**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2016] NZEmpC 165
EMPC 127/2015**

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
BETWEEN	TERE LAWSON Plaintiff
AND	NEW ZEALAND TRANSPORT AGENCY Defendant

Hearing:	29, 30, 31 August and 1, 2, 5, 6, 7, 9 September 2016 (heard at Auckland)
Appearances:	Plaintiff in person G Cain, counsel for the defendant
Judgment:	13 December 2016

JUDGMENT OF JUDGE B A CORKILL

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Introduction

[1] Mr Tere Lawson was dismissed for serious misconduct. He had been employed as a Manager of Transport Officers by the New Zealand Transport Agency (the Agency). The dismissal arose because he gave evidence in controversial circumstances at a hearing of a Disputes Tribunal.

[2] A taxi driver, Mr Mark Hendry, brought proceedings in the Tribunal against one of several taxi companies operated by Mr Robert Van Heiningen, which together formed the Alert Group (Alert). At about the same time, Mr Hendry also made a complaint to the Agency about Alert. Mr Lawson advised a member of his team who handled the complaint, Mr Michael Collie, not to process the complaint as it related to a civil matter.

[3] Mr Hendry later asked Mr Collie to attend the Tribunal hearing. Mr Lawson advised him not to do so unless he was summoned. However, not long afterwards, Mr Van Heiningen asked Mr Lawson to appear as a witness for his taxi company in the Tribunal proceedings. Mr Lawson alleges he said he would only appear if summoned, and that Mr Van Heiningen gave him a summons, a copy of which could not be produced subsequently. But it is common ground that Mr Lawson gave evidence at the hearing in the Tribunal. He made statements which it is alleged were helpful for Mr Van Heiningen's position in his dispute with Mr Hendry.

[4] Subsequently, Mr Hendry lodged a second complaint with the Agency, asserting that Mr Lawson had favoured Mr Van Heiningen's position in the Tribunal proceeding. He later alleged that his first complaint appeared not to have been investigated because of the relationship between Mr Lawson and Mr Van Heiningen.

[5] As a result of Mr Hendry's assertions, Mr John Henderson was asked to conduct on behalf of the Agency a process review as to the filing of complaints. This led to a decision that Mr Lawson's involvement in the Disputes Tribunal matter should be investigated as a disciplinary matter. Ultimately the senior Agency manager who investigated the issues, Mr David Pearks, concluded that Mr Lawson had not told the truth as to why he had given evidence, and that he had done so when there was an unacceptable conflict of interest because he had favoured one of the two parties whose case was before the Tribunal. Mr Pearks decided there was serious misconduct justifying dismissal.

[6] Subsequently, Mr Lawson raised a personal grievance which was heard by the Employment Relations Authority (the Authority). It determined that the decision to dismiss was one that a fair and reasonable employer could have taken in all the circumstances.[1] The Authority also found that there was no unjustified disadvantage by the Agency not providing Mr Lawson with all relevant information. Subsequently, Mr Lawson was ordered to pay a contribution to the Agency's costs of $33,000.[2]

[7] Mr Lawson brought a challenge of the Authority's substantive determination to the Court on a de novo basis. He alleged that the dismissal was unjustified and sought significant remedies. The Agency maintained its position that it had acted appropriately, both on a substantive and procedural basis. Mr Lawson also challenged the Authority's costs determination.[3]

[8] Although unrepresented at the substantive hearing, Mr Lawson presented his case competently due to his extensive court experience as a police prosecutor.

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1 *Lawson v New Zealand Transport Agency* [2015] NZERA Auckland 116.
2 *Lawson v New Zealand Transport Agency* [2015] NZERA Auckland 173.
3 *Lawson v New Zealand Transport Agency*, above n 2.

Chronology of events

Background

[9] Mr Lawson commenced employment with the Agency in April 2007, and worked continuously for it until 15 May 2014.

[10] On 23 November 2009, he was appointed to the position of Manager Transport Officers under an individual employment agreement (IEA). In that role he reported directly to the Regional Manager, Mr Rick Barber.

[11] Previously, he had worked for 18 years as a sworn police officer, 10 of them as a prosecutor. He was a police officer until 2004. He had also been a Human Resources Manager for Korucabs Sub Franchising Ltd in 2004 and 2005; and a driver for Korucabs Auckland Ltd from 2005 to 2007.

[12] At the Agency, Mr Lawson managed a passenger team which covered taxis, buses, shuttles and private hire vehicles. His team of transport officers was responsible for information, education, and enforcement in relation to those engaged in these transport activities. As a Manager Transport Officer (MTO) he was required to coordinate the delivery of regulatory services in the Auckland region, which included deterrence and education activities. As a MTO, Mr Lawson also had the ability to recommend enforcement action against an Approved Taxi Organisation (ATO) or a taxi driver.

[13] The Court was told that in about 2012, there was a shift away from enforcement and prosecution by the dedicated taxi enforcement team, with the Agency beginning to take a broader compliance-based approach. Compliance issues were more commonly dealt with through reviews and audits. That said, Mr Lawson still had the ability to recommend prosecutions as well as impose warnings and direct that audits be undertaken, fulfilling the Agency's responsibility as gatekeeper.

Mr Hendry's first complaint

[14] One of the organisations which operated in the Auckland area was the Alert Group of companies. Mr Van Heiningen was one of its directors. In March 2013,

Mr Collie, a Transport Officer and a member of Mr Lawson's team, received a call from Mr Hendry who said he had formerly worked for an Alert company. He claimed that he had been left responsible for the outstanding finance of a vehicle that Mr Van Heiningen had purported to, but did not, sell to him; and that he had been permitted to operate without either a Passenger Service Licence (PSL) or as an employee of an ATO so that he had operated an unlicensed service. He also referred to two taxis he had purchased which he said were not up to the required certificate of fitness standard required by all taxis, and which he said were in a "terrible state mechanically".

[15] Mr Collie sent him a complaint form to complete. Mr Hendry did so on 24 March 2013, attaching a detailed complaint and a zip file of documents. In his covering email he said that he did not expect Mr Collie to do anything with the documents, but to hold and store them securely for the time being. Mr Collie spoke to Mr Lawson about the complaint. He said he showed Mr Lawson a copy of it, and parts of the 16-page document where Mr Hendry had outlined his grievances in more detail. There is a dispute as to how much of the documentation Mr Lawson perused, if any. Mr Lawson concluded that there appeared to be a civil dispute but that an issue regarding the condition of a motor vehicle should be referred to the MTO of the Auckland based vehicles team, Mr David Mabey.

[16] Apart from referring the vehicle issue to Mr Mabey, Mr Collie took no further steps. Mr Lawson said he had told Mr Collie to case file the documentation. Mr Collie now says he did not do this having regard to the request that had been made to him by the complainant. It appears there was no further communication with Mr Hendry at the time.

[17] About six to eight weeks later, Mr Collie received another call from Mr Hendry, who said he wanted Mr Collie to attend an upcoming Disputes Tribunal hearing. Mr Collie said he was unable to do so because of prior commitments, but suggested that Mr Mabey might be available. He understood Mr Hendry subsequently asked Mr Mabey to do so, but he too was unavailable. Then, Mr Collie told Mr Lawson about this request. Mr Lawson recalled that Mr Collie had said they had not been asked to be witnesses, but "to turn up and simply sit in the rear of the

Court room". Mr Collie himself later said that Mr Hendry simply wanted someone from the Agency to attend, but not to speak. Mr Lawson told Mr Collie that his staff were in no way obligated to attend unless they were summoned to do so.

[18] In June 2013, Mr Van Heiningen contacted Mr Lawson and asked him to attend the Disputes Tribunal as a witness. He told Mr Lawson that he was involved in a dispute which was between Alert and a former driver, Mr Hendry.[4] Mr Lawson said that he responded by stating that he would not attend unless he was summoned to do so, and that even if summoned he would not be discussing or entering into any discussions surrounding the specific employment issues between the parties. Mr Lawson said he understood from Mr Van Heiningen that the purpose of his attendance was to explain the regulatory regime, and requirements and expectations pertaining to ATOs. Mr Lawson did not refer to the Agency's previous dealings with Mr Hendry.

[19] Mr Lawson says that on either 1 or 2 July 2013, Mr Van Heiningen personally served him with a document which summoned him to appear as a witness at a hearing of the Disputes Tribunal on 3 July 2013. He says he was served at the Agency's Auckland office by Mr Van Heiningen. Upon being served, he arranged telephone contact with Mr Van Heiningen for the morning of the hearing date, so as to agree an accurate time for his attendance.

[20] He duly attended the Tribunal hearing and gave evidence. He later told his employer that the only information he provided was his full name, his employment position and experience, and the current regulatory requirements for the taxi industry and ATOs which operate in that environment. A transcript as to what he said became available after his dismissal; I shall refer to it in detail later.

[21] Six months later, on 6 or 7 January 2014, Mr Hendry rang Mr Collie. He accused Mr Collie of having provided information from his zip file to Mr Van Heiningen. Mr Collie explained this was incorrect as the information was still stored on his computer as had been requested. Mr Hendry also told him that Mr Lawson

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[4] In fact, the Agency later established that the parties to the proceeding in the Disputes Tribunal were Auckland Maxi Taxi Company Ltd (Maxi Taxi), and Mr Hendry.

had attended a hearing of the Disputes Tribunal, giving evidence for Mr Van Heiningen. Mr Collie said that if Mr Lawson attended, he must have received a summons. Mr Hendry was angry and accusatory, and said he regarded the situation as unsatisfactory. Mr Collie told him that if he felt this way he could raise a complaint with senior management of the Agency. Appropriate contacts in the Agency for doing so were given.

Mr Hendry's second complaint

[22] On 26 February 2014, Mr Hendry initiated a complaint with Ms Celia Patrick, the Agency's Access and Use General Manager. She spoke to him the next day. Then he sent her a detailed email in which he complained about Mr Lawson giving evidence to the Disputes Tribunal thereby giving credibility to the case which was presented on behalf of Alert/Mr Van Heiningen. He said that the evidence served to allay the concerns he was attempting to raise with the Disputes Tribunal as to irregularities which he claimed had occurred when he was driving for Alert, including as to whether he had driven as an employee of an ATO who did not therefore need a Transport Service Licence (TSL).

[23] Mr Lawson's grievance relates to the events which followed Mr Hendry's second complaint. In the following sections of this judgment,[5] I summarise the process and context of the information which was obtained; and then how it was evaluated.

Process review

[24] Ms Patrick asked Mr Andrew Thompson, Managing Counsel, (Regulatory and Commercial), and acting chief legal counsel of the Agency to undertake what she described as a "short piece of due diligence", which would include interviewing Mr Hendry and maybe others, and reviewing relevant documentation so that consideration could be given as to whether any further steps were necessary.

[25] Initially, Mr Thompson sought the assistance of Mr Henderson, Chief Risk Assurance. Between 2 and 4 March 2014 Mr Henderson received and considered the documents Mr Hendry had forwarded, and prepared to undertake the review

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[5] Paras [24] – [152] of this judgment.

which Ms Patrick had requested. He agreed with Mr Thompson that the latter would interview Mr Hendry; his own role would be to conduct a process review as to how the Agency had managed the initial complaint which Mr Hendry had forwarded to Mr Collie in March 2013.

[26] Over the following days, Mr Henderson advised Mr Barber that he would be conducting an independent review on some wide ranging issues. He said he would need to speak to members of Mr Barber's team so as to obtain a full picture. Then Mr Barber told Mr Lawson and Mr Mabey what was to occur; and he asked that Mr Lawson tell Mr Collie about the review. He also forwarded a copy of Mr Henderson's email to them. Mr Henderson also emailed Mr Lawson and Mr Collie about the commencement of the review he was undertaking "around some issues that have been raised by Mark Hendry". He asked that if either of them had any correspondence that might make mention of Mr Hendry or be relevant, this should be looked out.

[27] Mr Henderson met with the members of Mr Barber's team on 11 March 2014. The first meeting was with Mr Collie. Mr Collie described the complaints procedure generally; then he explained his involvement in the complaint which Mr Hendry had brought in March 2013. In the course of questioning, Mr Collie accepted that although the complaint was official, he had not opened a file. This was because he was following instructions from Mr Lawson who had said that the issue was a civil matter and that the Agency should not get involved. Mr Lawson had told him, however, to refer the vehicle issues to Mr Mabey.

[28] Then he described receiving a number of requests from Mr Hendry, asking him or Mr Mabey to attend a Disputes Tribunal hearing. Later he described the telephone call he had received from Mr Hendry in January 2014, when he said Mr Hendry was aggressive and wound up. He said he had told Mr Hendry that if he was upset he should make a complaint.

[29] As part of his record of this conversation, Mr Henderson recorded his "thoughts". He said that Mr Collie had initially been cagey and quite defensive, particularly as to why the complaints process had not been followed or acted on, but

it was apparently thought that Mr Hendry was unstable or that the matter was civil in nature. It seemed odd, however, that this characterisation was reached without a full investigation. He thought that Mr Collie was concerned that he was to be blamed for someone else's error, although he did not say whose error it was.

[30] Then Mr Henderson interviewed Mr Lawson. After discussing the regulatory context, Mr Lawson asked him why he did not ask the questions that he was there to ask. Mr Henderson responded by stating that he had been. The complaints process was then discussed, with Mr Lawson being recorded as saying that not all written complaints would be automatically logged. He said that the exercise of judgement might be required.

