback. Callaghan Innovation indicated that it was willing to attend mediation but not to defer its decision in the meantime.

[29] Once Ms Bailey objected to the final decision being issued (an hour) before the expiry of the time for feedback, Callaghan Innovation withdrew its final decision letter. Extended time for a response was provided with feedback supplied on 22 December 2020.

[30] Ms Bailey wrote, expressing dissatisfaction with the process and requesting more information. Further detailed letters were then provided by Mr Chemis and by Ms Bailey in response. She urged the organisation to remove Mr Thomson as decision-maker on the basis he was seen as biased.

[31] Mr Chemis replied on 3 January 2021. Ms Bailey replied providing more feedback and reiterating the request that Mr Thomson be removed.

[32] Although Callaghan Innovation did not recognise any issue with Mr Thomson proceeding, it decided that it would appoint Mr Linton as decision-maker. Having been away, Mr Linton saw himself as coming with a fresh mind. More feedback occurred between Ms Bailey and Mr Chemis and then back again.

[33] On 22 January 2021 a meeting was held between Dr Kadmiry, Ms Bailey, Mr Chemis and Callaghan Innovation personnel including Mr Linton. Dr Kadmiry provided feedback including about his experience and skills.

[34] A final decision letter was given to Dr Kadmiry on 27 January 2021 setting out the disestablishment of his role. The same day Dr Kadmiry had an interview for the role of Senior Data Scientist in the Data and IoT Group. That interview did not result in Dr Kadmiry being offered the job. He was informed of this by a comprehensive 4 February letter exploring the interview, the job's requirements and the interview panel's conclusions.

[35] During the process Dr Kadmiry approached the CEO Vic Crone on several occasions. She messaged Mr Linton indicating she was not sure Callaghan Innovation was in the right. Further messages were exchanged. Mr Linton spoke briefly to Ms Crone, then reconsidered the decision he had already made to make Dr Kadmiry's position redundant, but concluded that it was the right decision. There is no sign Ms Crone felt the need to take any further steps.

[36] As there were no other suitable positions identified by Callaghan Innovation or Dr Kadmiry, his position was terminated on 28 February 2021. He was paid his entitlements under his agreement, which totalled around \$86,000 including redundancy compensation.

Was this a genuine redundancy?

[37] Redundancy has been defined as a termination of employment “attributable, wholly or mainly to the fact that the position ... is, or will become, superfluous to the needs of the employer”.¹ A similar definition was used in Dr Kadmiry’s employment agreement. Although redundancies will often be for cost savings reasons, that is not always the case.

[38] The Authority should examine whether this was a decision made genuinely and in a way that was open to a fair and reasonable employer.²

[39] Dr Kadmiry challenges whether a genuine business decision was made by Callaghan Innovation or whether there was an ulterior motive behind the decision to disestablish his role. The employer has the onus to prove that it was justified in dismissing Dr Kadmiry for redundancy. I found both Callaghan Innovation’s witnesses reliable.

Rationale behind the decision

[40] I accept that Mr Thomson had sufficient oversight of Dr Kadmiry’s role, along with information from discussions with the direct manager, to conclude that the role was focussed on research activities and internal capability development. Mr Thomson was in a position to put together the proposal which was premised, accurately, on Dr Kadmiry’s current work not providing significant immediate commercial benefits for Callaghan Innovation.

[41] Mr Thomson assessed that any remaining SIF work which Callaghan Innovation still wished to pursue could be redistributed amongst other team members as and when needed.

[42] I do not consider the manager’s comments in the mid-November 2020 meeting to assist Dr Kadmiry to establish his argument that this was not a genuine business decision.

¹ *GN Hale & Son Ltd v Wellington Caretakers etc IUOW* [1991] 1 NZLR 151 (CA) at 155.

² *Grace Team Accounting Limited v Brake* [2014] NZCA 541.

It was not the manager's decision. On the face of the interview transcript the manager was attempting to assist Dr Kadmiry to focus his feedback on the more commercial aspects of his role and stress that he was working as had been previously approved by his manager. The manager's view, when pressed, that there was a need for Dr Kadmiry in the team but he would have to change.

