IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 36
ARC 11/14

IN THE MATTER OF	challenge to a determination of the Employment Relations Authority
BETWEEN	MICHAEL KINLIM YAN Plaintiff
AND	COMMISSIONER OF INLAND REVENUE Defendant

Hearing:	18-25 August and 22-23 October 2014 and by way of further submissions dated 11 November 2014; 2, 5 and 19 December 2014; and 19 and 27 February 2015 (Heard at Auckland)
Appearances:	M Scott, advocate for plaintiff S Hornsby-Geluk and M Harrop, counsel for defendant
Judgment:	24 March 2015

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Yan is a solicitor. He worked for the Department of Inland Revenue (the Department) in that capacity for around 26 years. He was dismissed for poor performance in December 2011. Mr Yan's dismissal followed an 11 month performance improvement process. He contends that his dismissal was unjustified.

[2] The Employment Relations Authority (the Authority) investigated his grievance and dismissed it.[1] Mr Yan has challenged that determination together with the Authority's subsequent costs determination. The costs challenge has been put to one side pending the outcome of the substantive challenge. Mr Yan has a number of

[1] *Yan v Commissioner of Inland Revenue* [2014] NZERA Auckland 6.

concerns about the process leading up to his dismissal and the substantive basis for it, which were thoroughly traversed on his behalf during the course of the hearing. Mr Yan seeks compensation, lost wages, and an order for reinstatement. As agreed the hearing proceeded on a de novo basis.[2]

[3] It is well accepted that an employer may dismiss an employee for poor performance. Section 103A of the Employment Relations Act 2000 (the Act) provides the yardstick for assessing the justification or otherwise for the Department's actions. While Mr Scott, advocate for the plaintiff, cautioned against a formulaic tick-box approach, the factors identified in *Trotter v Telecom*[3] (which largely mirror or are subsumed within the statutory considerations set out in s 103A(3)) provide a useful framework for analysis and it is convenient to summarise them at the outset:

a) Did the employer in fact become dissatisfied with the employee's performance?

b) Did the employer inform the employee of its dissatisfaction and require the employee to achieve a higher standard of performance?

c) Was information given to the employee readily comprehensible, an objective critique of the employee's work and an objective statement of the standards to reach?

d) Was the employee given a reasonable time to attain the required standards?

e) Following the expiry of a reasonable time:

    i) Use of an objective assessment of measurable targets?

    ii) Fairly putting tentative conclusions before the employee?

    iii) Listening to the employee's explanation with an open mind?

    iv) Considering the employee's explanation and favourable aspects of the employee's service and the employer's responsibility for the situation (for example, not detecting weaknesses sooner or promoting beyond level of competence).

    v) Exhausting all remedial steps including training, counselling and exploring redeployment.

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2 While the statement of claim refers to a non de novo challenge it was confirmed on the plaintiff's behalf that the challenge was to be pursued on a de novo basis.

3 *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659 (EmpC) at 681.

[4] Ms Hornsby-Geluk (counsel for the defendant) drew my attention to *Bagchi v Chief Executive of the Inland Revenue Department*. In that case the plaintiff had been dismissed after a performance improvement plan failed to produce the required results, and claimed that the employer had improperly prejudged the outcome of the process.[4] The Chief Judge observed that:[5]

> [70] It is simply not possible for a court, perhaps years later, to determine many elements of justification for a performance dismissal as does the employer. It is, after all, the employer, that sets the expected standards and must assess those. It is also the employer that is aware of, and must deal with, the consequences of poor performance on the enterprise and other staff. All the court can do is to ensure that the decision to dismiss was taken in good faith, fairly and reasonably and otherwise is a decision that it is reasonably open to the employer to make.

[5] The employer's actions are not to be subjected to minute scrutiny in an effort to find any fault, however minor. The overarching question is whether what the employer did and how it did it was what a fair and reasonable employer could have done in all of the circumstances at the relevant time.[6]

The facts

[6] Mr Yan was employed as a solicitor with the Department in 1985. He was part of a team (Legal Technical Services (LTS)) providing tax technical and legal advice to departmental investigators and debt collection staff.

[7] It is apparent that concerns relating to Mr Yan's performance arose from a relatively early stage. Mr Oomen, who was the manager of LTS at the relevant time, gave evidence (which I accept) that he had never experienced so many issues over such an extended period of time with any other employee. He said that the Department took extensive steps over the course of a 20 year period to deal with concerns about Mr Yan's performance, including by engaging a psychologist, arranging mediation, accommodating attendance on a course on managing relationships, investing significantly in Mr Yan's training and career development, and rearranging work commitments. Mr Oomen said that despite these steps it

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4 *Bagchi v Chief Executive of the Inland Revenue Department* [2008] 5 NZELR 767 (EmpC).

5 At [70].

6 Employment Relations Act 2000, s 103A. Mr Yan's dismissal post-dated the most recent amendment to this provision, which came into force in April 2011.

eventually got to the point where formal performance management could not be avoided.

[8] Mr Haycock was the team leader of LTS and Mr Yan's immediate supervisor. He reported to Mr Oomen. As is reflected in the contemporaneous documentation, Mr Haycock had ongoing discussions with Mr Yan about his performance, including highlighting the need to take personal responsibility for his work and articulating the Department's performance expectations. Concerns relating to Mr Yan's performance were also formally identified in the context of his May 2010 performance review. They included low work outputs (said to be the lowest in the unit) and poor feedback from LTS customers, some of whom were recorded as indicating that they did not want their work allocated to him. It is clear that performance concerns had been a feature of discussions that Mr Haycock and Mr Oomen had with Mr Yan during the course of the previous 18 months, and these concerns had been formally identified as part of the annual performance review process.

[9] Mr Haycock and Mr Oomen discussed how matters might best be progressed. It was agreed that a formal process might need to be implemented. Mr Haycock accordingly wrote to Mr Yan on 4 June 2010 outlining a number of issues, advising that:

> … if this behaviour continues, I will have no alternative but to address this through a formal process.

[10] Matters did not improve from Mr Haycock's perspective. He advised Mr Yan that he had received two complaints on 8 June 2010 about the quality of Mr Yan's work not being of the required standard. Mr Haycock provided Mr Yan with these complaints and discussed the details of them with him.

[11] Mr Haycock and Mr Oomen took the precaution of seeking advice from the human resources team within the Department. It was confirmed that a formal performance improvement process was appropriate. A document setting out a number of draft expectations and measures (known as a Performance Improvement Plan (PIP)) was prepared. Mr Yan was given a copy of the draft PIP in advance of a meeting with Mr Oomen, which subsequently took place on 15 November 2010. I

pause to note that while numerous criticisms were levelled at the wording of the PIP during the course of hearing Mr Yan did not indicate that he found any of the stated expectations or performance measures confusing, or that he was uncertain as to what was required, when provided with the opportunity for input at the relevant time.

[12] The PIP was detailed and focussed on 11 areas of concern that had been identified as requiring improvement. They can be summarised as failures to meet electronic recording and reporting requirements, the quality of communication and interaction with colleagues and with internal departmental customers, an inability to follow instructions, the quality of Mr Yan's advice and the unsatisfactory organisation of his work.

[13] In accordance with the Department's policy, there were to be three PIP periods. The underlying objective of this was to provide Mr Yan with an opportunity to improve. The three PIP periods were to span around 12 months.

[14] Mr Oomen finalised the documentation and advised Mr Yan, by letter dated 17 November 2010, that if his performance did not reach the required standard by the end of the first PIP period he may be subject to a warning. Mr Yan was accordingly on clear notice as to the importance of the issues that had been identified and the potential consequences if his performance did not adequately improve.

[15] On 21 March 2011 Mr Oomen met with Mr Yan to discuss the results of the first PIP. There was a dispute as to whether Mr Yan had been given advance notice of the meeting and the matters to be discussed at it. I am satisfied that he was provided with a copy of a letter that was to form the basis of their discussions prior to the meeting. Mr Oomen's evidence in this regard was consistent with the contemporaneous documentation.