[31] Asked about Mr Hendry's complaint, he said that he could not recall anything about the complaint, other than that it was outside the Agency's area of authority, and that it was a civil matter. He had asked Mr Collie to speak to Mr Mabey which he thought occurred, and he had instructed Mr Collie not to process the complaint.

[32] After confirming he did not recall anything more, Mr Henderson asked him whether he had attended a Disputes Tribunal in relation to Mr Hendry's dispute. He acknowledged that he had. Asked why he had not previously referred to this, he said that he had not thought it was relevant. He said he was summoned to attend so he had done so. Asked if he had a copy of the summons, he said it was not the sort of thing he would keep. Nor had he made any file notes. As to the nature of his testimony he just said who he was, what his job was, and what he did. He did not have a relationship with Mr Van Heiningen other than as a customer or stakeholder. He thought he might see him perhaps twice a year. Asked if he met Mr Van Heiningen for coffee, he said he may have done so at the Agency's Auckland offices with others from the organisation. He did not have lunches with Mr Van Heiningen, and he did not catch up with him regularly.

[33] Mr Henderson recorded that he asked Mr Lawson if Mr Van Heiningen had spoken to Mr Lawson "about the summons beforehand". Mr Lawson said that would be tampering with a witness. Then he stated that Mr Van Heiningen had called him to advise he was summoning Mr Lawson, and that he wanted him to

attend the Disputes Tribunal to describe what he did. Mr Henderson recorded that he received the summons the day before. Because he and his colleagues were summoned to appear at hearings frequently, they would not normally tell other members of the team this had occurred. He did not obtain in-house legal advice because he was an experienced police prosecutor.

[34] Mr Lawson was then asked about what occurred at the hearing. He said that he described who he was, what he did and what the Agency did. He said he did not really know why he was there and attended only because he had been summoned to do so. He repeated that he had made no file note and confirmed that he had not retained a copy of the document.

[35] Mr Henderson recorded as his "thoughts" that he was not getting the full truth and that he was not sure how much of this information had been fabricated. He said that there was evasiveness and the giving of quite short answers, after fuller responses to the initial questions which had been asked regarding Mr Lawson's role, budget pressures and numbers of staff. He thought that a process review could be useful. He considered there might be more to Mr Lawson's relationship with Mr Van Heiningen, but there was nothing concrete; this concern arose from the way the questions had been answered.

[36] Mr Henderson considered that the reference to a summons was a "total fabrication and not well prepared for". He recorded that he knew from the Registrar of the Disputes Tribunal that no summons had been issued for Mr Lawson, so that this was an issue which needed to be tested. The absence of a summons made the situation "untidy". There was no apparent reason for him to attend the Disputes Tribunal and no relevant communication with Mr Van Heiningen. If there was no summons it was "almost impossible" for Mr Lawson to attend but he did. He thought Mr Lawson had been "cagey, cocky and then defensive", and that he did not like questions being asked. He recorded that more questions in writing might be appropriate.

[37] Then Mr Henderson interviewed Mr Mabey. This interview was relatively short. Mr Mabey is recorded as having described how the vehicles team operated. He recalled that Mr Hendry has apparently wanted the history of a particular vehicle. He recalled Mr Lawson "got [the] information but didn't want to be involved".

[38] Mr Thompson met with Mr Hendry for the purposes of the review on 13 March 2014, subsequently preparing a report which he provided to Ms Patrick and Mr Henderson on 21 March 2014.

[39] Mr Thompson established that Mr Hendry had three concerns:

a) The first was an alleged failure on the part of the Agency to investigate Mr Hendry's written complaint of 2013: Mr Thompson said that there were questions as to whether the complaint was investigated and if not, whether this was due to the relationship between Mr Lawson and Mr Van Heiningen.

b) The failure of Agency staff to attend the Disputes Tribunal: Mr Thompson recorded that Mr Hendry said he had sent a number of emails to Mr Collie asking for his attendance at a Disputes Tribunal hearing. However, as Mr Collie had not been summoned, Mr Thompson considered this complaint required no further investigation.

c) Mr Lawson's attendance at the Disputes Tribunal hearing as a witness for Auckland Maxi Taxi Company Limited (Maxi Taxi, an Alert company): Mr Hendry had stated that Mr Lawson's attendance at this hearing was a complete surprise and caused considerable anxiety to him as he attempted to prosecute his claim. He recorded aspects of what Mr Hendry understood Mr Lawson to have said at the Disputes Tribunal hearing which included him being introduced as someone "very high up" in the regulation of taxis, and "an adviser to the Minister of Transport". He said that he felt let down that a person to whom he had directed a specific complaint as well as allegations of general

impropriety (against Mr Van Heiningen) then appeared to give evidence in support of the subject of the complaints. He was disturbed that "lower" staff who he had asked to attend did not, but that Mr Lawson attended without announcement in support of Mr Van Heiningen. He also asserted that Mr Lawson was not summoned to attend; that is, he attended by choice.

[40] Mr Thompson considered that these allegations needed to be put to Mr Lawson. Mr Hendry was alleging matters of some significance to the Agency that should be further and fully investigated.

[41] Following an email exchange several days earlier, on 17 March 2014 Mr Lawson met with Mr Van Heiningen and a colleague over coffee to discuss a particular issue concerning the Northland Regional Council, and whether a person apparently operating a taxi from Whangarei Airport was authorised to do so. Mr Lawson said he told Mr Van Heiningen that the Agency would need the registration number of the vehicle to take the matter forward. Mr Henderson was not informed about this meeting at the time.

[42] On 18 March 2014, Mr Hendry rang the Agency. He said that his name was "Robert", and asked to be put through to Mr Lawson. A transcript of this conversation was subsequently produced. It is evident from this that Mr Hendry raised his concerns about Mr Lawson's appearance at the Disputes Tribunal. In the course of the conversation, Mr Lawson said that he had been "legally summonsed". Mr Hendry said he was unaware of this. Mr Lawson said that when the summons was served on him, it was indicated that he was to "talk about what I do". Mr Lawson later discussed the difference between a driver of a taxi holding a TSL on the one hand, and a driver who is an employee on the other, stating that in the latter case the Agency had no interest and that any issues in that regard would be a civil matter. He said he would investigate a complaint if Mr Hendry was working unlicensed, but not if he was doing so as an employee.

[43] After the telephone conversation, Mr Lawson emailed Mr Henderson advising him of the call, stating that Mr Hendry had attempted to re-litigate his relationship with Alert. He said that although he had told Mr Hendry it was not appropriate for him to be talking with him he would not stop talking, and wished to know why he had attended "Court". He said he had told him that he had been summoned, but this explanation simply:

> … fuelled his aggression and he continued to rant and rave. He also made a number of allegations regarding my behaviour and relationship with Mr Robert Van Heiningen. I am not [too] fussed about the allegations, because they are all untrue, but I am concerned he is attempting to contact me and draw me into an inappropriate shouting match with him.

[44] Mr Lawson stated that Mr Hendry should not be calling him, particularly when an inquiry was being conducted. He was also annoyed that Mr Hendry had intentionally deceived the call centre and himself so as to have his call put through.

[45] On the same day Mr Collie sent Mr Lawson a copy of Mr Hendry's original complaint as lodged in 2013, at Mr Lawson's request.

[46] Later that day, Mr Lawson became very ill with a virus, and went home; he was off work for the remainder of that month.

[47] On 21 March 2014, Mr Hendry made a request to the Agency under the Official Information Act (OIA), asking a series of questions as to Mr Lawson's involvement in the Disputes Tribunal hearing of 3 July 2013. Included was a request for the summons Mr Lawson said he had received. In his OIA letter, Mr Hendry also said that Mr Lawson had told him that his "official complaint of March 2013 was closed with me being referred to pursue any issues via Civil Action [sic]. I am not aware of any such closing of my complaint nor any such direction".

[48] On the same day, Mr Hendry sent a second email to the Agency asserting that Mr Van Heiningen was not a fit and proper person to hold an ATO.

[49] Also on 21 March 2014, Mr Henderson sent an email to Mr Lawson about Mr Hendry. Mr Henderson acknowledged Mr Lawson's email of 18 March 2014. He said that he had not himself yet spoken to Mr Hendry, and that the majority of

Mr Hendry's contact had been with Ms Patrick. He did not disclose that Mr Thompson had in fact spoken to Mr Hendry. The email went on to set out several questions regarding Mr Hendry's complaint.

Meeting at Mr Lawson's home

[50] On 24 March 2014, Mr Collie who had been on leave returned to work and discovered Mr Hendry's two emails of 21 March 2014. After discussing them with Mr Barber, the OIA request was forwarded to Mr Colin Jessup, the MTO of the Agency's Auckland based commercial team. At 7.43 am he emailed Mr Lawson stating that he understood Mr Lawson had discussed the OIA request with Mr Barber, and that Mr Lawson and "legal" would be drafting a suitable response.

[51] Later, Mr Lawson asked Mr Collie to come to his home, bringing Mr Lawson's laptop, diary and some work files. Mr Lawson also asked him to print copies of the two emails which had been sent a few days earlier by Mr Hendry. Mr Collie did so.

[52] Mr Collie arrived at Mr Lawson's home around midday with the requested items. After a coffee, they discussed some professional matters. Then they discussed Mr Hendry's OIA letter. Mr Collie asserts, and Mr Lawson denies, that the latter candidly told him there was no summons.

[53] Then Mr Lawson rang Mr Van Heiningen on his cell phone, with the speaker function engaged so that Mr Collie could hear the call. These events, and in particular what Mr Lawson and Mr Van Heiningen discussed on the telephone call, are hotly disputed. It suffices to say at this stage that Mr Collie was very concerned about the content of the conversation because he says Mr Lawson coached Mr Van Heiningen what to say about the summons if asked. Mr Lawson denies this and says the primary purpose of the call related to a rogue taxi driver at Whangarei Airport; towards the end of the conversation he mentioned Mr Hendry's request for a copy of the Tribunal summons, and said that if asked about this Mr Van Heiningen should tell the truth.

[54] Initially Mr Collie discussed his concerns about this call with Mr Jessup in private later that day. He asked him what he should do. Mr Jessup said it was entirely up to him. Then Mr Collie spoke to his wife, agreeing with her that he should tell Mr Henderson what had occurred.

[55] In the afternoon of 25 March 2014, Mr Collie rang Mr Henderson and described what had occurred. They arranged to meet on 31 March 2014 so Mr Collie could give a statement. At the end of this call, Mr Henderson recorded his reaction to Mr Collie's account, which was that the content of Mr Lawson's conversation with Mr Van Heiningen seemed to constitute "an amazing sequence of events and [a] completely daft thing for Tere to do". The call indicated "a conflict of interest somewhere".

[56] It is evident that the information which Mr Collie provided to Mr Henderson was based on notes which he had made soon after leaving Mr Lawson's home. But because it is this information which the Agency held when it came to interview Mr Lawson subsequently, it is necessary to refer to the account given by Mr Collie to Mr Henderson when they met a few days later.

[57] Mr Henderson recorded Mr Collie's information, in question and answer form. In the first part of the conversation he recounted the history of contact he had had with Mr Hendry from early 2013.

[58] Coming to what occurred at Mr Lawson's house on 24 March 2014, he said that there was initially a discussion about a police matter, staffing and other work issues. In the course of their discussion, reference was made to the OIA request received from Mr Hendry. Mr Lawson had made notations on a copy of the OIA letter. He said that whilst dealing with that letter, Mr Lawson took out his cell phone to ring Mr Van Heiningen. He had to ring him twice to obtain contact. He said that once Mr Van Heiningen answered, Mr Lawson placed the cell phone on speaker, and put it on a coffee table so Mr Collie could hear the conversation.

[59] Initially Mr Lawson and Mr Van Heiningen exchanged pleasantries. Then he said that “the muppet Hendry”, or something like that, had made another complaint, and an OIA request with regard to the Disputes Tribunal hearing. He explained that Mr Hendry was seeking information and a copy of the summons. Mr Lawson had told Mr Van Heiningen that he was going to say he no longer had it, and that it was not “something that you keep”. He said that if Mr Van Heiningen was asked for proof of service of the summons, he should say that he never took the document back to the court and that he had thrown it away because “you never keep things you don’t need”.

[60] Mr Collie said that Mr Van Heiningen must have misheard or was confused about this, because Mr Van Heiningen asked him to repeat it. He did so. Mr Van Heiningen responded by saying that he understood what to say and he was not to worry about it. The call then ended.

[61] In his statement, Mr Collie said that he was very uncomfortable with what had occurred, and that he had been eager to leave Mr Lawson’s house. He made notes within half an hour of the conversation; they would not be word perfect but they indicated how the conversation had proceeded. After much consideration he had decided it was appropriate to bring the matter to Mr Henderson’s attention. There was then a brief discussion about other concerns “when [Mr Lawson’s] integrity had been questioned”, including matters relating to the Agency’s interactions with Green Cabs, and Korucabs.

[62] On a copy of Mr Hendry’s OIA request, Mr Lawson had made some notations, as Mr Collie had explained to Mr Henderson. With regard to the request for a summons, Mr Lawson had written two words; these were either “none held” or “neva had”.

[63] Mr Collie said that when he questioned Mr Lawson about this notation on 24 March 2014 he had said “I was never actually summoned”.