[43] I note Dr Kadmiry's view that he was a robotics specialist and Callaghan Innovation was lacking in that area. He considered that the rational approach was to retain such expertise. However, creating such a new position did not fit with Callaghan Innovation's strategy.

[44] A small component of Dr Kadmiry's work was a project which had commercial application. The evidence was that it brought in around \$16,000 a year. Dr Kadmiry's own evidence was that commercial work was "last on the list of tasks [he] should fulfil". Mr Thomson was aware that Dr Kadmiry did some commercial work. Callaghan Innovation was not saying that Dr Kadmiry's work did not have value but rather that it was not the type of work which the organisation wished, and had been instructed, to focus on.

[45] The other two staff members at Dr Kadmiry's level in the team did substantially more commercially focused work than he undertook. Dr Kadmiry's work had a longer term focus, including keeping up on the leading edge of science and technology, including through connections with universities. Mr Thomson described Dr Kadmiry's skills as fitting particularly well with those aspects, building in-house knowledge and capabilities. That was what was needed at the time he was appointed but not so much by 2020.

[46] Timesheet information obtained for the purpose of responding to Dr Kadmiry's claim, showed that he spent 67% of his time on SIF and overhead work. The latter included business development, conferences, and administration work. A smaller proportion was spent on client related work.

[47] The organisation's explanation for the rationale behind the proposal was criticised. The preliminary decision to disestablish referred to the rationale being based on an updated strategy approved in July 2019. It then referred to "the revised strategy" being in response to the Minister's Letter of Expectation. That letter was from March 2020. Submissions for Dr Kadmiry argued that the letter could not have been the reason for the revised strategy as the revised strategy came first.

[48] That critique merges the reference to “updated strategy” and “revised strategy” and appears to be based on a premise that there would only be one revision. Clearly the movement to a more commercially based approach was a change which happened over a long period. The strategy was updated in July 2019. It was then revised after the Letter of Expectation was received. I see no difficulty with Callaghan Innovation’s explanations here and do not accept that they were flawed.

[49] I have considered the suggestion that Dr Kadmiry should have been permitted to pivot his work to a more commercial focus. Initially that seems like an attractive proposition as he is clearly a capable individual. Callaghan Innovation did not however, have sufficient commercial work for him to undertake. Immediate generation of commercial work was described by Mr Thomson as not being easy, so such work would have had to be taken off others to add to Dr Kadmiry’s responsibilities.

Ulterior motive?

[50] Having moved with his family to the other side of the world and wanting to stay in New Zealand, along with being very committed to Callaghan Innovation and his work, Dr Kadmiry did not readily accept that his role might be disestablished.

[51] Dr Kadmiry was searching for the reason behind Callaghan Innovation’s proposal and brought his scientific approach to that analysis. He was the only person in this particular restructuring whose position was to be disestablished. Dr Kadmiry struggled to see how, when his work had been approved and funded by Callaghan Innovation, he could now be in a position to lose his job.

[52] Several possibilities were denied or rejected. These included an economic/money saving reason, any suggestion of unethical or unprofessional behaviour by him and not doing what he was supposed to do in his contract.

[53] An inability to understand or recognise Callaghan Innovation’s rationale lead Dr Kadmiry to a view that there must be some ulterior motive behind this decision. This in turn lead him to claims of an orchestrated attempt to remove him or a sham or staged exercise.

[54] Dr Kadmiry thought that he had good relationship with his team, his manager and Mr Thomson. They seem to have felt the same way. Dr Kadmiry had less to do with Mr

Linton but there was no basis was asserted for Mr Linton having any particular motive to want Dr Kadmiry out of the organisation.

[55] Dr Kadmiry's view was that his team leader deliberately 'diverted' him towards SIF projects, taking him away from commercial work. The recorded 20 November conversation provides no evidence to support that any improper motive, rather indicating that the manager was trying to ensure that Dr Kadmiry's R&D work was more industry aligned. I do not accept that there was any deliberate plan by his manager to head him towards work which was not going to be useful for Callaghan Innovation or would put his job in jeopardy.