[16] Mr Oomen's letter set out areas where Mr Yan's performance had improved and also clearly highlighted those areas requiring further improvement. Mr Yan was given an opportunity to discuss matters with Mr Oomen at the meeting and was provided with a further opportunity following the meeting to provide any additional response. Mr Oomen made it clear that he would not be reaching any final

conclusions until he had considered Mr Yan's feedback. The timeframe for any feedback was by Friday 25 March. Mr Oomen reiterated that the issues were serious and, if substantiated, might result in disciplinary action (including a first warning). Mr Yan did not provide any further response within the specified timeframe.

[17] Mr Oomen concluded that Mr Yan's performance did not meet the required standards and that it was appropriate to issue a first warning and to renew the PIP for a further period of three months. He wrote to Mr Yan on 28 March setting out his conclusions. Mr Oomen recorded that Mr Yan had achieved the required standards in relation to promptness of work recording and monthly reporting but advised that eight expectations had not been met, including completeness of work recording, compliance with the LTS standards, positive customer interaction, quality of advice and organisation of work. His conclusion in relation to each expectation, and the basis for his conclusions, was set out in a PIP review document (which was attached for Mr Yan's reference).

[18] On 29 March Mr Yan provided Mr Haycock with some written feedback on the matters that Mr Oomen had raised. At hearing Mr Yan gave evidence that he had gone home sick on 25 March and that that was why he had not provided feedback to Mr Oomen within time. He appeared to suggest that it was unfair for Mr Oomen to have concluded the first PIP in the circumstances. I did not find his evidence in relation to events of 25 March straightforward. He said that Mr Haycock was aware that he was going home sick but later said that he was not sure whether he had advised Mr Haycock that he was intending to go home. Mr Haycock could not recall any such advice being given. Nor could he recall Mr Yan requesting an extension of time. Mr Yan's subsequent correspondence of 29 March tends to reinforce the view that he did not advise Mr Haycock of his departure, or the reasons for it, or indicate that he would be unable to meet the deadline for response. Mr Oomen's evidence (which I accept) was that if Mr Yan had requested an extension of time it would have been granted. The documentation suggests that no request was made. Mr Yan was certain that he would have written his departure on a blackboard, in accordance with his usual practice, but even if that is so it falls short of the sort of reasonable step that he ought to have taken in the circumstances. Mr Yan agreed in cross-examination that he may not have specifically asked either Mr Haycock or Mr Oomen for more

time. He was well aware that his opportunity to provide any further feedback to Mr Oomen expired on 25 March. He was also well aware that timeliness and communication were issues that were giving rise to concerns in relation to his performance.

[19] During the course of the hearing concerns were also raised about references that Mr Oomen had made to matters that fell outside the first PIP period. However, as the letter makes clear, these matters were referred to for completeness and because Mr Yan had himself referred to them during the course of the meeting of 21 March. In this regard Mr Oomen listed a number of files which had been reviewed by various people which he said provided clear evidence, contrary to Mr Yan's earlier assertion, that there were significant issues in terms of his ability to provide opinion work to an acceptable standard. He went on to record that in almost all cases Mr Yan had disputed the validity of the comments made by the reviewers (eight in total, including personnel from other LTS units, a senior solicitor and senior tax counsel).

[20] Viewed objectively the PIP review document for this period reflects balanced feedback, acknowledging areas where Mr Haycock (as team leader) had noted "pleasing results", acknowledged aspects of Mr Yan's performance that were improving and the efforts he was making to meet the required standards, and noting expectations that had not been properly tested. The document also records assistance that Mr Yan had been provided with during the period at issue in relation to various expectations and discussions that had taken place about what was required and how this might be achieved.

[21] Mr Ridling took over the PIP process from Mr Oomen from early April, as Mr Oomen had earlier foreshadowed in light of his departure overseas to take up a position with the United Nations.

[22] Mr Ridling met with Mr Yan on 4 April 2011. He raised two new matters that had come to his attention since 28 February 2011, namely the quality of work relating to a Notice of Proposed Adjustment file and an issue relating to certification of documents. Mr Ridling advised that future work in respect of these issues would be assessed in the context of the second PIP period, under the "Quality of advice"

and "Follow instructions" expectations. Mr Ridling reiterated that the purpose of the PIP was to help Mr Yan achieve the required level of performance, while noting the possible consequences (the imposition of a final warning) if there was a failure to do so by the conclusion of the second PIP period. A copy of the Performance Plan for the second PIP period was annexed to Mr Ridling's letter. Mr Yan accepted that he had the opportunity to comment on the Performance Plan before it was finalised, and it is apparent that he did so as one of his handwritten amendments was incorporated into the finalised version. It is also clear that Mr Yan had regular meetings with his team leader to discuss his progress during the second PIP period.

[23] Mr Ridling wrote to Mr Yan again at the end of the second PIP period. He enclosed the results from the PIP and invited Mr Yan to a meeting six days later, on 9 August 2011. The purpose of the meeting was to give Mr Yan a further opportunity to provide responses to the performance issues that had been identified. Mr Ridling noted areas of work that had improved but also noted a number of areas (by reference to specific case files) where Mr Yan's performance was considered to be lacking, and why that was said to be so. Although the meeting was to have been held on 9 August it was rescheduled to 12 August at Mr Yan's request.

[24] The PIP document was discussed at the meeting. Mr Yan sought clarification of the process. Mr Ridling reiterated that he was the decision-maker and would listen to all feedback and take it into account. He went on to emphasise that the decision-making process was not a matter of "point-scoring" of each individual aspect of the PIP but involved overall consideration of all specific material facts and explanations. A further opportunity was provided for feedback after the meeting, which it seems Mr Yan took up on 18 August.

[25] On 23 August Mr Ridling wrote to Mr Yan advising of the outcome of the second PIP period. He noted aspects of Mr Yan's performance that had improved and areas that had been addressed as not reaching the required standard. Specific examples were set out and Mr Yan's explanations in relation to various concerns were recorded. Feedback that had been provided on a range of files (negative, neutral and positive) was also referred to. The letter spanned just over 12 pages and annexed the PIP document. On its face, the PIP documentation reflects a balanced

approach, with credit being given for areas of improved performance and Mr Ridling having checked explanations as considered appropriate. Mr Ridling advised Mr Yan that, having considered all available information (including Mr Yan's written and verbal responses) he had concluded that Mr Yan's performance did not reach the required standards and that it was appropriate to issue a final warning for poor performance. He confirmed that a PIP would be implemented for a third PIP period and that if Mr Yan's performance did not improve to the required standard disciplinary action, including dismissal, may result.

[26] No personal grievance was pursued in relation to either the first or final warning. Nor has there been any application to pursue a grievance out of time. That means that the justification for the warnings cannot be called in to question in these proceedings, although the fact of them and the circumstances surrounding them are contextually relevant to the matters at issue on the challenge.[7]

[27] Mr Scott referred to three judgments in support of his contention that the Court could inquire into the basis for the earlier warnings.[8] In *Premier Events Group Ltd v Beattie (No 3)* the plaintiff had raised concerns with the employer at a very early stage. That is not the position in the present case. The remaining two authorities are broadly consistent with the approach adopted in *Coy v Commissioner of Police*, where it was said that:[9]

> [6] So while the plaintiff is not entitled to rely upon events that occurred prior to 90 days before she raised the relevant personal grievances as independent disadvantage grievances, neither should she be prevented from adducing any evidence at all about these events to support her justiciable grievances. Such evidence of events at that time will have to be relevant to the grievances that remain alive.

[28] Further, as Judge Ford observed in *Snowdon v Radio New Zealand*, an unjustifiable dismissal claim should not be seen as an opportunity to raise other out of time alleged disadvantage grievances.[10] Enabling such an approach would, in my

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7 *Coy v Commissioner of Police* EmpC Christchurch CC23/07, 19 November 2007 at [6].