Subsequent telephone conversation between Mr Lawson and Mr Henderson

[64] Later on 24 March 2014, Mr Lawson emailed Mr Henderson to say that he was off work longer than he had anticipated, and asked Mr Henderson to ring him about his emailed questions of 21 March 2014. This occurred, with Mr Henderson making notes of the call, which is recorded as having taken place at "15:12". It obviously took place after Mr Lawson had spoken to Mr Van Heiningen as observed by Mr Collie.

[65] After recording generic information regarding the number of annual complaints received and prosecutions brought, Mr Henderson recorded information Mr Lawson gave as to his "actions" when summoned by Mr Van Heiningen. Mr Henderson said he recorded Mr Lawson as stating that he had informed "his team that he was summoned", mentioning Mr Barber. Mr Henderson recorded that this was a "change in story". He said this occurred the previous day, because the summons "only just arrived [the] day before". There was no record of it and no file note. He said he did not know why he was summoned. He had not asked Mr Van Heiningen why he was required to attend. Later in the conversation, Mr Henderson recorded Mr Lawson as stating that Mr Collie had told him that Mr Hendry had made an OIA request, but he did not know what was in it. However, Mr Lawson had then referred to an item which was contained in the OIA request.

[66] There is no evidence that Mr Lawson informed Mr Henderson he had phoned Mr Van Heiningen earlier that day; that non-disclosure is to be considered alongside Mr Lawson's grievance that the other party to the Disputes Tribunal's dispute, Mr Hendry, had phoned him during the investigation; and that he had expressed a strong objection to receiving such a call, given the circumstances of the complaint.

[67] Describing his "thoughts", Mr Henderson recorded that there were "more mistruths". These included Mr Lawson's insistence that he had been summoned; and having said he was unaware of the content of the OIA request, Mr Lawson was then able to refer to one of the requests, which sounded as if he had seen the OIA letter. Mr Henderson recorded that he was confused as to why Mr Lawson had not stated that he had made a bad judgement call in attending the Disputes Tribunal hearing, because he had now "painted himself into a corner". Mr Henderson wrote that he

knew from the Registrar of the Disputes Tribunal that Mr Lawson had not been summoned; and he strongly suspected Mr Lawson would have talked to Mr Van Heiningen about the matter. He noted that he would need to check Mr Lawson's phone records.

Conclusion of Mr Henderson's review

[68] Mr Henderson prepared a report for Ms Patrick regarding the review he had undertaken. Initially he drafted this on 25 March 2014, but after discussing it with senior colleagues on 27 March 2014, he arranged to take the statement from Mr Collie to which I have already referred. He completed his report on 1 April 2014. In it he discussed the following matters:

a) The management of the complaint: after describing the normal process for managing complaints, he said that in Mr Hendry's case the standard process had not been followed. Normally a complaint would be logged into the system, given an identification number and assigned to a MTO. He recorded that Mr Collie had consulted with Mr Lawson and that Mr Hendry's issues were deemed to amount to a "civil complaint" and that no further action should be taken. Accordingly, the normal processes were not followed. He said that when first interviewed, Mr Lawson's position was that he had no recollection of Mr Hendry's complaint, but that a number of issues became clearer following questioning. Mr Lawson had confirmed that he had told Mr Collie that no further action was to be taken. When it was put to Mr Lawson that there was more to Mr Hendry's complaint than "civil matters", such as the operation of a taxi without a PSL which was a common practice for drivers of Alert taxis, no direct action had been taken. He recorded that Mr Lawson stated this was not uncommon, as the Agency could not follow up every complaint from a disgruntled taxi driver. He concluded that no written feedback had been provided to Mr Hendry, although telephone conversations had continued with Mr Collie from time to time.

b) Agency staff attending Disputes Tribunal: Mr Henderson described the information he had been given as to the request made initially to Mr Collie to attend the Disputes Tribunal hearing, and then Mr Lawson. He referred to the various accounts Mr Lawson had given, and that no copy of the summons had been retained.

c) Conclusion and recommendation: Mr Hendry had alleged that Mr Lawson had acted corruptly and was engaged in an inappropriate relationship with Mr Van Heiningen. No evidence was presented through the interviews to support this assertion. There were, however, a number of departures from process which could be reviewed to ensure they did not recur. Having regard to the new information which had come to Mr Henderson's attention as to Mr Lawson's attendance at the Disputes Tribunal, he considered that an employment investigation was warranted.

Employment investigation

[69] Ms Patrick accepted this recommendation. She provided a temporary authorisation to Mr Pearks, as Acting Regional Manager Northern Operations, to undertake a disciplinary investigation of matters relating to Mr Lawson; and to make any decision on employment matters resulting from that investigation.

[70] Mr Pearks was asked to review the information obtained by Mr Henderson as part of his process review. He was provided with Mr Hendry's original complaint along with some of the background information, Mr Henderson's notes of his meetings with Mr Collie, Mr Lawson and Mr Mabey of 11 March 2014, Mr Thompson's notes of his meeting with Mr Hendry of 13 March 2014, the transcript of Mr Hendry's call to Mr Lawson of 18 March 2014, Mr Collie's statement of 31 March 2014, and Mr Henderson's memo to Ms Patrick as submitted on 1 April 2014.

[71] After reviewing this information, Mr Pearks concluded that an employment investigation was required. A key issue, he thought, was whether or not there had been some kind of collusion between Mr Lawson and Mr Van Heiningen. It was his

view that the Agency's responsibility was to regulate the taxi industry, and that it could not be seen to favour one organisation over another by not following up on complaints that may be justified.

[72] Mr Pearks was to receive HR support from Ms Danielle Brown, from the Agency's People and Capability team. Mr Pearks met with representatives of that team, and Mr Henderson, on 4 April 2014. The purpose of the meeting was to discuss the intended process.

[73] Mr Pearks decided to involve Mr Henderson in a meeting he proposed to convene with Mr Lawson; amongst his reasons for doing so was that he had reviewed Mr Henderson's notes which were not verbatim notes. He wanted Mr Henderson to be present so that he could assist with assessing Mr Lawson's answers, and to see whether those answers were consistent with what Mr Lawson had said previously.

[74] Then Mr Henderson arranged for an analysis of Mr Lawson's telephone records; this exercise was completed by 9 April 2014.

[75] On the same day, Mr Pearks wrote to Mr Lawson inviting him to attend a disciplinary investigation meeting. The three allegations raised in that letter were:

a) That Mr Lawson had deliberately misled the Agency's internal review, in relation to his attendance as a witness for Alert and its Director, Mr Van Heiningen, at a Disputes Tribunal hearing. The review had concluded that no summons was in existence, and that subsequently a statement had been received from Mr Collie that Mr Lawson had admitted that no summons was ever issued. Reference was also made to the fact Mr Collie had witnessed a telephone conversation where Mr Lawson had arranged what Mr Van Heiningen would say should he be questioned.

b) Mr Lawson had informed the independent review that he had no personal relationship with Mr Van Heiningen and had not spoken to

him prior to the Disputes Tribunal hearing. Mr Lawson had later recalled that a single phone call took place, some days beforehand, when he was informed that he would be summoned. His subsequent appearance at the Disputes Tribunal hearing without a summons and the alleged actions in trying to have Mr Van Heiningen support his story implied a relationship existed in some form that may constitute a conflict of interest.

c) Mr Lawson had allowed himself to be introduced at the Disputes Tribunal hearing without correction as an advisor to the then Minister of Transport and a significant senior manager at the Agency, and in doing so placed the Agency in a position where there was a risk of it being brought into disrepute.

[76] The letter went on to refer to the Agency's Code of Conduct, which included the following descriptions of serious misconduct:

1. Acting in a way that brought the Agency into disrepute.

2. Giving false and misleading information to stakeholders or customers directly.

3. Failing to declare a conflict of interest that affected performance or judgement.

[77] Established breaches could be considered serious misconduct, and could result in disciplinary action up to and including summary dismissal.

[78] Advice was given of an initial meeting with Mr Pearks, Mr Henderson and Ms Brown; this was to be held on 14 April 2014. Mr Lawson was encouraged to bring a support person or a representative.

[79] Mr Lawson was also asked to consider whether he would agree to take leave on pay; if this could not be agreed, the appropriate suspension would need to be considered.

[80] Mr Lawson agreed to take leave on pay, so that a process to consider the possibility of suspension was unnecessary.

Disclosure

[81] On 13 April 2014, Mr Lawson wrote to Mr Pearks requesting disclosure of documents under the OIA; he also requested a delay in the scheduled investigation meeting so that he had sufficient time to receive and consider that material.

[82] On 23 April 2014, he received by courier a package of documents; these included the documents which have been summarised in this judgment to this point.

Preparations for meeting with Mr Lawson

[83] Prior to the meeting with Mr Lawson, Mr Pearks prepared the various areas of inquiry which he wished to explore with Mr Lawson. He was particularly interested in whether or not Mr Lawson had any personal relationship with Mr Van Heiningen. He was also interested in issues concerning the summons, and why no copy of it had been retained. Also of concern was why Mr Lawson had instructed Mr Collie not to appear at the Disputes Tribunal hearing because it concerned a civil matter, but then attended himself. He also considered that Mr Henderson's notes of conversations with Mr Lawson suggested he had not been open and forthcoming but defensive and vague in his answers, and there were inconsistencies in his answers.

[84] On 27 April 2014, Mr Pearks received and considered the review of Mr Hendry's material which Mr Thompson had prepared for Ms Patrick;[6] this document had been incorporated in the materials which were forwarded to Mr Lawson a few days earlier. Mr Pearks said that upon reviewing this memorandum, he noted Mr Thompson's statement that no conclusions could be drawn as to what had occurred until hearing fully from Mr Lawson, an observation with which he said he agreed.

[6] See para [39] of this judgment.

[85] On 28 April 2014, Mr Henderson received a transcript of the telephone call between Mr Lawson and Mr Hendry which had occurred on 18 March 2014, via Mr Thompson. This was provided to Mr Lawson on the same day.

[86] Also on that day, Mr Henderson received another email from Mr Thompson which contained further information from Mr Hendry. This was in the form of an email with copies of summons issued by the Registrar for three witnesses who Mr Hendry had called to a Disputes Tribunal hearing. Mr Henderson forwarded this email to Mr Lawson, which he acknowledged.

[87] Then Mr Henderson sought confirmation from the relevant Deputy Registrar that no Agency staff had been issued a summons to attend a hearing in relation to the matter concerning Mr Hendry. She confirmed this was the case. This information was not forwarded to Mr Lawson.

[88] Prior to the meeting with Mr Lawson on 2 May 2014, Mr Henderson provided to Mr Pearks a transcript of Mr Hendry's telephone call to Mr Lawson of 18 March 2014. He noted some inconsistencies in what Mr Lawson told Mr Hendry, when compared with what Mr Lawson had told him. He briefed Mr Pearks on these issues; and referred to them at the meeting held with Mr Lawson on 2 May 2014.

Disciplinary investigation meeting, 2 May 2014

[89] Mr Pearks attended the meeting with Mr Henderson and Ms Brown; Mr Lawson attended with Mr Jessup. It ran for over two hours, with a short break towards its conclusion. Ms Brown took notes by way of a summary, as did Mr Jessup. Their respective summaries were subsequently transcribed and placed before the Court. Mr Lawson also recorded the meeting on his cell phone, and each party made a transcription of that recording at a later stage. These transcripts were also produced in evidence. From these various sources, the Court has obtained an accurate understanding as to what occurred at the meeting.

[90] Mr Pearks gave a brief introduction, and made it clear that no decision would be made at the meeting, but it was intended to provide an opportunity for Mr Lawson to set out his responses to the letter which had been sent to him. He was asked to

make an opening statement; he said he did not want to make any general opening statement but would answer specific questions instead.

[91] The meeting then proceeded on a question and answer basis; most of the questions were asked by Mr Pearks, although Mr Henderson asked some.

[92] In the main, they pertained to the process review which Mr Henderson had undertaken regarding the issue as to the summons Mr Lawson said had been served on him by Mr Van Heiningen the day before the Disputes Tribunal hearing. Mr Lawson said that it was not on letterhead; and that he did not know who had signed it. He had never checked that issue with regard to the hundreds of summonses that had been provided to him. He also said it was served at the office of the Agency. Mr Van Heiningen had asked for him at the counter, and he received a telephone call stating that there was someone to see him.

[93] He stated that he was unaware that the only person who could issue and serve a summons for the Disputes Tribunal was a Registrar. Later, Mr Lawson said that he may have made a mistake by not checking to see whether the summons was valid. He suggested that Mr Van Heiningen should be spoken to about the issue.

[94] Mr Lawson stated Mr Van Heiningen had spoken to him several days before the Tribunal hearing: he told Mr Van Heiningen that he would not attend the hearing unless he was summoned. Mr Van Heiningen wanted Mr Lawson to talk about his position, and what he did at the Agency.

[95] A further topic which was discussed related to the telephone conversation which occurred between Mr Lawson and Mr Van Heiningen on 24 March 2014, as reported by Mr Collie. Mr Lawson explained that the focus of the conversation related to an unlicensed taxi operating at Whangarei Airport. Subsequent texts exchanged with Mr Van Heiningen related to the registration number of the vehicle involved. Mr Lawson described those texts.

[96] Mr Lawson said Mr Hendry's name was raised at the end of the call, and he asked Mr Van Heiningen if he had a copy of the summons. Mr Van Heiningen said he did not have a copy, nor had he provided one to the Tribunal. Mr Lawson then

told Mr Van Heiningen that if he was asked about the summons, he should tell the truth and that "if you don't have it, say you don't have it".