[56] Dr Kadmiry found it distressing when at a few points during the 12 November 2020 meeting Mr Thomson laughed. Mr Thomson referred to this as his nervous laugh, having found Dr Kadmiry at time quite confronting and somewhat aggressive during the meeting. During the Authority's meeting Mr Thomson took the opportunity to apologise to Dr Kadmiry if his laugh came across badly. I found this to be a genuine apology.

[57] I do not accept that Ms Crone's comment or her messages with Mr Linton are sufficient to throw the genuineness of Mr Linton's decision into doubt. A CEO, hearing from a highly qualified staff member, may appropriately check whether a proposal has been sufficiently thought through and was consistent with the organisation's strategy. That does not of itself impugn the decision.

Conclusion

[58] Whether Callaghan Innovation's strategy is the right or best one for the organisation is not for me to say. Having heard all the witnesses and looked at the contemporaneous documents, I conclude that the decision to make Dr Kadmiry's role redundant was a genuine business decision which it was open to Callaghan Innovation to make. Both Mr Thomson and Mr Linton proceeded without impropriety. Dr Kadmiry has not established that there was any ulterior move behind his redundancy.

[59] For Callaghan Innovation it was properly acknowledged at the meeting that Dr Kadmiry had suffered as a result of having his position restructured.

Did Callaghan Innovation use a fair process?

[60] Dr Kadmiry is critical of a number of aspects of Callaghan Innovation's process.

Start of the process

[61] Submissions for Dr Kadmiry were critical of the time taken between the first draft of the proposal by Mr Thomson in September 2020 to the completion of the draft by an HR representative on 6 November 2020. Having heard the evidence of Mr Thomson, I conclude that he spent some time thinking about the possibility of restructuring. He appropriately wanted to come up to Auckland so he could meet with Dr Kadmiry. It is not evident that Dr Kadmiry was disadvantaged in any way by the proposal being first put to him in November, compared to a possible September or October presentation.

Other staff

[62] Ms Bailey raised that the other two in the team with the same generic title should have been part of the restructuring process as well, with a contest established.

[63] The other staff had doctorates in different subjects than Dr Kadmiry. Mr Thomson's understanding, which was discussed with Dr Kadmiry's manager, was that the other two did a considerable amount more commercial work than Dr Kadmiry. It was perhaps unwise not to undertake some further fact checking of that understanding before focusing on Dr Kadmiry's role. However, the documents which he obtained after consultation with Dr Kadmiry strongly reinforced that view. Dr Kadmiry did not dispute that a different mix of work was undertaken.

[64] Dr Kadmiry was free to raise the position of the other two as part of his feedback. I am not satisfied that Callaghan Innovation acted unfairly by not including them in the restructuring process from the start.

Information provision

[65] This was a situation covered by the requirement of s 4(1A) of the Act, where Callaghan Innovation was proposing a decision which was likely to have an adverse effect on the continuation of Dr Kadmiry's employment. Mr Thomson saw the justification and rationale for the proposal as concise and involving a fairly logical argument.

[66] Given his background and role, it was perhaps foreseeable that the amount of information initially provided on the three page consultation document (without attachments) would not meet Dr Kadmiry's wishes. This initial information was supplemented somewhat by more provided during the 12 November 2020 meeting.

[67] Perhaps more information could have been given earlier on but that matter was corrected by the later provision of sufficient documentation. Requests made by Ms Bailey were complied with.

Consultation process

[68] Although the consultation process was envisaged by Callaghan Innovation as occurring more rapidly, what eventuated was a process lasting over two months.

[69] Dr Kadmiry would have liked to have more information before attending the first meeting. That is accepted by Mr Thomson. However, Mr Thomson was conscious that providing substantial information before meeting with employees can also be distressing for them when they do not immediately have the opportunity for discussion. Many employers prefer to provide a proposal and associated information at a first meeting, not expecting any feedback at that stage.

[70] Dr Kadmiry chose to comment substantially in the 12 November meeting, although I accept the proposal was new to him at that point.

[71] There was a significant number of exchanges of views between the parties and their representatives, including the provision of several tranches of additional information. Two further meetings were held. The decision-maker was changed when a concern about the original decision-maker was raised on Dr Kadmiry's behalf.