8 *Davis v Commissioner of Police* [2013] NZEmpC 226 at [7]; *Ramkissoon v Commissioner of Police* [2013] NZEmpC 147 at [17], [25]; *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79 at [15], [20].

9 *Coy v Commissioner of Police*, above n 7.

10 *Snowdon v Radio New Zealand Ltd* [2014] NZEmpC 45 at [83].

view, undermine the underlying purpose of prescribing time limits for notifying grievances under the Act.

[29] To continue with the narrative of events, the PIP was extended into a third period. Mr Yan again met with his team leader regularly throughout the third period and his work was subject to ongoing review by a range of people and discussion.

[30] Mr Ridling wrote to Mr Yan at the end of the third PIP period, on 21 November. Once again he set out in detail each of the expectations that comprised part of the PIP process and areas where Mr Yan was perceived to be meeting and not meeting the expectations, by way of reference to particular cases and the feedback that had been given.

[31] A "roll-up" document combining each of the PIP periods was prepared. There was some uncertainty as to whether it was provided with Mr Ridling's letter of 21 November or not. Mr Yan gave evidence that it had not been. Mr Ridling could not specifically recall but made the point that it would have been consistent with the practice followed in relation to the previous PIP periods to have annexed it to the letter rather than presenting it at the meeting. I return to this issue later, as it was the source of complaint on behalf of the plaintiff. What is clear is that a meeting which had been scheduled to discuss matters was postponed at Mr Yan's request. It was held on 29 November 2011. It is also clear that Mr Yan was given a detailed letter (dated 21 November) in advance of the meeting setting out a summary of Mr Ridling's concerns and seeking a response.

[32] Mr Yan brought a representative to the meeting. He had declined to take up that opportunity (which had been offered in relation to each of the initial PIP periods) earlier in the process. At the outset of the meeting he provided Mr Ridling with a document entitled "Procedural Issues". The 29 November meeting was a very lengthy one, lasting around four hours. Each of the expectations was traversed. Mr Yan was invited to comment on the expectations and his assessed performance. Mr Yan also provided very detailed written comments during the course of the meeting. It was also made clear to Mr Yan that further feedback could be provided after the meeting, by Thursday 1 December. He was advised that a preliminary decision

would be made on 8 December covering the whole period and that he would then be given further time to provide feedback before a final decision was made. He was told that dismissal for work performance was a possible outcome.

[33] I pause to note that Mr Yan took issue with the accuracy of the notes of the meeting of 29 November 2011, both at the relevant time and at hearing. But despite asserting on separate occasions that they were inaccurate, and despite being invited to identify any errors or omissions, he failed to do so. I take the meeting notes as an accurate summary of what was discussed.

[34] Mr Yan sent Mr Ridling a follow-up email on 6 December seeking a response to a number of matters in relation to eCase and quality of advice/format of documentation which had been raised during the course of the 29 November meeting. Mr Ridling advised that his response on these matters would be covered off in the letter he was preparing.

[35] Mr Ridling wrote to Mr Yan by way of letter dated 8 December 2011 advising of his conclusion that six of the expectations had not been met and why this was so. He set out his preliminary decision to dismiss for poor performance. The reasons underlying this preliminary decision were traversed in the correspondence, including the unsatisfactory outcome of the third PIP period and Mr Ridling's assessment of Mr Yan's performance overall. This conclusion was expressed by way of reference to the job expectations for Mr Yan's position. Mr Ridling met with Mr Yan briefly on 8 December and handed him the letter.

[36] Mr Yan gave evidence that he was caught off guard by the turn of events on 8 December as he had been expecting a discussion as to the third PIP. Rather he was confronted with a letter setting out a preliminary decision to dismiss. He gave evidence that his concerns were shared by his representative at the time, although his representative did not give evidence. I do not accept that Mr Yan could reasonably have been labouring under any misapprehension as to what would be discussed at the meeting. He had been advised at the meeting of 29 November that a preliminary decision would be communicated to him relating to the whole PIP. Even if he was

surprised by the nature and scope of the letter he had a full opportunity to comment on the matters referred to in it. A meeting was scheduled for 14 December.

[37] Several emails ensued, with Mr Yan raising a number of concerns. He took issue with Mr Ridling's assessment of his performance and raised some issues about the process that had been followed. Mr Ridling responded to these matters, including specifically responding to Mr Yan's comments on the PIP document set out in his email of 16 December 2011. Mr Ridling's email reflects his considered view of concerns raised by Mr Yan and explanations provided in relation to particular files. It also reflects that he took the step of clarifying with others the position in relation to Mr Yan's version of events, with their response being set out in Mr Ridling's email.

[38] Included in the correspondence around this time was reference to a possible basis for settlement, including a proposal that termination of Mr Yan's employment be treated as a resignation. It is apparent that the proposal was designed to deal with issues that otherwise would have arisen in respect of Mr Yan's leave entitlements.

[39] A meeting took place on 19 December. From Mr Ridling's perspective possible resolution was still 'on the table' and he indicated that if a draft settlement proposal could not be agreed he would confirm his preliminary decision to dismiss. He handed Mr Yan a letter of dismissal dated 19 December 2011 which he indicated he would rescind if the settlement was agreed. The meeting concluded on the basis that Mr Yan would consider matters further. A further meeting was convened on 21 December. Mr Yan advised Mr Ridling that he was not amenable to settlement and Mr Ridling confirmed his earlier decision to dismiss Mr Yan.

[40] Mr Yan notified a personal grievance on 23 February 2012. The notification of grievance referred to Mr Ridling's decision to dismiss and set out Mr Yan's view that the decision to dismiss was both procedurally and substantively flawed.

Bias

[41] As will be evident from the overview outlined above, the PIP process provided a comprehensive framework for managing performance concerns fairly. The primary focus of the policy is on improvement and employee engagement. It is fair to say that it is not the policy that Mr Yan takes issue with, rather the application of the policy. A key component of Mr Yan's case is that the process was fatally infected by apparent bias, and that the ultimate decision to dismiss was accordingly unjustified. Because bias was advanced as a central plank of the plaintiff's claim, and one that was said to be determinative of the justifiability of the decision to dismiss, I deal with it first.

[42] As I understood the submission advanced on behalf of the plaintiff, there was a reasonable perception of bias and accordingly there was no need for any further inquiry by the Court as to whether or not the PIP process and outcome was actually affected by bias. Mr Scott developed the argument by way of reference to a number of cases, most notably *R v Inner West London Coroner, ex p Dallaglio*.[11] There the Court held that there was apparent bias in a decision of a coroner not to resume an inquest in circumstances where he had earlier publicly referred to relatives of the victims as being "unhinged" and "mentally unwell". Simon Brown LJ observed that:[12]

> As it is, however, all that the applicants need show is in the first instance an appearance of bias and then on an examination of all of the facts a real possibility that the coroner may unconsciously have felt resentful towards them in such a way as to have influenced his approach to their case for a resumption.

[43] Mr Scott submitted that the *Dallaglio* principle ought to be applied in the present case. He said that evidence relating to concerns that Mr Oomen and Mr Haycock had about Mr Yan's behaviour gave rise to an appearance of bias and that there was a real possibility that this may unconsciously have affected their approach to the PIP process. These concerns stemmed from evidence originally given during the course of the Authority's investigation that they believed that Mr Yan may

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11 *R v Inner West London Coroner, ex parte Dallaglio* [1994] 4 AllER 139 (CA Civ).
12 At 153.

present a threat to physical safety. Mr Scott submitted that the following test applied:

> … would the reasonable informed observer think that the impartiality of Mr Oomen and Mr Haycock (at least) **might** have been affected by themselves sincerely but wrongly believing that Mr Yan threatened their very lives and those of their families and colleagues?