[97] Discussion also occurred on the question of why Mr Lawson had regarded Mr Hendry's initial complaint as being a civil matter, since it involved not only an employment relationship issue, but also whether the company had allowed Mr Hendry to operate an unlicensed service. Mr Pearks was concerned that this was a matter which would have warranted an investigation. Mr Lawson responded by stating that Mr Hendry was no longer driving so that the problem did not exist at the time of Mr Hendry's complaint. He also said that both Alert and Maxi Taxis had previously been reviewed, unlicensed services had been identified and an action plan had been put forward to deal with these.

[98] There was further discussion as to the circumstances of the events of 24 March 2014, including Mr Collie's statement that Mr Lawson had admitted to him that there was no summons. Mr Lawson denied making this statement. He stated that Mr Collie's recollection of events was light and bereft of detail. He repeated that he had discussed work issues with Mr Collie, one of which related to a rogue taxi driver at the Whangarei Airport, and that this led to him phoning Mr Van Heiningen to obtain the relevant registration number. He repeated the fact that the topic of Mr Hendry's OIA request arose towards the end of the conversation.

[99] Asked if Mr Collie had fabricated his account, Mr Lawson said that was a big call, but suggested Mr Collie's memory may be failing.

[100] Then Mr Pearks indicated he wished to check the key points Mr Lawson had made; he went through each of these and Mr Lawson confirmed his account. That led to further discussion as to the service of the summons by Mr Van Heiningen.

[101] Mr Pearks asked Mr Lawson whether he had anything further he would like to add. Mr Lawson was provided with an opportunity to meet privately with his support person. Upon resuming the meeting, Mr Lawson said that he and Mr Jessup felt it was not necessary to provide any further statements or to make a written statement. However, he wished to clarify one point, relating to a note Mr Henderson

made after his conversation with Mr Lawson on 24 March 2014. Mr Henderson had recorded, as an example of a mistruth, that Mr Lawson had said he could not make a response in writing because he only had a small phone key board; yet Mr Henderson could hear a Windows programme starting up in the background. Mr Lawson said that may have been him, but in any event he had difficulties accessing work emails (such as Mr Henderson's) through his home computer. He said he sent an email about this to the Help Service Desk, which he produced.

[102] Mr Pearks then confirmed that he would not make a decision at that stage, but would need to consider the information which had been provided. There was then a discussion concerning whether Mr Lawson's initial OIA request remain in effect, so that any other documents which might be obtained could be forwarded to him. Mr Henderson suggested that his OIA request should be renewed.

[103] Clarification was sought as to whether there would be an investigation of the Green Cabs' and Korucabs' issues to which Mr Collie had referred. Mr Pearks confirmed that he was not considering those issues; he said the only matter that was material were the issues raised in the letter which he had sent to Mr Lawson.

Meeting between Mr Pearks, Mr Henderson and Ms Brown

[104] On 5 May 2014, Mr Pearks met with Mr Henderson and Ms Brown to discuss what had taken place at the investigation meeting. In course of that meeting Mr Pearks described the concerns and difficulties that in his view arose from Mr Lawson's explanation; Ms Brown recorded these. Specifically, it was noted:

a) Mr Lawson's answers had been short and brief, giving an impression of being obstructive and concealing the truth by omitting information unless it was directly asked of him. This seemed to be a strategic move, and one which was not conducive to an employee who wanted to exonerate himself, and retain faith and trust from the Agency. The only occasions where anything more than what was required was offered, was when it served Mr Lawson's needs.

b) Mr Lawson had been a police officer before working for the Agency and by his own admission had received "hundreds" of summonses. Yet he did not question the validity of the document served on him.

c) He did not check to see who the summons was from, whether it was on a letterhead, and took it at face value. He did not retain it, even though the circumstances were "odd".

d) When he had been advised that Mr Henderson would be speaking to him about the Hendry compliant, he did not take time to look over the file or discuss it with Mr Collie. Therefore he was unable to answer Mr Henderson's questions as he was unable to recall anything. This seemed "downright bizarre", especially from a former police officer. It was also disrespectful to senior colleagues.

e) Mr Lawson did not think it relevant to talk about the summons when Mr Henderson spoke to him about the Hendry complaint. It was drawing a long bow to say that he was "put on the spot" and did not necessarily connect the issue of Mr Hendry's concerns with the fact he had been summoned.

f) Mr Lawson claimed he had not bothered to ask Mr Van Heiningen why he wanted Mr Lawson to appear at the Disputes Tribunal on his behalf. He claimed that he gave evidence with no context as to what was wanted from him. This was considered "bizarre" given his employment history and his naturally questioning nature.

g) His memory for events seemed extremely poor for a former police officer, or anyone in his position. He claimed that his recall had improved over the previous month. However, these were in respect of matters that were helpful to him.

h) He was able to produce text messages between himself and Mr Van Heiningen that backed up his claims regarding the conversation he had with Mr Van Heiningen in front of Mr Collie, but he had no record on his phone of the other text messages that appeared in his phone records between the two of them.

i) Mr Collie's statement regarding the conversation he witnessed was refuted by Mr Lawson but there was no reason why Mr Collie would make up such an explanation – there was no bad history between the two which would encourage Mr Collie to incriminate Mr Lawson. Mr Pearks could not think of anything else he would gain by doing so; by contrast there was a "huge motivation" for Mr Lawson to be lying about his version of events, as he needed Mr Van Heiningen to back up his story. That was why he was explicit in telling Mr Van Heiningen what to say if asked.

j) Mr Pearks concluded that he was unable to believe much of what Mr Lawson had said. He found it hard to accept that someone with his questioning and careful nature would blindly accept a summons in the circumstances which had arisen.

k) When reviewing all the information, Mr Pearks considered that on the balance of probabilities Mr Lawson was lying about his involvement in the incident, and that he was withholding information from the Agency. Mr Pearks considered he had to assume this was because Mr Lawson knew his behaviour was unacceptable and in breach of the Code of Conduct. He accordingly did not have trust and confidence in Mr Lawson as an employee of the Agency.

l) The other option, and one which Mr Lawson was effectively presenting, was that Mr Lawson had not lied but had made a series of bad judgement calls. However, he had taken no responsibility for these, nor admitted he had made a mistake or learnt from what had occurred. He did not show a willingness to make amends or acknowledge an

error. In fact he was defensive and unhelpful to the point of being obstructive. If this account were to be believed, then there was a risk to the Agency as Mr Lawson's judgement was "extremely questionable" as was his commitment to the Agency's expectations. On that alternative basis he would not have trust and confidence in Mr Lawson as an employee.

[105] Mr Pearks then decided that Mr Henderson should interview Mr Van Heiningen, since this had been requested by Mr Lawson. Mr Pearks asked Mr Henderson to focus on questions concerning the summons, his relationship with Mr Lawson, and what he recalled of the Disputes Tribunal hearing when Mr Lawson gave evidence. He said he wanted to hear what Mr Van Heiningen had to say and whether his answers could provide useful information.

[106] On 8 May 2014, Mr Lawson wrote to Mr Pearks requesting under the OIA any and all information relating to the inquiry, as it came to hand.

[107] Also on 8 May 2014, Mr Henderson interviewed Mr Van Heiningen. Mr Henderson took notes and subsequently typed these up. But his notes were not available for the further meeting which was to take place with Mr Lawson on 14 May 2014. Rather, Mr Henderson gave Mr Pearks a verbal briefing as to what had been said and his thoughts about the interview. Since Mr Henderson did not attend the outcomes meeting, it is appropriate to record Mr Pearks' understanding of the interview with Mr Van Heiningen as it was this information which he relied on when making his decision.

[108] Mr Pearks said that the main points he took from that briefing were:

a) Although Mr Van Heiningen essentially endorsed what Mr Lawson had said in relation to the summons, there were some critical differences.

b) Mr Van Heiningen said that the summons had been served outside while Mr Lawson had been having a cigarette; Mr Lawson had said the summons had been served in the Agency's reception area.

c) Mr Van Heiningen said that the summons had been served on Alert letterhead, which was distinctive and it was bright yellow and red; Mr Lawson had said that the summons had been served on blank paper.

d) Mr Van Heiningen said the document had been served some days prior to the hearing; Mr Lawson had said it had been served the day before the hearing.

e) Mr Van Heiningen emphasised that he and Mr Lawson were not friends, and appeared to be "quite over-the-top" in his comments about this. Mr Henderson considered these statements to be exaggerated and lacking in sincerity. Moreover, it was information that had been volunteered without a relevant question being put to him by Mr Henderson.

f) Mr Van Heiningen had been unable to recall any of the details as to what was in the summons.

g) Mr Van Heiningen said it had been his lawyer's idea to ask Mr Lawson to appear.

[109] Mr Pearks considered it strange that his lawyer did not arrange for Mr Lawson's appearance, or prepare a summons for that purpose. It was also strange that no copy of the summons had been kept by Mr Van Heiningen, even though he had created the document. This contrasted with a later statement which he had made that he used advanced technology to retain information relating to his business; thus he had copies of relevant documents to call on at all times.

[110] Mr Pearks concluded that the information derived from Mr Van Heiningen did not alter his thinking in any significant way; rather it tended to confirm that Mr Lawson had not been telling the truth about the summons, this being reinforced by the disparities in detail between Mr Lawson and Mr Van Heiningen. He believed there was no actual summons, and the story that there was one was concocted after the events had occurred to try and explain why Mr Lawson had attended the hearing

in support of Mr Van Heiningen. He also found Mr Van Heiningen's explanation difficult to believe: he had prepared the summons himself despite acknowledging he did not know about the legal process, and he had not retained either a paper or electronic copy of the document.

[111] He also considered Mr Collie's statement to be credible, and "at the very least plausible". It was agreed there was a call between Mr Lawson and Mr Van Heiningen, and that Mr Collie witnessed it. It was also agreed there had been some discussion about the summons. From thereon there was a divergence. He preferred Mr Collie's version for these reasons:

a) Mr Collie had taken notes of the conversation immediately after the discussion occurred.

b) He understood that Mr Collie contacted Mr Henderson the same day to ensure the information was passed on as soon as possible.

c) Despite discussing Mr Hendry's complaint and dispute with Alert, as well as at the Disputes Tribunal hearing with Mr Henderson on the day of the conversation, Mr Lawson had failed to mention that he had spoken to Mr Van Heiningen earlier that morning.

d) Mr Collie had nothing to gain by divulging the information, and Mr Lawson had not produced anything at the meeting of 2 May 2014 to cause him to question Mr Collie's credibility.

e) Mr Collie's statement was also consistent with his own initial view that Mr Lawson was not telling the truth about the summons.

[112] Mr Pearks also formed an initial view that despite what Mr Lawson and Mr Van Heiningen had to say about their relationship, their actions as he understood them to be suggested they were closer than their respective roles in the industry justified; this had compromised decision-making. Mr Pearks was inclined to believe Mr Lawson did have an inappropriate relationship with Mr Van Heiningen. He did

not believe Mr Lawson had been summoned. It followed he attended the civil hearing on behalf of Mr Van Heiningen simply because he was asked to do so. He had specifically told his team members not to be involved because there was a civil matter, yet he did so. Mr Lawson had initially claimed he had not spoken to Mr Van Heiningen before the hearing, but then claimed that they had spoken once, and later suggested this could have been more than once. He also said they had not discussed why he was to attend the hearing, although he later said otherwise. Mr Pearks considered Mr Lawson was trying to hide the true nature of the relationship.

[113] As he accepted Mr Collie's account of the telephone call on 24 March 2014, he concluded that Mr Lawson had colluded with Mr Van Heiningen and told him what to say to justify his appearance at the hearing. That was a further aspect of an inappropriate relationship with Mr Van Heiningen.

[114] Although concerned about Mr Hendry's allegation that Mr Lawson had allowed himself to be introduced incorrectly at the Disputes Tribunal hearing, because Mr Lawson had appeared unable to recall exactly what had been said and gave different answers to Mr Henderson on this topic, and because a Disputes Tribunal transcript was not available, this was an issue that could not be followed up further. Mr Pearks said it was not something on which he focused.

Outcomes meeting: 14 May 2014

[115] On 9 May 2014, Mr Pearks sent a further letter to Mr Lawson inviting him to attend a second meeting. The letter repeated that the Agency had received allegations that Mr Lawson may have acted in breach of the Code of Conduct, and that these had been outlined in the Agency's earlier letter of 9 April 2014. It stated that if Mr Lawson was found to have acted as alleged, it could be concluded there was serious misconduct, and that there could be disciplinary action up to and including summary dismissal.

[116] On 12 May 2014, Mr Lawson wrote to Mr Pearks, following up on his disclosure request of 8 May 2014. He said he had received disclosure prior to the first meeting, but nothing since, so that he assumed no further information had been obtained. He asked for confirmation of this. He said that if he was to be the subject

of an adverse finding at the upcoming meeting, he would in fairness like an opportunity to read any additional material which had been gathered, before attending. He said his preference was "not to be ambushed … on the day". Mr Pearks responded that day stating that he was not aware of any additional meeting notes that were available. He said he did know that Mr Henderson had met with Mr Van Heiningen in the previous week, but he had not been provided with any notes. Mr Lawson would be furnished with any copy as soon as they became available. He said there was no intention to ambush him.

[117] The outcomes meeting was held on 14 May 2014; it was attended by Mr Pearks and Ms Brown on the one hand, and Mr Lawson and Mr Jessup as his support person, on the other.