Redeployment

[72] Dr Kadmiry identified a Senior Data Scientist role which he was interested in. An external recruitment process had already commenced and over half a dozen people interviewed. He requested that the consultation process be ceased and he be automatically appointed to the data role. Callaghan Innovation did not consider it appropriate to abandon its restructuring process but agreed that Dr Kadmiry would be interviewed to assess his suitability.

[73] I do not accept that the role was sufficiently similar for Dr Kadmiry to be automatically transferred into. The panel concluded that he did not have the experience, skills and competency levels to meet the minimum requirements for the position, nor the ability to obtain these within a reasonable time. I can see no basis for Dr Kadmiry's argument that the interview process was staged. None of the panel had previously worked directly with Dr Kadmiry although the person most directly involved with the role was someone Dr Kadmiry, according to his own evidence, got on very well with. That person's view was that it would have taken some months, possibly up to a year, to get up to speed for that job.

[74] Callaghan Innovation provided Dr Kadmiry with some information about other jobs but he did not regard these as appropriate. No other suitable roles were identified either at the time or during the Authority's investigation.

Conclusion

[75] By the conclusion of the process sufficient information was provided, detailed exchanges had occurred, Dr Kadmiry had a fair chance to interview for another role and ultimately had adequate opportunity to respond to the proposal and the additional information. Callaghan Innovation's process was one which a fair and reasonable employer could have used. I do not accept that the decision was predetermined.

[76] Having decided that this was a genuine business decision and that a fair process was adopted, I find that Dr Kadmiry has not established his unjustified dismissal claim.

Was there a breach regarding mediation?

[77] For Dr Kadmiry it is argued that Callaghan Innovation breached its duty of good faith and/or the employment agreement by refusing to attend mediation during the consultation process. Callaghan denies that, saying that it did not refuse but at worst briefly delayed mediation so that the parties would know where they stood.

[78] The employment agreement required discussion on an employment relationship problem and states that "either party can take part in mediation".

[79] Dr Kadmiry's representative first mentioned mediation in a 9 December 2020 letter, seeking to deal with his concerns which included, in the email from him to his manager the same day, that there was a "master plan" to "erase" him from the team.

[80] At that stage Dr Kadmiry sought that the process stopped and himself be left in his role, be promoted, or be automatically placed in another role. There was little evidence to support the allegation of there being a plan against him and Callaghan Innovation did not accept it.

[81] On 17 December 2020 Ms Bailey communicated her view that the restructuring process could not safely proceed without the parties attending mediation.

[82] The following day Callaghan Innovation advised that it was willing to attend mediation but not to defer the process for that purpose. It was noted in the organisation's letter that Dr Kadmiry had sought dates and it looked forward to hearing about those dates.

[83] On 21 December 2020 Callaghan Innovation again advised that it was prepared to attend mediation but not to stop the process.

[84] In the New Year it appears there were no immediate dates available. On 14 January 2021 Callaghan Innovation reiterated that it was not required to stop the process because the applicant had raised concerns. The parties remained in communication and had the opportunity to discuss the situation.

[85] On 22 January 2021 Callaghan Innovation's decision to disestablish Dr Kadmiry's role was communicated to him with notice of termination taking effect from 28 February. The parties did attend mediation on 19 February 2021 whilst Dr Kadmiry was still employed.

[86] Whilst on occasions good faith can be seen as requiring participation in mediation, not every failure to attend on each occasion the other party seeks it, will necessarily amount to a breach. Here there were extensive communications between experienced employment representatives occurring. A meeting was held in mid-January 2021 for face to face discussion. Callaghan Innovation agreed to and did attend mediation whilst Dr Kadmiry was still employed.

[87] The employment agreement does not assist and I do not conclude that good faith was breached. Even if it was, I would not have assessed this as a situation involving a serious and sustained breach warranting a penalty.³

Costs

[88] Dr Kadmiry has not been successful in his application. If costs are sought, the parties are to seek to resolve any question of costs between themselves. If they cannot, Callaghan Innovation shall have 21 days within which to lodge any application for costs. Dr Kadmiry shall have a further 14 days to provide any response.

Nicola Craig
Member of the Employment Relations Authority

³ The Act, s 4A(a).