[44] As Mr Scott pointed out, the principles relating to apparent bias have been applied in many cases, including in respect of non-judicial officers. He referred to the observation in *R v Secretary of State for the Environment, ex p Kirkstall Valley Campaign* that:[13]

> Not only is there, therefore, no authority which limits the Gough principle to judicial or quasi-judicial proceedings; there are sound grounds of principle in modern public law for declining so to limit it. The concrete reason, which is not always given the attention it deserves, is that in the modern state the interests of individuals or of the public may be more radically affected by administrative decisions than by the decisions of courts of law and judicial tribunals.

[45] Bias is a predisposition to decide a cause or issue in a certain way which does not leave one's mind properly open to persuasion. As the author of *Judicial Review: A New Zealand Perspective* notes, it is necessary first to inquire into what kind or degree of neutrality (if any) is to be expected of the decision-maker in the particular factual circumstances:[14]

> For a judge or tribunal operating an adversarial process, it will be complete neutrality. For a local authority exercising a discretionary power expressed in broad terms to which multiple considerations apply and with respect to which the range of permissible opinion is extraordinarily wide, for example, including issues of policy, taste and philosophy, it will be pre-judgment or a closed mind not open to persuasion. … There are many intermediate positions.

[46] It is notable that cases referred to on behalf of the plaintiff relate to decision-making bodies governed by the principles of public law.[15] While I accept the proposition that an employee may be radically affected by decisions made in relation to their employment status by their employer, it does not follow that the sort of

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13 At 323.

14 Graham Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, Lexis Nexis, Wellington 2014), at 13.56.

15 See, for example, *R v Secretary of State for the Environment, ex parte Kirkstall Valley Campaign* [1996] 3 All ER 304 (QB).

standard of neutrality, or appearance of neutrality, advocated for on behalf of the plaintiff applies in the disciplinary context.

[47] As the Court of Appeal observed in *Marlborough Girls' College v Sutherland*:[16]

> [24] This case highlights the problems of applying statements of principle of bias developed in relation to courts, tribunals and other bodies which operate independently of the parties. An employer exercising the kind of powers provided for in the collective employment contract inevitably has a real interest in the issues and the members of the governing board of a school similarly are very likely to bring into their consideration and decisions those interests. Section 94 of the Education Act 1989 indeed requires that Board members *be* interested …Also relevant to the application of the bias principle is the availability of the additional safeguard … of the independent examination of the grounds for dismissal provided by the common law action.
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> [25] In that context, the lack of any concrete evidence supporting the alleged appearance of bias and the particular member's employment position at the relevant time lead us to the conclusion that the ground for bias was not established.

[48] Mr Scott sought to distinguish *Sutherland* on a number of grounds, including that there was no equivalent statutory provision requiring Mr Oomen, Mr Haycock and Mr Ridling to be involved in the process leading up to his dismissal. However the principles expressed in that case have broader application. Given the personal nature of the employment relationship, there can be no expectation that an employer will approach decision-making processes involving an employee unaffected by any prior knowledge or views.[17] Complete neutrality is plainly not the applicable standard. What is required in the context of a decision-making process undertaken by an employer is evidence that the fairness of the employer's actions and/or decisions has been adversely affected.[18]

[49] Numerous other authorities referred to on behalf of the plaintiff are of limited assistance, although they reinforce the basic requirements of natural justice and fair decision-making processes having regard to the context in which those decisions are being made.

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16 *Board of Trustees of Marlborough Girls' College v Sutherland* [1999] 2 ERNZ 611 (CA).
17 See, for example, *Peters v Collinge* [1993] 2 NZLR 554 (HC) at 566.
18 See *Smith v Attorney-General* [2009] ERNZ 467 (EmpC) at [34].

[50] It is helpful to return to the facts at this point. The plaintiff's concerns about bias are focussed on animosity, based on extreme fears that Mr Oomen and Mr Haycock were said to have had in relation to what Mr Yan might do. He repeatedly described them as being "obsessed" and fixated with him. It was suggested that they lived in fear of their lives and in the shadow of concerns that Mr Yan might harm their family members and/or property. The factual basis for the claim of bias is exaggerated when their evidence is viewed in context. It is clear that Mr Oomen and Mr Haycock found Mr Yan difficult to deal with and that they had concerns from time to time about his unpredictable temper and what he might be capable of. On occasion this led them to turn their minds to possible issues of safety and to take certain precautionary steps, such as not drawing Mr Yan's attention to where they lived. However, as Mr Oomen made plain, while he had had concerns about Mr Yan's behaviour at various times over the many years he had dealt with him, his concerns were not omnipresent and there were lengthy periods of time where their dealings were uneventful. He refuted the suggestion that he lived in fear of Mr Yan.

[51] Mr Oomen and Mr Haycock found it challenging to deal with Mr Yan, yet it is evident that they approached their involvement in aspects of the PIP process with professionalism and objectivity. Indeed it is notable that in evidence Mr Yan characterised his relationship with Mr Oomen, Mr Haycock and Mr Ridling during the course of the PIP process as "harmonious". The professionalism and objectivity that Mr Oomen and Mr Haycock brought to bear is reinforced by the way in which various aspects of the process unfolded. As I have said, Mr Ridling took over the process from Mr Oomen towards the end of the second PIP period. The way in which the handover meeting was conducted is illustrative of Mr Oomen's approach. He did not tell Mr Ridling about any concerns he had about Mr Yan's behaviour. Nor did he express any views about Mr Yan's performance. Rather he emphasised the need for Mr Ridling to reach his own conclusions and reinforced the need for a fair and objective process.

[52] It is clear that Mr Haycock was open to acknowledging aspects of Mr Yan's performance which were favourable and that he spent a considerable period of time discussing matters and working through feedback. The fact that he did not comment

positively on all aspects of Mr Yan's performance, or accept Mr Yan's views on each matter of contention, does not mean that he was lacking objectivity.

[53] Both Mr Oomen and Mr Haycock perceived that Mr Yan responded negatively to concerns being raised with him, and had a tendency to get angry and aggressive. Mr Yan characterised his own reactions during the course of the PIP process as being nothing more than "robust". I do not accept that that is an apt description. During the course of the hearing he tended to minimise his behaviour and the potential impact of it.

[54] I pause to note that in the employment setting the logical outcome of the argument advanced by the plaintiff is that an employee, confronted with an employment process, could become so difficult, intimidating and obstructive that each manager involved with their performance management would have to step aside on the basis of apparent bias. Such an approach would have the capacity to grind performance management processes to a halt, reward obstructive and intimidatory behaviour, and bind an employer's hands in a way that is contrary to public policy and the objectives underlying the Act.

[55] Mr Scott submitted that the apprehensions that Mr Oomen and Mr Haycock held would lead a fair-minded observer to conclude that they were unable to bring an impartial mind to bear, while not accepting that there was a reasonable basis for such concerns. Even putting to one side the degree of neutrality point, I do not accept that an informed fair-minded observer would draw such a conclusion. In any event, the fundamental difficulty with the submission advanced on behalf of the plaintiff is that neither Mr Oomen nor Mr Haycock was the decision-maker.

[56] Mr Ridling was the ultimate decision-maker and he never expressed, or harboured, any concerns about Mr Yan presenting a perceived threat to his safety. Mr Scott made much of a general statement in Mr Ridling's evidence that he had read Mr Oomen and Mr Haycock's briefs of evidence and endorsed what they had to say. Mr Scott suggested that Mr Ridling's general endorsement of their evidence meant that he was aware of their concerns about what Mr Yan might be capable of and agreed with them, providing a platform for a submission of apparent bias against

Mr Ridling as well. This submission involved an uncomfortable stretch, and one that I am not prepared to make.

[57] Mr Scott submitted that although neither Mr Oomen nor Mr Haycock was the ultimate decision-maker, their involvement in the process was nevertheless problematic. He advanced an argument that their roles should have been delegated to others. Mr Haycock was appropriately involved as Mr Yan's manager throughout and undertook some, but not all, peer reviews. Mr Oomen had limited involvement, and at the early stages of the process. He issued a warning at the conclusion of the first PIP period. As I have said, no grievance was raised in relation to the warnings. While they form part of the relevant background context the justification or otherwise of them falls outside the scope of the challenge. Mr Ridling was ultimately tasked with the decision-making process and it was Mr Ridling who dismissed Mr Yan for poor performance following a process involving feedback from a range of people. As Mr Yan pointed out in evidence, he had had very little involvement with Mr Ridling prior to the PIP.