[118] The meeting was in two parts. Mr Lawson wished to record the meeting, and this happened in respect of the second half; his support person, Mr Jessup was the only person to have recorded the first part, making notes as the meeting progressed. His notes do not purport to be a verbatim transcript, and in some respects are difficult to follow.

[119] Of the four persons who attended the meeting, three of them gave evidence: Mr Pearks, Mr Lawson and Mr Jessup. There are some differences in their accounts; these are relevant in respect of the first part of the meeting since it was not fully recorded.

[120] What occurred at that stage was important, and it will be necessary to discuss the details more fully later. At this point, a summary will suffice.

[121] The initial phase of the meeting lasted approximately ten minutes.

[122] All parties agree that at the outset Mr Pearks explained that the purpose of the meeting was for him to set out his preliminary conclusions, and for Mr Lawson to provide any further comment that he wished to give, before Mr Pearks formed a final view.

[123] It is also common ground that Ms Brown then explained that all the information would need to be considered; other people had been spoken to which created a clear picture which allowed a conclusion to be reached on the balance of probabilities.

[124] Mr Pearks stated that Mr Van Heiningen had been spoken to by Mr Henderson in the previous week. Mr Pearks said he had reviewed the facts and reached a determination; he said in evidence that this was a preliminary determination that serious misconduct had occurred.

[125] Mr Lawson then asked what the information was that had been relied upon and what was the misconduct. Mr Pearks explained that this was as outlined in the letter that had been sent to him earlier; Ms Brown clarified that this was the letter of 9 May 2014.

[126] Mr Pearks referred to some matters that were of concern to him, including the way Mr Lawson had supported Mr Van Heiningen and had not supported Mr Hendry; that there were questions about the summons and the way he has responded to it. He referred to the fact that Mr Van Heiningen had said that the summons was signed and presented on an Alert letterhead.

[127] Discussion followed as to whether the summons was valid, even if not issued by the Tribunal. Mr Lawson said he was clearly given a piece of paper to go to court. He had not checked it to see whether it was valid. Mr Lawson said this was not serious misconduct; he would not have attended the hearing if he had not been given that document.

[128] Ms Brown explained that there was not only the issue of the summons, but that there were a "few incidents" making up the serious misconduct.

[129] Then Mr Pearks stated a letter would be sent to Mr Lawson advising him as to the outcome of the meeting, by the end of the week. Mr Lawson responded to this by stating that once he had heard from Mr Pearks in writing, he would provide his own response in writing.

[130] Mr Pearks stated that there were trust and confidence issues as to how he had acted. He referred to the fact that Mr Lawson had been evasive; initially he said he could not recall matters, but as time went on he had apparently been able to do so.

[131] Mr Pearks said that if Mr Lawson had been served a document by Mr Van Heiningen, he should have checked the document.

[132] Then there was reference to the fact that although he had been told by Mr Barber that Mr Henderson would be interviewing him, Mr Lawson had said that he had been put on the spot when questioned about what had happened, the inference being that he should not have been in a position where he repeatedly said that he could not recall aspects of matters about which he was being questioned.

[133] That concluded the first part of the meeting.

[134] In evidence Mr Pearks said that he used the original letter of 9 April 2014 as a guide to the structure as to what he had said, that he outlined the allegations against Mr Lawson and the consequences if those allegations were substantiated with reference to the Code of Conduct. He said he also referred to the document of 5 May 2014 which summarised his concerns as to Mr Lawson's explanations; he said he went through these concerns and explained why he did not find Mr Lawson's explanation credible. He says he also asked Mr Lawson if there was anything further he wished to say before he made a final decision. He said he found Mr Lawson "very closed and unwilling to volunteer any information".

[135] However, when giving his evidence Mr Pearks confirmed that the conversation in the first phase of the meeting was "disconnected"; and that he had not referred to all aspects of his document in which he had analysed Mr Lawson's explanations. I shall discuss this evidence shortly.

[136] During the break which followed the first part of the meeting, Mr Lawson and Mr Jessup decided there were several questions that should be asked. As soon as the meeting resumed, Mr Lawson asked those questions.

[137] The first was whether Mr Pearks was looking to dismiss him. Mr Pearks responded by stating that the first stage was for him to provide any comment; and he said that serious misconduct would lead to termination of employment.

[138] Then Mr Lawson asked what "failing to declare a conflict of interest" meant. Mr Pearks responded by stating that this arose where Mr Lawson had an interest with another party that was not in keeping with the way the Agency undertook its business or decision-making capability. Mr Pearks confirmed that in his view, this is what had occurred.

[139] Then Mr Lawson asked what was meant by giving "false or misleading information to stakeholders or customers". Mr Pearks explained that because Mr Lawson attended the Tribunal fixture on behalf of one party and not the other, the Agency had sought information about what had occurred and considered Mr Lawson had given misleading information. Ms Brown said that when Mr Henderson spoke to him about the Hendry complaint, he had provided false or misleading information. Mr Pearks said he did not want to re-litigate the matter, but in the Agency's opinion one of the most substantial issues concerned the summons.

[140] At this point Mr Jessup asked what form the letter would take, that is would it be a dismissal letter, or would it be providing further opportunity to comment. Mr Pearks stated that it would be a "termination of employment" letter. The letter would contain his decision, and it would be in writing. Mr Lawson asked him to confirm that decisions had already been made and Mr Pearks confirmed he had.

[141] Mr Lawson asked whether the decision to dismiss him had been made prior to the meeting, and prior to disclosure having been given. Mr Pearks said that if a conclusive decision had been made before the meeting, Mr Lawson would have been provided with a letter at the meeting. He then said that Mr Lawson had been given an opportunity to comment should he wish to do so, and that he had chosen not to do so. Mr Pearks said that he had made his decision which he had conveyed, and that this would be confirmed in the letter which Mr Lawson would receive. He said that termination would be immediate.

[142] It was at that point that Ms Brown referred again to information which Mr Van Heiningen had provided when he spoke to Mr Henderson. She said that on the matter of the summons, Mr Van Heiningen had said that he had served the summons on Mr Lawson outside the Agency's office where he apparently found Mr Lawson smoking. Mr Lawson responded by stating that was possible, but that he could not remember. Ms Brown stated that the result had not changed because what he was saying was the same as what Mr Lawson had said.

[143] Mr Lawson asked for clarification as to why it was considered he had lied about the summons, when his account had been substantiated. Mr Pearks said that he supposed that this was because there was no summons.

[144] Ms Brown said the two other issues which arose were the giving of false and misleading information to Mr Henderson and to Mr Pearks/Ms Brown; and failing to declare a conflict of interest that affected performance and judgement.

[145] Ms Brown then said that they would forward a copy of the notes of the interview with Mr Van Heiningen but they had confirmed what he had said, and it had not affected the Agency's finding. The problem was that neither party had been able to produce a summons.

[146] Mr Lawson then spoke, stating that he was shocked at the outcome, and that he had considered the allegation that he had a relationship with Mr Van Heiningen outrageous, as was the assertion that he had given false information to Mr Henderson when he came and spoke to him, particularly as to the summons. There was then discussion as to the logistics of the termination of his employment.

[147] Finally, Mr Lawson said that he wished now to produce an email from Mr Collie, which he said set out Mr Collie's concerns that there was no chance of a career progression for him. He said that it showed Mr Collie had a motivation to try and discredit Mr Lawson, so that he would have an opportunity of taking over Mr Lawson's job. Asked why he had not produced this information earlier, he said that he thought that the facts would come out with a proper investigation. He

suggested that this should cause reconsideration of the validity of the information which had been provided by Mr Collie.

[148] However, Ms Brown then emphasised that the decision had not been made lightly. She said that following the first meeting, she and Mr Pearks had gone their separate ways, so they could reflect on what they had heard before a decision was made. When they next met they decided to obtain information from Mr Van Heiningen. This led to a further discussion as to what he had said. Then Ms Brown stated that a letter would be sent by the end of the week confirming the conversation which had occurred at the disciplinary meeting.

Subsequent events

[149] Later that day, Mr Lawson sent Mr Pearks a letter advising him of a personal grievance which he said he was raising, although he had yet to receive a formal letter terminating his employment. He said that the investigation had not been conducted in an objective, impartial or fair manner, and that a decision had been made without all of the available information being fully disclosed to him, which brought into question the integrity of the entire investigation and those involved. He said that the termination decision was unjustified and unfair, and that unjustifiable actions had taken place which had severely disadvantaged him.

[150] On 15 May 2014, Mr Pearks wrote to Mr Lawson. He referred to the letter of 9 April 2014, and repeated the three allegations which had been raised against Mr Lawson.

[151] He referred specifically to the meeting of 2 May 2014 and then the meeting of 14 May 2014, which he said took place so that he could:

> … verbally advise you that the allegations were substantiated and my preliminary decision was to dismiss you. At this time I gave you another opportunity to provide me with any further information related to these allegations and any response to my preliminary decision to convince me that dismissal was not the right outcome. I allowed you some time to consider a response however nothing was forthcoming and on consideration I was not persuaded to change my preliminary decision. I subsequently verbally confirmed my decision to dismiss you without notice.

[152] He went on to say that having considered his decision overnight he was now writing to confirm his preliminary decision which he had communicated, and that he had concluded that Mr Lawson had acted in a manner that seriously breached the Agency's Code of Conduct. He considered that summary dismissal was the only option.

Submissions

[153] In his closing submissions, Mr Lawson summarised his concerns overall as follows. He said the hearing had been about a loyal and hardworking employee who had worked for one of the largest and most well-resourced government agencies in the country. He was tireless and dedicated, and had achieved great outcomes for his employer over a seven-year period.

[154] At the end of that period, a seemingly routine and innocuous interaction between another employee and a member of the public had a devastating knock-on effect that resulted in him being immediately dismissed for serious misconduct. He was shocked because he genuinely believed he had done the right thing, and had acted honestly and in good faith.

[155] He said that he had been treated unfairly, and that his employer had conducted an employment investigation "full of rumour, scuttlebutt, innuendo and assumptions". He felt worthless, and that his employer had no intention of taking his explanations seriously. He felt that he had been "shafted" by his employer, and that it had not met its obligation to be a good employer by conducting a full and fair investigation. He asserted there had been a gross injustice.

[156] Then he reviewed the history of events in detail, considering each step of the review and the disciplinary process which the Agency had undertaken. He submitted that there were multiple flaws at each and every stage. It will be necessary to consider these assertions in detail shortly.

[157] For the Agency, Mr Cain submitted in essence that the decision to dismiss Mr Lawson was both procedurally and substantively justified.

[158] Mr Cain said that the Agency's decision to dismiss Mr Lawson for serious misconduct was one that a fair and reasonable employer could have made in all of the circumstances. He also said it was reasonable for the Agency to conclude that he had been dishonest about the existence of a summons, so that he misled the Agency when questioned about this during the process review and subsequent investigation; and that he had a personal relationship with Mr Van Heiningen that was inappropriate for a regulator and external shareholder which constituted a conflict of interest.

[159] It was submitted that the Agency conducted a fair process and ensured that it sufficiently investigated the matter by raising its concerns with Mr Lawson, giving him a reasonable opportunity to respond and by genuinely considering his explanation before coming to a decision. Accordingly, there was no valid personal grievance for unjustified dismissal.

[160] If, alternatively, the Court found there was a personal grievance, which was denied, detailed submissions as to remedies were made.

Relevant legal principles as to justification

[161] Section 103A of the Employment Relations Act 2000 (the Act) provides that the question of whether a dismissal or an action was justified must be determined on an objective basis by applying the test in subs 2 which provides:

> **103A Test of justification**
>
> …
>
> (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
>
> …

[162] The section goes on to stipulate four factors which the Authority or Court must consider namely:

> …
>
> (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the

employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[163] The Court may consider any other factors it thinks relevant. It cannot determine that a dismissal or an action is unjustifiable solely because of defects in the process followed by the employer if the defects were minor, and did not result in the employee being treated unfairly.

[164] It is not for the Court to substitute its decision for what a fair and reasonable employer could have done in the circumstances, and how such an employer could have done it. In *Angus v Ports of Auckland Ltd* it was emphasised there may be a range of responses open to a fair and reasonable employer, and that the Court's task is to examine objectively the employer's decision-making process and determine whether what the employer did, and how it was done, were steps which were open to a fair and reasonable employer.[7]

[165] Recently, the Court of Appeal emphasised this point in *A Ltd v H*.[8] It said:[9]

> It is apparent that the effect of the statute is that there may be a variety of ways of achieving a fair and reasonable result in a particular case. As the Court in *Angus* observed, the requirement is for an assessment of substantive fairness and reasonableness rather than "minute and pedantic scrutiny" to identify any failings.

[166] Dicta of the Court of Appeal in an earlier case, that of *Air Nelson Ltd v C* is also of assistance:[10]

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7 *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, [2011] ERNZ 466 at [36] – [44].

8 *A Ltd v H* [2016] NZCA 419, (2016) 10 NZELC 79-065.

9 At [46].

10 *Air Nelson Ltd v C* [2011] NZCA 488, (2011) 8 NZELR 453 at [19].

> Section 103A requires the Court to undertake an objective assessment both of the fairness and reasonableness of the procedure adopted by [the employer] when carrying out its inquiry and of its decision to dismiss [the employee]. Within that inquiry into fairness and reasonableness the Court is empowered to determine whether [the employer] had a sufficient and reliable evidential basis for concluding that [the employee] had been guilty of misconduct.