[58] I agree with Mr Scott's submission that a process vitiated by bias is not a process sanctioned by s 103A of the Act. I do not agree that either the process or the ultimate decision to dismiss can be impugned on the basis of bias in this case.

[59] I turn to consider the factors relevant to a dismissal for poor performance, as articulated in *Trotter v Telecom*.[19]

Was the Department dissatisfied with Mr Yan's performance?

[60] Yes. The evidence clearly reveals that the Department had genuine concerns about Mr Yan's performance, which it had for a considerable period of time and which it had earlier attempted to address on an informal and constructive basis.

[61] Mr Yan suggested that the cause of the drop in his performance was related to the introduction of a new assessment system in 2009 and that no evidence was produced to show that there was a variation in performance before and after that

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19 *Trotter v Telecom Corporation of New Zealand*, above n 2.

date. However, it appears that the system did not come into effect for staff until 2010 and it is readily apparent that concerns relating to Mr Yan's ability to meet the core requirements of his position were identified and raised with him over a lengthy period of time pre-dating this. This is reflected in the slippage in ratings in his annual performance assessment for the 2007/08 year and again in the following review period. Notably the review documents from around this time made specific reference to a range of concerns, including complaints from customers, attempts to re-litigate issues and communication. These concerns remained unresolved at the point the Department decided to move to a formal performance improvement process and were reflected in the PIP documentation going forward.

Did the employer inform the employee of its dissatisfaction and require the employee to achieve a higher standard of performance?

[62] Yes. Mr Yan was on notice of the concerns about his performance, what they related to and the standard he was expected to meet. This is reflected in the PIP documentation. Mr Yan argued that the Department had breached its own policy by omitting to undertake an informal process before commencing the formal PIP. That argument does not withstand scrutiny. It is very clear that the PIP process followed earlier extensive discussions between Mr Yan and his managers about performance issues and the provision of feedback. He was on notice of the concerns and had been advised that if his performance did not improve a formal performance management process would be instigated, as he accepted in cross-examination. The decision to implement a formal performance management process could not reasonably have come as a shock to him.

Was information given to the employee readily comprehensible, an objective critique of the employee's work and an objective statement of the standards to reach?

[63] Yes. The concerns were clearly articulated at the outset of the PIP process and related to 11 broad issues, supported by way of reference to specified cases. The required areas for improvement were identified, as were the performance expectations and performance measures relating to each. The Department engaged with Mr Yan at each step of the process, including in relation to the expectations that applied throughout each of the PIP periods.

[64] Mr Yan was advised of the Department's expectations and he was clearly advised throughout the process of the areas where he was perceived to be falling short. It was not until towards the end of the process that Mr Yan expressed concerns about the absence of objective work performance standards. The job description for Mr Yan's position set out the applicable core competencies and the detail of the standards (for example in relation to eCase reporting and timeliness) were made clear to him, as I will come to. The areas of concern for the Department were: core aspects of the role of solicitor, including technical competencies, effective communication and client relationship management skills, and a developed knowledge and understanding of the applicable principles and law relating to his area of work.

[65] Mr Yan also raised a concern about the extent to which the LTS standards as to font, layout and the like had been specifically raised with him. However given his concession in cross-examination that he knew what was required his complaint effectively boiled down to not being expressly told what he already understood.

[66] Mr Yan suggested that what was being asked of him was perfection, most specifically in relation to the completion of work-recording in the first PIP. That complaint is not made out having regard to the concerns that were raised in relation to particular files (namely DTPG and C).

[67] I have already observed that a number of concerns were raised in relation to the wording of the PIP documentation and the extent to which it may have been confusing. I was not drawn to Mr Yan's evidence in relation to these matters. It is telling that he did not raise any concerns about the clarity of what was expected of him at the time. Nevertheless three particular complaints were focussed on at hearing: compliance with LTS standards, whether this was substantive compliance or related to timeliness (and if so what the timeliness measure was) and the expectation relating to entries in eCase and the way in which certain expectations had been "amalgamated". I deal with each in turn.

[68] Mr Yan took issue with the way in which the expectation "Compliance with LTS Standards: Legal and technical work produced will comply with LTS

performance standards" was expressed. The stated expectation at the beginning of the process was that 85 per cent of all advice and support work would be completed to the required quality standard within 25 days of allocation. The measurement was "no cases are older than 25 days from the date of allocation (without the prior approval of [the] team leader)." It was put to the defendant's witnesses that the 85 per cent expectation related both to quality and timing and was unclear. I agree with Mr Oomen that, when read in context, it is plain that the 85 per cent relates to timeliness and is directed at ensuring that the applicable timeframes for the completion of work (absent agreement from the team leader) were met. Indeed Mr Yan accepted this in cross-examination, although later retreated from that position in re-examination. In any event, the basis on which Mr Yan's performance was being measured, and the distinction between timeliness and quality of advice, was made clear in the contemporaneous communications with him. Finally, any lack of clarity that might otherwise have existed in relation to this expectation was resolved by a reformulation of wording of the second PIP documentation.

[69] An issue was also raised about whether the 25 day period ran from the date a request was received in LTS or the date of allocation. Mr Yan's evidence in relation to this was confused. He appeared to rely on a document dated 20 April 2011, which he said suggested that the time ran from the date it was received by him but it was clear that he understood that management's expectation was that the time ran from the date it was received by the unit, and that this was consistent with what the customer would expect.

[70] Concerns about eCase were raised by Mr Yan at a late stage of the process, at the meeting of 29 November 2011. Mr Ridling had identified issues relating to the sufficiency of Mr Yan's eCase entries, a matter which had previously been identified during the PIP process. When discussed at the 29 November meeting Mr Yan's response was that he had had "other priorities" and that he did not understand what level of detail was required. Mr Ridling did not accept that there was any uncertainty as to what was expected. It is notable that the issue had been raised and discussed at the earlier meeting of 12 August 2011 and, as Mr Yan accepted in cross-examination, a memorandum had been sent to all LTS staff (dated 18 February 2010) which had made it clear that all taxpayer-specific advice must be entered into eCase.

It was open to Mr Ridling to conclude that Mr Yan was not under any misapprehension as to what was required of him in this regard.

[71] Mr Yan said that he had been confused about "Promptness" and "Completion of Work recording" in eCase being combined in Mr Ridling's letter of 3 August 2011, inviting him to a meeting at the end of the second PIP. The letter, taken with the annexed table, could not reasonably have given rise to any uncertainty. Both expectations were discussed at the meeting with Mr Ridling, as Mr Yan accepted in cross-examination. The two expectations were plainly dealt with separately, as is reflected in the final warning letter of 23 August 2011 and in Mr Ridling's subsequent letter of 8 December 2011. Indeed Mr Yan ultimately accepted in evidence that he knew that he was being assessed on both matters.

[72] It is also evident that the expectations were amended from the first PIP to remove the expectation relating to work volume. That was on the basis that it would be fairer to exclude this measure in recognition of the lower amounts of work that could be allocated to Mr Yan (because of customer satisfaction issues). Mr Yan submitted that rather than being fair, this approach disadvantaged him because he had fewer files to work on and because it led to a number of "not tested" ratings. I do not accept that Mr Yan was disadvantaged by the approach taken. Mr Ridling's evidence, which I accept, was that this led to a neutral rating and had no adverse impact overall. And, as Ms Hornsby-Geluk observed, it enabled Mr Yan to spend more time on the work that he did have, to ensure that it was of the required standard.