Analysis of personal grievance claim

The process review

[167] Mr Lawson submitted that Mr Henderson's process review was unfair, for several reasons.

[168] The first of these was that Mr Henderson did not obtain full and accurate statements from the various people he interviewed. A related concern was that Mr Henderson had used subjective recording techniques which made statement analysis impossible.

[169] This criticism is one of a number which Mr Lawson made which I find were influenced by his experience as a police prosecutor. The statements which were taken by Mr Henderson for the purposes of a procedural review were not taken for the purposes of a potential prosecution relating to a criminal offence. Mr Lawson's criticisms may have been correct if Mr Henderson was taking statements for the purposes of a prosecution. A different standard may well apply to an employment-related process of the kind which Mr Henderson was undertaking. The issue is whether the statements which were taken were those which a fair and reasonable employer could take in all the circumstances.

[170] The key meetings or conversations which Mr Henderson undertook were on 11 March 2014 (with Mr Collie, Mr Lawson and Mr Mabey); on 24 March (a telephone conversation with Mr Lawson); on 25 March (a telephone conversation with Mr Collie) and on 31 March (when a statement was taken from Mr Collie).

[171] Mr Lawson was particularly critical of the record of Mr Henderson's first interview with him. He asserted that this resulted in a summary which was incomplete and should not have been relied on subsequently.

[172] Mr Henderson accepted that the notes which he took of his conversation with each of Mr Lawson and his colleagues on 11 March 2014 did not record every word spoken, but he was confident that he had produced an accurate summary of the key parts of those conversations.

[173] Later, during the investigative process, and again during the hearing itself, Mr Lawson asserted that Mr Henderson's method of note-taking was short and selective; and that when it came to questions relating to Mr Hendry's complaint, the notes were in the end inaccurate because insufficient context was recorded. An illustration of this difficulty, Mr Lawson asserted, related to the frequent occasions Mr Lawson was recorded as stating that he could not recall key details relating to interactions with Mr Hendry and as to his appearance at the Disputes Tribunal hearing.

[174] The interview notes taken on 11 March 2014 show that Mr Lawson provided an overview of the regulatory environment for commercial transport, what his role involved, and of the strategic direction for compliance activities, together with related topics. When, however, the conversation turned to the complaint brought by Mr Hendry, the notes suggest that the nature of the responses from Mr Lawson changed, as did the mode of recording. From then on, questions and answers were recorded. Mr Lawson was frequently recorded as stating that he could not recall details about Mr Hendry's original complaint, or anything about him.

[175] It is evident that the adequacy of the interview notes was raised in the course of the disciplinary process by Mr Lawson, for instance at the first investigation meeting on 2 May 2014, and that the issue was fully considered by Mr Pearks.

[176] Despite Mr Lawson's attempt to assert that the interview notes were unfair, that criticism was not accepted by Mr Pearks at the time. He was well placed to assess the adequacy of Mr Lawson's response about not recalling particular matters. It is evident that Mr Pearks considered there was a significant pattern to these; he also was well placed to consider Mr Lawson's assertion that Mr Henderson had failed to record context. Having regard to the evidence heard by the Court, I am satisfied that a fair and reasonable employer could have concluded that the responses

given by Mr Lawson were reliably recorded by Mr Henderson. I reach the same conclusion as regards the record of Mr Henderson's interviews with Mr Collie and Mr Mabey, for the same reasons.

Pre-determination by Mr Henderson

[177] A second and related issue raised by Mr Lawson was that there was in Mr Henderson's various interview and file notes, a liberal use of opinion statements which were unsubstantiated and therefore prejudicial and unfair.

[178] This allegation arises because of the somewhat unusual practice adopted by Mr Henderson, where at the conclusion of an interview he recorded his "thoughts".

[179] Analysis of these opinions shows that by the end of the first interview, Mr Henderson considered that the references to the summons was "a total fabrication and not well prepared for". Following his second interaction with Mr Lawson, he believed he was being told "more mistruths", although he was "confused" as to some aspects of the information with which he was provided. This meant he would need to obtain copies of Mr Lawson's webmail and phone records.

[180] After Mr Collie contacted him on 25 March 2014 as to what had occurred in the telephone conversation on the previous day between Mr Lawson and Mr Van Heiningen – a conversation which Mr Lawson had not disclosed to Mr Henderson when the two had spoken on 24 March 2014 – he recorded the concerns which arose at that time. He recognised there was an issue as to whether Mr Collie could be taken at his word; but he also considered Mr Lawson had lied to him and to Mr Hendry over whether a summons existed.

[181] Although Mr Henderson was more cautious when formulating his conclusions in the report he submitted to Ms Patrick, sent on 1 April 2014, he did say that "new information has come to my attention around the attendance of T. Lawson at the Disputes Tribunal that I believe warrants further investigation".

[182] It was Mr Henderson's concerns which became the focus of the disciplinary allegations which were set out in the Agency's letter to Mr Lawson of 9 April 2014.

[183] Mr Henderson continued to be actively involved in conducting further enquiries. On 7 April 2014, he told Mr Thompson that one issue he was "trying to head off" was to the effect that Mr Van Heiningen had served a summons which would not be noted by the Registrar until a copy of the relevant form had been returned. This language, as was the case following his earlier interviews, suggested he had formed a clear view as to Mr Lawson's lack of veracity.

[184] Such a conclusion is reinforced by exchanges which took place in this period between Mr Henderson and Mr Colin Jessup, a Transport Officer who worked in the Auckland office of the Agency.

[185] Mr Jessup became involved in these events in several respects. First, he dealt with Mr Hendry's OIA request as from 25 March 2014. Secondly, on 24 March 2014 Mr Collie confided in him that he had overheard Mr Lawson telling Mr Van Heiningen by telephone what to say if asked by the Agency questions regarding service of a summons. Thirdly, he ultimately became Mr Lawson's support person in late April 2014 for the purposes of the disciplinary process which was instituted by the Agency.

[186] There were two candid conversations between Mr Henderson and Mr Jessup. In the second of these, on 14 April 2014 which preceded the disciplinary investigation, Mr Henderson told Mr Jessup he did not believe Mr Lawson was telling the truth. There is controversy as to whether Mr Jessup also criticised Mr Lawson's truthfulness in the first of these conversations, and that at the same time Mr Henderson had used language indicating that he would "get" Mr Lawson.

[187] Then, in late April 2014, Mr Jessup telephoned Mr Henderson to tell him he had become Mr Lawson's support person. He referred to the previous conversations, stating that these should be regarded as personal and confidential. Mr Henderson agreed.

[188] Since Mr Jessup initiated the telephone call to Mr Henderson which led to their unusual agreement as to confidentiality, I find that it is more likely than not that Mr Jessup had criticised Mr Lawson. But for present purposes, the main point is that

Mr Henderson had freely volunteered to Mr Jessup his opinion that Mr Lawson had lied, and it is probable he also indicated that he would establish that this had occurred.

[189] There is no doubt that Mr Henderson held a firm view as to Mr Lawson's truthfulness from the outset of the review.

[190] However, whether those views were ultimately significant, so that it could be concluded that the process undertaken for the Agency became flawed through pre-determination, is a question which has to be assessed in the context of later events. I shall return to this issue later.

Initiation of disciplinary process

[191] As already recorded the Agency wrote to Mr Lawson by letter dated 9 April 2014, raising allegations which it indicated could be considered as serious misconduct under the Agency's Code of Conduct.

[192] There are two criticisms made by Mr Lawson about this aspect of the process. The first is that the letter proposed an investigation meeting on three working days' notice, that is, on 14 April 2014. But as it transpired, that meeting did not take place until 2 May 2014, by which time Mr Lawson had raised and had received relevant documents under an OIA request; and he had arranged a support person. There can be no valid criticism as to the effective notice which was given prior to the first investigation meeting.

[193] The second criticism related to the fact that Mr Lawson was told he could take leave on pay until the process concluded, but if he did not do so consideration would need to be given to suspending him. He chose the former. Although he believed he had no choice, I attribute no significance to this step since he could have indicated that he would not take leave as offered, and it is probable the Agency would then have undertaken due process with regard to any issue of suspension.

Disclosure issues

[194] In response to an OIA request made by Mr Lawson, a courier pack of information was sent to him which he received on 23 April 2014.

[195] There are several issues which arise from this material. The first is that Mr Lawson asserted there was no "investigation file or plan in the disclosed material, and no job sheets to show that a systematic investigation was being conducted". This is another example of an approach to an investigation which might be expected of a police officer; but it is not necessarily what could be expected of a fair and reasonable employer. I find that in the circumstances of this case, such an approach was not required.

[196] Secondly, Mr Lawson referred to the fact that Mr Collie's statement of 31 March 2014 which described the telephone conversation he overheard between Mr Lawson and Mr Van Heiningen, referred also to an assertion by Mr Collie that there were other instances where Mr Lawson's integrity had been questioned. He referred to certain matters involving Green Cabs and Korucabs. I shall return to evidence concerning these allegations later, since the parties gave and led evidence on these topics to support their various assertions as to credibility. At this stage it suffices to say that these additional concerns as raised by Mr Collie were not considered relevant for the purposes of either the review process or the disciplinary process instituted by the Agency. In my view, Mr Pearks could not be criticised for maintaining his focus on the particular matters that had arisen from Mr Hendry's complaint; a proper inquiry did not require him to investigate those issues as well.

[197] The third factor arising from the disclosure is that Mr Henderson's interview notes, containing his "thoughts" were disclosed. This ensured transparency in that Mr Lawson was thus well aware of those opinions. Although that is not a complete answer to any potential issues of pre-determination, it does mean Mr Lawson was informed as to the concerns which gave rise to the allegations he was facing.

Issues relating to the investigation meeting of 2 May 2014

[198] The first matter raised by Mr Lawson with regard to the meeting itself was that the Agency should have "re-interviewed witnesses and conducted quality investigative interviews". He said that "ethical interviews and recordings" were essential to the conduct of a fair and impartial employment investigation.

[199] While these requirements may apply in respect of a police investigation, it does not follow that an employer must necessarily do likewise. Such a question is answered by considering what a fair and reasonable employer would have done in all the circumstances.

[200] I have already touched on the question as to whether Mr Henderson's interview notes were adequate, and on the key issues, accurate. I have found in respect of the first interview of Mr Lawson himself they were; and I have made the same finding with regard to the other interviews which he carried out. Accordingly, I do not consider a fair and reasonable employer could be expected in all the present circumstances to re-interview persons who had already been questioned.

[201] There is a separate issue relating to the issue of whether Mr Van Heiningen should have been interviewed; but that was to come later and I will comment on the adequacy of that aspect of the process then.

[202] Next, Mr Lawson submitted there was a procedural flaw because a transcript of the Disputes Tribunal hearing – which had been obtained by the time of the Authority's investigation meeting but was not available to the Agency at the time of the disciplinary process – should have been obtained. A related criticism is that the allegation referred to in the Agency's letter of 9 April 2014 (that Mr Lawson allowed himself to be introduced to the Tribunal hearing without correction as an advisor to the then Minister of Transport and a significant senior manager at the Agency, and in doing so placed the Agency in a position where it was at risk of being brought into disrepute) was not put expressly to Mr Lawson for response.

[203] This criticism is answered by the fact that Mr Pearks did not consider he had sufficient information which would have enabled him to form a view as to what occurred at the Disputes Tribunal hearing. He said that he based his decision to dismiss on the other allegations which were substantiated. If an allegation is not to be pursued, information about it need not be obtained and it need not be put. However, as I shall discuss with regard to the outcomes meeting, there is a question as to whether Mr Lawson should have been told this was no longer a live allegation.

[204] Mr Lawson also submits that he was not requested to make an "opening statement". A related submission was that the two allegations which were pursued were not "put" to him directly and/or that there was a failure to ask for or provide an opportunity to him to respond to each of those allegations.

[205] An analysis of the lengthy investigation meeting held on 2 May 2014 suggests otherwise. Four illustrations will suffice:

a) Towards the start of the meeting, Mr Pearks offered Mr Lawson the opportunity of going through the issues that had been raised, so that he could understand from Mr Lawson's point of view exactly what had happened. After a pause, Mr Lawson indicated that he would prefer that he was asked questions (reminiscent of a similar response given to Mr Henderson when he was first interviewed). He was thereby asked to make an opening statement. Furthermore, by the date of the meeting, Mr Lawson had been in possession of an outline of the Agency's concerns, and a significant range of documentation that explained those issues. He was in a position where it was reasonable to expect him to be able to provide a response.

b) As to whether issues relating to the existence of a summons were "put", there was careful questioning as to the form of the document which constituted the alleged summons, the identity of the person who served Mr Lawson, and when and where service had allegedly occurred. Then he was asked questions as to what he had said on earlier occasions on

this issue, which was relevant to the question of whether he had misled either Mr Henderson or Mr Hendry.

c) Similarly, detailed questions were asked of him concerning his telephone conversation with Mr Van Heiningen together with other interactions with him which were relevant to the question as to why he had attended the Disputes Tribunal hearing and whether Mr Lawson had a conflict of interest.

d) At the conclusion of the meeting, he was asked if there was anything else he wanted to add.

[206] The issue which Mr Lawson in effect raised was whether he was given a reasonable opportunity to respond to the Agency's concerns before dismissing or taking action against him, as required under s 103A(3)(c) of the Act. I do not consider that the Agency can be criticised for failing "to put" aspects of its concerns; what occurred was what could be expected of a fair and reasonable employer in the circumstances.

[207] Then Mr Lawson said that the style of questioning at the interview was inappropriate. He said that at times Mr Pearks and Mr Henderson "double teamed and spoke over themselves", and that there were examples of a question being asked by Mr Pearks and answered by Mr Henderson. Mr Lawson submitted that unprofessional and unfair interview techniques were adopted.

[208] I do not accept this submission. Whilst at times questions became searching and detailed, that was appropriate having regard to Mr Lawson's responses. On some occasions he was obviously evasive and unhelpful in his answers. This is evident from the notes which were subsequently made as to Mr Pearks' impressions of Mr Lawson's responses, which were as follows:

> [Mr Lawson] presented as quite unwilling to front up and be honest and open in his discussions with us. He had his letter inviting him to this meeting stating the allegations made against him and the potential breaches of the Code of Conduct. He was asked to present his side of the story but instead of offering this information he wouldn't answer unless [Mr Pearks] or [Mr Henderson] asked him a specific question. His answers were short and

> as brief as possible, again giving an impression of being obstructive and concealing the truth by omitting information unless it was directly asked of him. This seemed a very strategic move on his part, and not conducive to an employee that wants to exonerate himself and retain any faith or trust from the Agency. …

[209] Having observed Mr Lawson give evidence over a significant period, these conclusions are unsurprising. Moreover, Mr Lawson is articulate; he was well able to advance his point of view including when in a difficult situation such as an investigation meeting. Accordingly, I do not consider that criticisms as to the mode of questioning adopted at the first investigation meeting can be sustained.

[210] The final criticism made by Mr Lawson with regard to this meeting is that notes were only made occasionally. Mr Lawson referred to the fact that Ms Brown's record of the long meeting extended only to five pages of notes.

[211] Under its policy, "Resolving Performance and Misconduct Issues", the Agency states that during a disciplinary process, a written record is kept to provide clarity for everyone involved. The notes taken by Ms Brown in respect of the first meeting met that requirement. But more to the point, Mr Lawson himself took a recording of it; and there is no evidence that he was unable to refer to that recording thereafter, if necessary. No viable criticism can be raised in respect of this requirement.

[212] I am not satisfied that any of the criticisms advanced by Mr Lawson with regard to the meeting of 2 May 2014 are established.

Mr Pearks' provisional conclusions

[213] Mr Pearks, Ms Brown and Mr Henderson met on 5 May 2014, to discuss their concerns as to Mr Lawson's answers and attitude.

[214] These were recorded, and became the basis of the ultimate decision to dismiss. I have already described these conclusions in detail.[11]

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[11] At para [104] of this judgment.

[215] It is appropriate to consider the adequacy of those reasons as part of the Court's consideration of Mr Lawson's general submission that the Agency's processes were wholly inadequate.

[216] I am satisfied that Mr Pearks had information from which a fair and reasonable employer could conclude:

a) Having regard to the Disputes Tribunal Rules, a valid summons had to be issued by a Registrar.

b) In this case, the Registrar had held no summons for Mr Lawson.

c) Mr Lawson had instructed Mr Collie not to attend the hearing of a civil dispute unless summoned.

d) Mr Lawson did not produce a copy of the summons document which he had referred, which was implausible giving his experience and usual practice.

e) As an experienced police prosecutor for 10 years, he had considerable experience in relation to summonses, yet he was "apparently fooled" by a summons document drafted by a person who was not legally trained.

f) Mr Lawson, despite his careful nature and extensive experience, did not check or consider the validity of the summons.

g) Mr Lawson was apparently unaware as to why he was being summoned.

h) There were inconsistencies in Mr Lawson's various accounts as to the content of the summons, whether it was presented to him on letterhead, and how it came to be served on him.

i) Mr Collie's account of the telephone conversation between Mr Lawson and Mr Van Heiningen was more credible.

[217] As described earlier, at the end of the document Mr Pearks recorded his conclusion that, on the balance of probabilities, Mr Lawson was lying about his involvement in the incident, and had gone to lengths to keep it from the Agency. Accordingly, he did not have trust and confidence in Mr Lawson as an employee of the Agency. He also considered "For argument's sake" the other option, which was what Mr Lawson was presenting, that he had not lied but had made a series of bad judgement calls. However, he had taken no responsibility for these nor admitted a mistake or lessons learned. This too suggested his judgement was questionable as was his commitment to the Agency's values. Mr Pearks concluded that this too would be a case where he would not have trust and confidence in Mr Lawson as an employee.

[218] Having regard to all aspects of Mr Pearks' analysis, I consider the concerns which were expressed in the document which arose from the meeting of 2 May 2014 were conclusions that a fair and reasonable employer could reach.

Interview with Mr Van Heiningen

[219] To this point, Mr Van Heiningen had not been interviewed. Mr Lawson said at the time, and submitted at the hearing, that the investigatory process was thereby flawed.

[220] Mr Pearks stated that he had seen no need to speak to Mr Van Heiningen until he had spoken to Mr Lawson. He said he was also conscious that Mr Van Heiningen was a stakeholder and he did not wish to risk undermining Mr Lawson's position with an external party. He considered that if Mr Lawson had provided a plausible explanation, it may not have been necessary to raise the matter with Mr Van Heiningen at all.

[221] In assessing this evidence, I note that it had been considered appropriate to interview Mr Hendry, and at an early point following his complaint to the Agency of March 2014. Thus, the Agency's initial review was extended to persons outside the Agency. Whilst Mr Hendry was the complainant so that it is understandable he would need to be interviewed at an early point, Mr Van Heiningen was also a key participant in the events which were the subject of the complaint. It might well have

been appropriate to interview Mr Van Heiningen at an earlier point. However, I do not find that this constitutes a procedural flaw. To do so would be unduly pedantic. The fact is that a decision to interview Mr Van Heiningen was eventually made in the course of the investigation which formed part of the disciplinary process. Accordingly, I accept Mr Pearks' evidence as to his approach to this issue. I do observe, however, the deferring of this interview to a late stage led to problems for the closing stage of the disciplinary process, as I will explain later.

[222] The transcript of the interview was not prepared until after the final outcomes meeting which was held on 14 May 2014. What is relevant for the purposes of that meeting is what Mr Henderson told Mr Pearks about this interview, as recorded earlier.[12] In summary, Mr Pearks concluded that Mr Van Heiningen's information and Mr Henderson's comments about how he provided that information tended to confirm Mr Lawson had not told the truth about the summons. That is, Mr Pearks relied on Mr Henderson's summary and opinion about Mr Van Heiningen's reliability.

[223] There are several issues arising from this interview which should be addressed now. The first relates to a submission made by Mr Lawson that Mr Van Heiningen was not interviewed adequately with regard to the disputed telephone conversation which Mr Collie overheard. The transcript records that the topic was raised and discussed. What Mr Henderson recorded Mr Van Heiningen as saying has to be understood in the context of an earlier phase of the interview when reference was made to the alleged serving of the summons. It would be unduly pedantic to criticise the scope of the questioning on that particular topic.

[224] Secondly, Mr Lawson highlighted Mr Van Heiningen's evidence to the Court when he said that what Mr Henderson had recorded was "completely false"; and that Mr Henderson was "not telling the truth".

[225] An example of this assertion was that Mr Van Heiningen had denied stating that the summons had been on an Alert letterhead and that it was bright yellow and red; yet this is what he was credited as having said.

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12 At paras [107] – [108] of this judgment.

[226] In my view, the information which Mr Henderson recorded with regard to the letterhead issue was specific and detailed. There is no reason why a fair and reasonable employer could not have proceeded on the basis that Mr Van Heiningen had indeed provided this information, and that Mr Henderson had recorded his response accurately.

[227] Mr Lawson also referred to the letterhead issue. He asserted that he received an Alert Taxi letterhead in the first disclosure pack. He also said that at the first investigation meeting on 2 May 2014, Mr Henderson had focused on the question as to whether the summons had been "on letterhead", rather than "on a blank piece of paper". Mr Lawson submitted in effect that it was Mr Henderson who introduced the idea of a summons being served on letterhead, and questioned him and subsequently Mr Van Heiningen on the basis of a pre-determined theory in the course of which he deliberately misrecorded Mr Van Heiningen's response.

[228] For his part, Mr Henderson was certain the Alert letterhead had not been sent to Mr Lawson when he first disclosed relevant documents. He also said that it was Mr Van Heiningen who told him about the use of an Alert letterhead. Additionally he said that it was only after that disclosure on 8 May 2014 that he referred to the issue of an Alert letterhead being used. It is correct that the first time an Alert letterhead was referred to in conversation with Mr Lawson was at the meeting held on 14 May 2014.

[229] Accordingly, I find that Mr Henderson's evidence is more reliable with regard to this issue. Both Mr Lawson and Mr Van Heiningen were incorrect in their respective assertions; it is significant that they both focused on this allegation.

Mr Lawson's OIA request of 8 May 2014

[230] I have already recorded that on 8 May 2014, Mr Lawson sent a further OIA request to Mr Pearks. When he responded on 12 May 2014, Mr Pearks referred to the fact of the meeting with Mr Van Heiningen in the previous week, but stated he did not have any notes of that meeting, but would furnish those as soon as they became available.

[231] It is now common ground that those notes were not made available prior to the outcomes meeting. Nor were Ms Brown's notes of the investigation meeting of 2 May 2014, nor were Mr Pearks' views as recorded on 5 May 2014. These were not forwarded until 4 June 2014.

[232] I do not regard the nondisclosure of Ms Brown's summary of the first meeting as being a matter of significance, since Mr Lawson had made his own recording of that meeting and there is no evidence that he could not have referred to it if need be.

[233] More significant, as I shall discuss shortly, was the nondisclosure of the summary of Mr Pearks' views of 5 May 2014, and the notes of the interview with Mr Van Heiningen incorporating Mr Henderson's reaction to his information of 8 May 2014.

Outcomes meeting of 14 May 2014

[234] In his submissions, Mr Lawson submitted that there were a variety of procedural flaws. These included alleged failures to formally record the meeting, to provide relevant documents as already discussed, or to properly disclose what Mr Van Heiningen had said. Mr Lawson also asserted that discussion about Mr Van Heiningen's comments occurred after he had been told that a decision to dismiss him had been made so that he did not have a proper opportunity of responding to that information before that decision was made. A related point was that a decision to terminate his employment had effectively made prior to the outcomes meeting.

[235] The first difficulty which arises with regard to a consideration of the final outcomes meeting, is that, as it transpires, the first short phase of the meeting which took place prior to the adjournment described earlier, was not recorded fully. Nor is there any evidence that Ms Brown who had made notes of key aspects of the first investigation meeting did so on this occasion, despite the requirement in the Agency's policy, "Resolving Performance and Misconduct Issues" that a written record was to be kept to provide clarity for all involved.

[236] The only person who did take any notes was Mr Jessup, Mr Lawson's support person. He was in a difficult situation, because not only was he taking notes, he was also assisting Mr Lawson. Inevitably his notes are incomplete. At times they are not easy to follow.

[237] Moreover, the witnesses were not accurate in their description of some aspects of the conversation which occurred.

[238] That said, I find that the topics which were discussed during the first phase of the meeting were as summarised earlier in this decision.[13] Although the absence of a formal record of the first part of the meeting has created obvious difficulties, I consider that in all the circumstances it amounts to a minor procedural flaw which did not, of itself, lead to unfair treatment of Mr Lawson.

[239] In his letter of 9 May 2014, which gave notice of the meeting, Mr Pearks said that its purpose was "to discuss the outcome of the investigation". Mr Pearks told the Court that he informed Mr Lawson and Mr Jessup at the outset of the meeting that he would explain his preliminary conclusions, and that Mr Lawson could then provide any further comment he wished to make before a final view was formed by him as decision-maker. The question is whether an adequate opportunity to do so was given.

[240] Another difficulty is that the first phase of the meeting was disconnected as Mr Pearks accepted. It was also compressed.

[241] I observe that there may well have been an issue as to the adequacy of the HR advice with which Mr Pearks was provided, since the problems which arose were foreseeable and avoidable.

Non-disclosure of the notes of interview with Mr Van Heiningen

[242] No notes of Mr Van Heiningen's interview were prepared and then provided to Mr Lawson before the meeting, despite Mr Lawson's second OIA request and Mr Pearks' assurance they would be provided as soon as they became available; nor

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[13] At paras [121] – [133] of this judgment.

was Mr Lawson informed about what was said during the interview, prior to the outcomes meeting.

[243] Mr Henderson said he was committed to a number of other matters at the time so that it was only later that his handwritten notes could be typed. Plainly, Mr Henderson ‘s handwritten notes could have been disclosed.

[244] There was discussion in the first part of the outcomes meeting regarding some only of the information which had been obtained from Mr Van Heiningen. Mr Lawson was told that Mr Van Heiningen’s account supported his account. Both he and Mr Van Heiningen were saying there had been a summons. However, what was not explained was that Mr Pearks had also concluded that the discrepancies in their respective stories were significant. This had led him to conclude that neither of them were telling the truth.

[245] The information obtained from Mr Van Heiningen served to reinforce the serious adverse conclusions which Mr Pearks had reached. Mr Van Heiningen’s evidence was important, because it was regarded in effect as ruling out the alternative scenario that Mr Lawson had advanced to the effect he made some bad judgement calls.