[73] Mr Yan asserted that the level of detail provided in relation to the Department's concerns was insufficient to enable meaningful discussion. That allegation largely fell away under cross-examination and was not made out on the evidence, including the roll-up document. He then clarified that his principle concern related to the first PIP. However, when asked about the basis for his concerns he was only able to point to two cases, referred to in the PIP documentation, which were said to have been closed after the due date and which had not been specifically identified.

[74] Mr Yan also suggested that no specifics had been provided in relation to concerns about customer interaction. This was not supported by the contemporaneous documentation.

[75] Mr Yan was provided with a summary document at the end of each PIP period which set out the expectations, comments (both the team leader's and Mr Yan's response) and an assessment of whether the expectation had been met or not met. There was a review meeting prior to the finalisation of these documents, and Mr Yan was invited to provide input into the process. There was also an opportunity for ongoing discussion during the course of each period.

[76] As I have said, it is telling that no concern was raised about the meaning of the expectations until the very end of the PIP process. I have no doubt that if Mr Yan had genuinely been confused about the nature, scope or meaning of any of the PIP expectations he would have raised it at an earlier stage to enable any issues to be resolved. As he accepted in cross-examination, Mr Ridling had made it clear during the course of the process that if Mr Yan was unclear about what was expected of him he should ask either himself or Mr Haycock. It is apparent that rather than labouring under any confusion as to the nature of the Department's concerns, and what was required of him throughout the relevant time, Mr Yan understood what was expected of him, although he did not agree that there were deficiencies that needed to be addressed.

[77] In cross-examination Ms Hornsby-Geluk asked:

> Q. Can I put it to you this way Mr Yan? You might be able to find one or two isolated examples but overall, would you not agree that the documentation provided to you was extensive? It provided examples of the alleged deficiencies in your performance against the expectations and you had an opportunity to comment on it?
>
> A. As a general proposition, yes.

Was the employee given a reasonable time to attain the required standards?

[78] Yes. The entire PIP process spanned around 12 months. It provided a fair timeframe within which Mr Yan could meet the required standards and he was

provided with sufficient support to do so. In addition the Department had sought to work through issues relating to Mr Yan's performance for a considerable period of time before a formal process was instigated.

Use of an objective assessment of measurable targets?

[79] Yes. There was a mix of qualitative and quantitative measurements that applied under the PIP, for example in relation to the substantive quality of Mr Yan's work and the timeliness of its delivery. A peer review process was put in place to assist in the assessment process, and a range of peer reviewers were utilised for this purpose, including specialist counsel and advisors from outside the LTS. Mr Yan accepted in cross-examination that a table he had prepared of files that had been peer reviewed, and by whom, was materially incorrect.

[80] I am satisfied that Mr Yan was given the opportunity to discuss feedback on a range of files. He said that he had been concerned that if he raised issues about feedback he was provided with, it might be seen as defensive and be used against him. While that is an understandable concern on one level, it is plain that he did feel comfortable about challenging various contrary views expressed in relation to his work.

[81] Mr Haycock was involved in the process both as Mr Yan's manager and as a peer reviewer from time to time. I do not see that as problematic having regard to the particular circumstances. It is apparent that some of his feedback was not accepted by Mr Ridling and other feedback was. Any issues relating to his role as peer reviewer are, in any event, balanced by the involvement of others who were outside the team. It is clear that Mr Ridling (who was the decision-maker) approached the assessment process fairly and dispassionately. He had the technical knowledge to enable him to make informed decisions about the feedback provided and Mr Yan's response to the concerns that were raised.

Fairly putting tentative conclusions before the employee?

[82] Yes. Mr Yan had a full opportunity to comment on the preliminary views that had been reached and to provide feedback on them throughout the process.

[83] As I have already observed, on occasion his explanations resulted in the allocation of a more favourable rating. His explanation in relation to the C (also referred to as DC) file was accepted by Mr Ridling, as reflected in the letter of 23 August 2011 and, while Mr Haycock had expressed some criticisms of the way in which Mr Yan had dealt with the WS file, Mr Ridling accepted Mr Yan's explanation as a "pragmatic solution" in the circumstances. More generally, the documentation (such as Mr Ridling's correspondence of 13 December and 15 December 2011) reflects detailed substantive consideration of Mr Yan's responses, and is illustrative of the measured approach that Mr Ridling brought to bear.

[84] Mr Yan expressed a concern that the process had been brought to a conclusion with undue haste. This concern is not made out. Mr Yan was invited to a meeting on 21 November, which eventually occurred on 29 November. The meeting occupied around four hours and, as Mr Yan confirmed, comprised a "full and wide ranging discussion". Mr Yan set out his response at length in communications and had a full opportunity to address Mr Ridling directly at the 29 November meeting. Mr Ridling's preliminary decision was communicated by way of letter dated 8 December and a meeting was to take place on 14 December. That meeting was subsequently deferred, at Mr Yan's request, to 19 December. Mr Ridling responded to issues raised by Mr Yan in detail on 13 December, some six days before the meeting occurred. Mr Yan maintained that this timeframe did not provide him with an adequate opportunity to consider and respond to the points that Mr Ridling had raised. I cannot accept this having regard to the timing involved, the fact that Mr Yan had the assistance of a support person, and was given paid special leave during this period to enable him to focus on his responses and to reflect on matters.

[85] It is also clear that Mr Yan felt able to raise a broad range of issues with Mr Ridling and did so over time. Mr Ridling responded to the issues that Mr Yan raised. Proposed timeframes were extended at Mr Yan's request. I am satisfied that sufficient time was made available to enable Mr Yan to engage fully in the process.

Listening to/considering the employee's explanation with an open mind?

[86] Yes. It is evident that Mr Ridling took on board Mr Yan's feedback, following up issues that had been raised. One such example related to Mr Yan's

handling of the DDNS file. His communication with an auditor had been criticised and Mr Ridling, after hearing from Mr Yan, undertook to follow-up with the auditor personally to check Mr Yan's version of events, which he did. As it happened the outcome of the follow-up enquiry was to reinforce Mr Ridling's concerns about communication on the file, and those concerns were supported by the absence of any eCase record relating it. It was put to Mr Ridling that he had failed to go back to Mr Yan with the results of his inquiries but it is apparent that he did, although not until 8 December. Mr Ridling accepted that the delay was regrettable but pointed out that it did not result in any unfairness. That is because he had simply clarified a point of difference raised by Mr Yan and, in any event, Mr Yan was advised of the results of his further inquiries before any concluded view had been reached. That meant that Mr Yan could have provided a further response, which he did not do.

[87] It is also clear on the evidence that Mr Yan's feedback was taken into account and further inquiries made at earlier stages of the process. Mr Oomen had, for example, followed up Mr Yan's recollection of a discussion with a peer reviewer (Mr Baun), which later resulted in Mr Yan retracting his earlier statement.

[88] The fact that Mr Ridling did not agree with many of the points raised by Mr Yan (for example, in relation to the RT file) does not mean that he took a jaundiced approach to the process or that his mind was closed. This is reflected in the way in which he altered some of the assessments made by others which were less favourable to Mr Yan.

[89] I am satisfied that a careful process was put in place to peer review Mr Yan's work. This was to ensure that objective feedback was provided. Contrary to Mr Yan's evidence-in-chief, it became apparent that the feedback was brought to his attention and that he was given an opportunity to provide comment on it. This was reflected in a number of concessions he made in cross-examination and the evidence of Mr Haycock, which was supported by a chart that he had prepared as an aide memoir during the course of the process. Mr Ridling described the feedback process in the following way during the course of evidence under cross-examination:

> Q. I'm saying if Mr Yan was driven to rely upon a cursory or cryptic summary made by yourself or Mr Haycock of what allegedly the peer reviewer had said, it is not a compliance with justice is it?
>
> A. Mr Yan had an incredibly large amount of opportunity to respond to all assessments of his work by both Mr Haycock and the peer reviewers which were involved. Mr Yan availed himself of that opportunity on most occasions, not all, and I took into account all the comments made by Mr Yan, Mr Haycock and all the peer reviewers when it came to my decision on each specific file.

[90] It is readily apparent that Mr Ridling had regard to a wide range of relevant information, which was drawn to Mr Yan's attention and which informed his decision-making. The information that Mr Ridling had regard to is conveniently summarised in his letter to Mr Yan dated 8 December 2011, including:

- Team leader comments as reflected in the PIP documents;
- Mr Yan's written responses;
- All additional information provided by Mr Yan;
- Comments made by and on Mr Yan's behalf during the PIP meetings;
- Comments made by the team leader during the PIP meetings;
- Formal comments of LTS and departmental staff in relation to the peer reviewing of Mr Yan's work;
- Comments of departmental staff clarifying any point of procedural ambiguity;
- Information contained in the first and second warning letters;
- The minutes of the meeting of 29 November 2011;
- The roll-up document for the whole period.

[91] Mr Yan was largely dismissive of the criticisms that had been identified in relation to his work both during the PIP process and at hearing. His position can be summarised in the following observation:

> … any shortcomings on my part were almost entirely not substantive but procedural, few in number and not having any adverse result.

[92] Mr Yan's perception does not accord with the evidence, which clearly reflects that a number of experienced people had concerns about the substantive quality of his work over a range of files. Plainly a lack of substantive quality has the ability to

impact adversely on the Department. So too do so-called procedural failings, including organisation of work, timeliness, customer interaction, and constraints on the ability to refer work, although Mr Yan asserted otherwise.

Considering favourable aspects of the employee's service?

[93] In his letter of personal grievance dated 31 May 2012 Mr Yan stated that:

> A cardinal error and perhaps the most fundamental error in my treatment comprises the total and deliberate failure of the Department to have regard to the need, in its decision making process, to consider my overall employment history. This error permeates the entirety of my treatment both vis a vis periods of time within the PIP process and periods of time antecedent to the PIP process.

[94] The Department's performance policy states that fairness *may* require past work history to be taken into account prior to a decision to dismiss. Mr Ridling decided that it would not be fair to have regard to Mr Yan's pre-PIP performance history with the Department as part of the process, on the basis that it would likely count against him. That is because Mr Yan had been the recipient of earlier warnings, in 1998 (relating to behaviour said to be tantamount to intimidation) and 2005. This was an approach that was beneficial to Mr Yan, as he effectively conceded in cross-examination.

[95] As I have already observed, it is apparent that there was a willingness to recognise areas of Mr Yan's performance that had improved. It is also clear that Mr Ridling had regard to positive customer feedback that had been drawn to his attention by Mr Yan and that he was willing to take on board explanations offered by Mr Yan, where considered appropriate. One such example is in respect of work recording, referred to in Mr Ridling's letter of 8 December 2011.

[96] In the final analysis the favourable aspects of Mr Yan's performance that had been identified, and acknowledged, did not weigh sufficiently to tilt the balance away from dismissal as the appropriate disciplinary outcome.

Considering the employer's responsibility for the situation?

[97] One of the striking features of this case is the length of time that it took the Department to initiate a formal performance management process with Mr Yan. As Mr Oomen observed, it would have been preferable, with the benefit of hindsight, to have moved to a formal process at an earlier stage. That may be so but it cannot be correct, as a matter of general principle, that an employer is prevented from formally dealing with performance concerns simply because there has been an earlier failure to do so. That would lead to perverse results. In any event, the delay in the present case was largely occasioned by attempts to deal with the performance issues informally and via a range of different methods. It could hardly be said to have prejudiced Mr Yan or lulled him into a false sense of security about the quality of his performance or the Department's expectations.

Remedial steps

[98] It is clear that the Department took a number of informal and formal steps to address the concerns relating to Mr Yan's performance over an extensive period of time. It is equally apparent that, despite the training, counselling and support that he received, the Department's concerns remained unresolved.

[99] There is no overarching obligation on an employer to exhaustively consider all possible alternatives to dismissal in cases involving poor work performance. No such requirement is contained within s 103A(3). The extent to which an employer may be required to explore other options will depend on the circumstances. In the present case a secondment was considered at an early stage, and discussed with Mr Yan, but did not eventuate. He considered that it was part of a hidden agenda. While he accepted in cross-examination that it may have been a lost opportunity, he did not resile from the view that the secondment had been mooted for ulterior purposes. The contemporaneous documentation reflects that the option was presented as an opportunity to assist in Mr Yan's professional development, and I accept Mr Oomen's evidence that this was so.

[100] I record Mr Yan's suggestion that the fact that a secondment opportunity had been identified for him could be taken as an indication that his performance was adequate. That is not so. As Mr Oomen said, he had been attempting to throw Mr Yan something of a life-line, and an opportunity to restore his reputation.

[101] The Department's performance policy refers to the need to consider any appropriate and reasonable suggestions for training and support. Reference is made in the guideline documentation to the need for managers to consider redeployment. Mr Ridling did turn his mind to alternatives to dismissal, as is evident from his letter of 8 December 2011.

[102] The plaintiff's attitude more generally also presented a stumbling block. A fundamental concern related to Mr Yan's response to and propensity to deflect criticism and difficulties with his interaction with others. This significantly reduced the options that may otherwise have been available, as did the broader concerns relating to technical ability. The Department was concerned to ensure that it was not simply shifting difficulties from one part of the organisation to another. That was reasonable given the nature of the concerns held in relation to Mr Yan's performance.

[103] I am satisfied that what the Department did, and how it acted, was what a fair and reasonable employer could have done in the circumstances.

Other concerns

[104] Mr Yan raised a number of additional issues, which I deal with in turn.

Disparity of treatment

[105] It was alleged that an inconsistent approach had been adopted to concerns about Mr Yan's performance and the performance of other departmental staff who had been treated more leniently. This, it was submitted, gave rise to disparity of treatment undermining the justification for the Department's actions. As the Court of

Appeal observed in *Chief Executive of the Department of Inland Revenue v Buchanan*:[20]

> [41] The test outlined by this Court in *Airline Stewards & Hostesses of NZ IUOW v Air NZ Ltd* was:
>
> > We accept that if there is a prima facie case of disparity or enough to cause inquiry to be made by the Arbitration Court into the issue of disparity, the employer may be found to have dismissed unjustifiably unless an adequate explanation is forthcoming. (citation omitted)
>
> [42] This was refined by this Court in the later case, *Samu v Air NZ Ltd* where the Court, having set out the quotation reproduced above, added:
>
> > Thus if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is forever after bound by the mistaken or overgenerous treatment of a particular employee on a particular occasion. (citation omitted)
>
> …
>
> [45] In essence, therefore, the argument for the Department is that the Court must consider three separate issues, namely,
>
> > (a) Is there disparity of treatment?
> >
> > (b) If so, is there an adequate explanation for the disparity?
> >
> > (c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[106] The prerequisites for establishing disparity of treatment have not been made out in this case. Particular mention was made of staff members involved in matters to do with what became known as the "Winebox Inquiry" who, while their performance was criticised during the course of the inquiry, nevertheless remained employed at the Department. That does not provide a prima facie basis for complaint about the disciplinary outcome Mr Yan faced some 17 years later. The details of the other employees were not fully before the Court and no sensible assessment can be made as to the similarity or otherwise of the circumstances relating to their cases.

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[20] *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] ERNZ 767 (CA) at [40]-[54].

[107] Nor do I accept that Mr Yan was subjected to fault-finding scrutiny. The reality was that his performance was the subject of a performance improvement plan and his work was being assessed as part of that process. Pointing to individual errors made by others, even if they were otherwise substantiated, does not materially assist having regard to the process as a whole.

[108] Mr Yan also complained that his alleged errors were treated more seriously than alleged errors made on behalf of those involved in the process, including a range of peer reviewers. Many of Mr Yan's criticisms of others were not made out. And the fact is that it was Mr Yan who was subject to a performance improvement process.

Letter of 21 November 2011

[109] Concerns were raised in relation to Mr Ridling's correspondence of 21 November, which was forwarded in advance of the meeting of 29 November at the end of the third PIP. As I understood it, the concerns were essentially three-fold. The first relates to Mr Ridling's direction that Mr Yan was not to communicate with anyone other than his representative and/or support person about matters referred to in the documentation. This, said Mr Yan, presented difficulties for him in providing feedback. However Mr Ridling made it clear that if Mr Yan believed that there were other people who could provide relevant information he should draw this to Mr Ridling's attention. Mr Yan did not do so.

[110] The second complaint was that the "roll-up" document was not provided ahead of the meeting. Some support for Mr Yan's evidence that it was provided to him during the course of the meeting can be found in the meeting minutes, which refer to the document being tabled. However, Mr Ridling's letter summarised the detail of the document and the issues that would be discussed. It is also clear that the roll-up document was thoroughly traversed during the meeting and that Mr Yan was given additional time following the meeting to provide any further responses. There was some suggestion that Mr Oomen had previously undertaken to provide Mr Yan with five clear days to provide feedback on documents and that the timeframe provided following the 29 November meeting fell short of this timeframe. While

that may be so there is no suggestion in the documentation that Mr Yan considered that insufficient time was given to him to provide a response and no request for an extension was requested. The history of events suggests that extension requests were not unusual and were invariably accommodated.

[111] The third concern relates to the allegedly confusing way in which the letter was drafted. I have already dealt with issues relating to the amalgamation of certain expectations. I do not consider that the letter, when read in context and in light of the annexed table, can be characterised as confusing. Nor do I accept more generally that Mr Yan could have been surprised by the approach taken at the end of the third PIP period. At the meeting of 29 November 2011 Mr Ridling made it clear that he would be reaching a preliminary decision covering the whole period from 17 November 2010 to 28 October 2011, and that is what he did.

The cumulative effect

[112] Mr Yan raised concerns about the same file giving rise to concerns in relation to different expectations. He suggested that this resulted in a cumulative negative effect. However each of the performance expectations was directed at different aspects of his work, and was designed to measure different aspects of his performance.

Positive Customer Interaction Expectation

[113] As Mr Yan pointed out, there were issues relating to the way in which the expectation "Positive Customer Interaction" was dealt with over the course of the PIP. It was not included in the template PIP for the third period, nor was it referred to in Mr Ridling's letter of 21 November 2011. However, it was included in the roll-up document which stated that the expectation had not been met. Mr Yan raised concerns about the inclusion at the meeting of 29 November 2011 and it is clear that it had been inserted in error and was not tested, as the letter of 8 December 2011 confirms. I accept that there was no adverse impact on Mr Yan.

Provision of relevant information

[114] Mr Yan raised a concern about the extent to which he had access to relevant information. He alleged that there had been a failure to provide a copy of a document entitled "Managing Poor Performance" at the outset of the PIP process and that this undermined the fairness of the process.

[115] The Department's performance policy was posted on the intranet and was readily available to all staff. The letter of 10 November 2010 clearly set out the process that would be followed, consistent with departmental policy. The "Managing Poor Performance" document comprised a set of guidelines for managers. It was not generally available to staff and I do not accept that the Department was obliged to provide a copy of it to Mr Yan at the outset of the PIP process. As Mr Oomen pointed out, it stretches credulity for Mr Yan to suggest (as he did in evidence) that he would have performed differently had he been provided with a copy of the management guidelines at the time the PIP process was instituted.

Wrongful attempt to secure resignation

[116] I return to the issue of the proposed settlement agreement and the discussions relating to it, which occurred in parallel to the proposed decision to dismiss. Mr Yan sought to characterise this sequence of events in the worst possible way. In fact it represented an attempt by the Department to allow Mr Yan to resign rather than be dismissed, and to have it characterised in this way. The Authority member saw it as a genuine attempt to agree an exit, and to deal with issues in a manner that was beneficial to Mr Yan. I have reached the same conclusion. I do not accept that there were elements of coercion involved, for example, to avoid potential liability. As Mr Yan accepted in cross-examination, and as reflected in the contemporaneous documentation, it was his representative at the time who initially enquired what the position with retiring leave would be. Mr Ridling's correspondence (namely his email of 15 December 2011) made specific reference to the right to seek independent advice on the offer, which was expressed to remain open for a reasonable period of time. Mr Yan was not obliged to accept the offer that was made and in the event he did not do so.

[117] I accept Mr Ridling's evidence that in responding to the query advanced on Mr Yan's behalf, and by presenting an offer of settlement, he was simply seeking to extend a benefit to Mr Yan that he would otherwise not be entitled to, including having regard to the length of time that he had been employed by the Department. It was a pragmatic attempt to resolve matters amicably between the parties.

[118] As was observed in *Morgan v Whanganui College Board of Trustees*:[21]

> [47] [Confidential off the record] discussions are a longstanding, important and frequent feature of attempting to resolve employment relationship disputes. Parties, and especially their representatives, hold such meetings and discussions frequently and much litigation, or potential litigation, is resolved or narrowed in scope by frank exchanges that are "off the record"… Such procedures lubricate the machinery of employment dispute resolution. Indeed, the emphasis in the problem resolution provisions in the Employment Relations Act 2000 is supportive of this approach.

Conclusion

[119] I do not accept that the defendant's actions were unjustified.

[120] The defendant reached the view, following an exhaustive and exhausting process, that Mr Yan did not reach the standards reasonably expected of a person in his position. I am satisfied, after considering all of the evidence and submissions advanced by both parties, that the decision to dismiss was one which a fair and reasonable employer could have made in all of the circumstances. Procedural perfection is not the applicable standard, as s 103A(5) of the Act makes clear. While Mr Yan has been able to point to some irregularities, they were minor and did not result in him being treated unfairly overall. The plaintiff's challenge is dismissed.

[121] I record, for completeness, that even if I had been persuaded that the defendant's actions were unjustified I would not have ordered reinstatement as a remedy. That is because it would be neither practicable nor reasonable.[22] I say that because the relationship between the parties has demonstrably and irreparably broken down. The position was underscored by Mr Yan's repeated assertions that Mr Oomen, Mr Ridling and Mr Haycock had dissembled during the course of their

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[21] *Morgan v Whanganui College Board of Trustees* [2013] NZEmpC 117, [2013] ERNZ 285.
[22] *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, [2011] ERNZ 466 at [62].

evidence, that they feared him, that they had effectively pursued an ulterior plan to speed his exit from the organisation, and that they were fixated and obsessed with him. He made it clear that if he was to return to the Department they would need to revisit their feelings towards him, "resiling their obsession" with him. Notably, however, there was no suggestion from Mr Yan that he himself would need to address any issues.

[122] The Department had genuine concerns about Mr Yan's ability to do the work he was employed to do, and concluded (on reasonable grounds) that he fell below the required standards. This tells against the appropriateness of reinstatement as a remedy.[23] I agree with Ms Hornsby-Geluk's submission that even if reinstatement to a lesser position is open as a matter of law, which is in doubt,[24] it would not be practicable having regard to the core requirements of the role of solicitor (at any level within the organisation), the valid concerns relating to Mr Yan's performance and his demonstrable inability to absorb constructive criticism.

[123] As I have observed, the plaintiff's challenge to the Authority's costs determination was put to one side pending the outcome of the substantive challenge. The plaintiff should advise the Registrar within 15 days of the date of this judgment as to whether the challenge to costs is to be pursued. If so, a telephone conference is to be convened for timetabling directions to be made.

[124] The parties are encouraged to seek to agree costs on the substantive challenge. If they are unable to do so the defendant may file a memorandum within 30 days of the date of this judgment, the plaintiff within a further 25 days, and any memorandum strictly in reply within a further 10 days.

Christina Inglis
Judge

Judgment signed at 12.30 pm on 24 March 2015

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[23] *NZEI v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 (CA) at 416, 417.

[24] *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [205]-[206].