[246] This significant omission was catalysed by the fact that not only were the notes of Mr Henderson’s interview with Mr Van Heiningen not disclosed, nor were his “thoughts” which I find were conveyed to Mr Pearks and on which he relied.

[247] I return, therefore, to the findings I made earlier relating to Mr Henderson’s “thoughts”.[14] I have found that these had been strongly held from the commencement of the process review, and were evident again in his notes of the Van Heiningen interview.

[248] Although Mr Pearks said he was aware of Mr Henderson’s thoughts since these were endorsed on his various interview notes, copies of which Mr Pearks received, he said conclusions were independently reached. On the basis of his

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[14] At paras [178] – [189] of this judgment.

evidence to the Court, I accept that he did review carefully all the information he received, giving his own consideration to that information. In the case of the interview with Mr Van Heiningen, however, which proved to be critical, he received and relied on Mr Henderson's views; that was inevitable since he was not the person who undertook that key interview. Mr Lawson was entitled to be provided with access to information which was relevant to the continuation of his employment; that included those interview notes. This was an aspect of the duty of good faith duty described in s 4(1A)(c) of the Act.

[249] Mr Cain submitted that this non-disclosure of Mr Henderson's notes of interview with Mr Van Heiningen was not a material factor because Mr Lawson had given extensive comments to the Agency about the differences which existed between Mr Van Heiningen and Mr Lawson (for instance, the letterhead issue, and the date and place of service of the summons). Thus Mr Lawson had already provided full information about the alleged service of a summons. He could not realistically provide any new information about what Mr Van Heiningen was stating, without creating further inconsistencies.

[250] Counsel referred to the decision of Chief Judge Colgan in *Kaipara v Carter Holt Harvey Ltd,* where a long term employee was dismissed for a safety breach. [15] The employee complained that seven separate documents ought to have been disclosed. The Court commented:[16]

> It is correct that CHH did not furnish Mr Kaipara with copies of several documents prepared by it after the incident and in the course of its investigation of his misconduct. It follows, therefore, that Mr Kaipara did not have an opportunity to try to contradict any of these documents. CHH was obliged, pursuant to s 4(1A)(c) of the Act to do that which it did not, and that its failure was a breach of its statutory obligation of good faith in this respect. But it is another matter whether this breach should cause Mr Kaipara's suspension and/or dismissal to be found to have been unjustified.

[251] I find that the facts discussed by the Court in *Kaipara* are distinguishable from those in the present case. As I have explained, the issue was not just what Mr Van Heiningen had said regarding particular details of the summons, but also

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15 *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 40, (2012) 9 NZELR 545.
16 At [22].

significant were the inferences that Mr Henderson, and then Mr Pearks, had taken from this interview to the effect that this evidence served to reinforce their view that Mr Lawson had lied.

[252] I conclude that a fair and reasonable employer could not have omitted to disclose the full record of the Van Heiningen interview, including Mr Henderson's reaction which I have found was conveyed to Mr Pearks.

[253] Although Mr Henderson held a consistent opinion from the start of the process review that Mr Lawson was not telling the truth, a view which was confirmed by his interview with Mr Van Heiningen, I do not consider there was pre-determination of the ultimate issues which had to be reached. Mr Henderson was not the decision-maker. Mr Pearks held that role. He considered all the information he received carefully. He had reached a clear decision, at the very least on a provisional basis, by 14 May 2014. He was entitled to do so by then. But he considered it fair to put his provisional views to Mr Lawson for comment. It is the adequacy of that opportunity which became significant, rather than an issue of pre-determination.

[254] The failure to disclose the Van Heiningen notes is relevant to the question of whether Mr Lawson had an adequate opportunity to respond, but there is a yet further aspect of this issue, to which I now turn.

Non disclosure of all of Mr Pearks' views

[255] There is a question as to the extent to which Mr Pearks views as recorded in his memorandum of 5 May 2014, were outlined so that Mr Lawson could, if he chose to do so, respond. Some of these points were covered in the first phase of the meeting. However, Mr Pearks frankly conceded that three of the eight listed points were not put, and one was only put "slightly".

[256] He also accepted that other remarks that he had recorded were not explained to Mr Lawson. This included Mr Pearks' opinion that he assumed the reason Mr Lawson was lying was because he knew his behaviour, in attending the Disputes Tribunal hearing to give evidence, was unacceptable.

[257] Since there were aspects of Mr Pearks' ultimate conclusions about which Mr Lawson was not advised, I find he was not given an adequate opportunity to respond to those views.

Reference to the sending of a letter

[258] The next issue relates to the fact that in the first part of the meeting, there was reference to the fact that Mr Lawson would be sent a letter. It was apparently indicated that this would record the outcome of the meeting; and it would be sent by the end of the week. This indication was perhaps given on the basis that Mr Pearks wished to confirm that he had not yet reached a final conclusion, and/or would need to consider Mr Lawson's responses as given at the meeting. But the reference to the sending of a letter at an early point in the meeting led to confusion as to its purpose.

[259] It is apparent from what occurred during the break after the relatively short first phase of the meeting that Mr Lawson and Mr Jessup were unclear as to what was happening. This was reflected in the questions they prepared and which Mr Lawson then asked as soon as the meeting resumed.

[260] It is important to repeat what occurred next. First, Mr Pearks was asked if he was looking to dismiss Mr Lawson, a possibility which had not been discussed to that point. He initially confirmed "its termination employment [sic]". Then he said:

> I 'spose this stage was the opportunity of any comment you wanted to make then the next stage was what does that lead to. So serious misconduct leads to termination of employment.

[261] This exchange was followed by further questions as to what was meant when it was alleged that Mr Lawson had failed to declare a conflict of interest, and what was meant as to the provision of false or misleading information to stakeholders or customers. After providing an answer and when questioned further as to the nature of false or misleading information, Mr Pearks said he did not want to "re-litigate" the matter: that is, a decision had been made. The final question which was asked related to the form of the proposed letter. Mr Pearks said it would confirm the termination of Mr Lawson's employment. Then he confirmed that the decision had

already been made and there was no opportunity for further comment by Mr Lawson.

[262] Although the meeting continued, it did so on the basis that Mr Lawson would be dismissed.

[263] In the result, not only was there inadequate disclosure before or at the meeting, there was also confusion as to whether, and if so how, Mr Lawson could respond; then the conversation moved quickly to a statement that the outcome had been determined so that any further input from Mr Lawson was not considered. For this additional reason, I find there was an inadequate opportunity for a proper response.

Other omissions

[264] There were two further problems.

[265] The first was the fact that there was no discussion as to whether, in the circumstances, a final warning might be appropriate. The Agency's Code of Conduct made it clear that serious misconduct was behaviour which was considered unacceptable to the Agency, and which "may result in a final warning or termination of employment". It is not enough for Mr Pearks to say that he considered such an option at the time and ruled it out because the conduct in his view justified dismissal. In all the circumstances, the options needed to be discussed.

[266] A relevant factor was Mr Lawson's apparently good record, which could be a factor justifying a less draconian outcome. So in *Wellington Local Bodies' Officers' IUOW v Wellington Regional Hydatids Control Authority,* Jamieson J stated: [17]

> Commonsense says that if an employer has to decide whether or not to inflict the ultimate penalty of dismissal for a particular piece of conduct or neglect he should consider the history of the person concerned. A worker who has given long and blameless service would rightly argue that this should stand to him in the circumstances …

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[17] *Wellington Local Bodies' Officers' IUOW v Wellington Regional Hydatids Control Authority* [1977] ICJ 141 (IC) at 142.

[267] Later cases have been to similar effect for instance, *Canterbury Clerical Workers IUOW v Tuckers Ltd* where the Court saw the employees' "very good past record, and who sustained employment of nine years standing" is relevant factors when considering a decision to dismiss.[18] Another example where this factor was considered is found in *W & H Newspapers Ltd v Oram*, where the previous employment record was relevant, though in the end it was not a sufficiently persuasive factor.[19]

[268] Mr Lawson was entitled to be asked whether the appropriate outcome was a final warning or dismissal, if there was serious misconduct. This aspect of the process did not occur. Although limited evidence was presented on this topic, I am not persuaded that the possibility of an outcome short of dismissal can be ruled out.

[269] The second and related matter was that Mr Pearks had decided that there was insufficient evidence to establish the third allegation (which related to how Mr Lawson had been introduced as the Disputes Tribunal hearing); Mr Lawson was thus not provided with an opportunity of responding to the proposition that there were now two allegations and not three, and whether that development was relevant to a potential outcome.

[270] A fair and reasonable employer could not have omitted to deal with these matters.

Conclusion

[271] I conclude that the totality of errors which arose at the final stage of the disciplinary process led to a conclusion that Mr Lawson's dismissal was not justifiable, having regard to the test of justification contained in s 103A. A fair and reasonable employer could not have concluded the disciplinary process in the manner which occurred here. The flaws were not minor, and as a result, Mr Lawson was treated unfairly. Accordingly, Mr Lawson's personal grievance is established.

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18 *Canterbury Clerical Workers IUOW v Tuckers Ltd* [1988] NZILR 80 (LC).
19 *W & H Newspapers Ltd v Oram* [2001] 3 NZLR 29 (CA) at [17] and [46],

Remedies

[272] The Court must next turn to the question of remedies.

[273] Mr Lawson sought lost wages for a period of 45 weeks, that is from the day of dismissal on 15 May 2014 until 29 March 2015 when his position was disestablished by the Agency. He also claimed voluntary redundancy because of the disestablishment.

[274] In addition, he sought $12,000 for humiliation, loss of dignity and injury to feelings.

[275] For his part, Mr Cain submitted that although the Agency had not been able to obtain a copy of the transcript as to what occurred at the Disputes Tribunal hearing, that had subsequently become available and was now relevant for remedy purposes. In particular, it was submitted that statements made by Mr Lawson at the Disputes Tribunal hearing were significant because it was clear he had misled the Tribunal. This amounted to subsequently discovered misconduct, which showed Mr Lawson had breached fundamental obligations to his employer. It was submitted he should not benefit from his own wrongs simply because these facts were unknown to the Agency at the time of his dismissal. Accordingly, the Court should conclude that remedies under s 123 of the Act were inappropriate, this submission being founded on the majority judgment of the Court of Appeal in *Salt v Fell*.[20]

[276] Mr Cain went on to submit that were the Court to consider that remedies should be provided, it would need to consider the extent to which his actions had contributed towards the situation giving rise to Mr Lawson's personal grievance, and reduce the remedies accordingly under s 124 of the Act. It was argued that the Court should find that Mr Lawson had contributed significantly to the circumstances giving rise to his dismissal, including his unacceptable conduct in not being open and honest with his managers, and his lack of contrition and acknowledgement of any wrongdoing or lack of judgement. For these reasons it was submitted that remedies should be reduced in their entirety.

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[20] *Salt v Fell* [2008] NZCA 128, [2008] 3 NZLR 193 at [83] and [104].

[277] Submissions were also made as to the appropriate calculation of quantum of the remedies sought, if the Court was persuaded that there should be an assessment of remedies.

Relevant legal principles as to remedies

[278] Recently a full Court considered the means by which the Authority or Court might conclude that no remedies should be awarded.[21] The Court commented on the correct approach where there was sufficiently egregious conduct on the part of an employee who had been dismissed. The Court said this:

> [216] We conclude that s 124 does not permit complete removal of a previously established remedy. Rather, when there is misconduct which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with "equity and good conscience". The absence of a remedy in rare cases, notwithstanding the establishing of a personal grievance may be appropriate. The Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal. We consider that the statutory scheme allows for the same outcome in other instances where, for example, there has been outrageous or particularly egregious employee misconduct.

[279] The Court went on to make some brief remarks as to the extent of reduction which may be justified in those instances where remedies have been determined and the Court is required to consider a reduction for contributory behaviour of the employee, under s 124 of the Act. It referred to the fact that a finding of contributory fault of 50 per cent was a significant one.[22] The dicta of this decision must be considered in this case having regard to the submissions which were made for the Agency.

[280] On the topic of contributory fault, I also refer to the judgment of the Court of Appeal in *Waitakere City Council v Ioane.*[23] There it was concluded that dismissal could have been justified substantively, but there had been procedural unfairness so that the dismissal of the employee was not justifiable. That said, there had been substantial fault on the part of the employee.

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[21] *Xtreme Dining Ltd t/aThink Steel v Dewar* [2016] NZEmpC 136.
[22] At [221].
[23] *Waitakere City Council v Ioane* [2006] 2 NZLR 310 (CA).

[281] The Court of Appeal held that the quality and significance of the employee's misconduct could not be assessed without considering whether dismissal would have been warranted had a fair process been followed. The Court found that the employee had been very much the author of his own misfortune, and that any award of compensation would be entirely unjust if it did not reflect that reality. In those circumstances, there had to be a substantial diminution of remedies, which the Court of Appeal assessed as being broadly 75 per cent. As I shall explain below, this reasoning is potentially relevant in this case.

[282] When considering issues of contributory conduct the Court must reach its own determination as to what occurred on the basis of all the evidence before it. The assessment is not confined to the conclusions which were reached by the Agency prior to Mr Lawson's dismissal.

The Disputes Tribunal hearing

[283] A verbatim transcript is now available as to what occurred at the Disputes Tribunal hearing so that an accurate understanding as to what transpired can be obtained.

[284] When Mr Lawson entered the hearing room, the Referee noted that Mr Van Heiningen had asked Mr Lawson to attend as a witness. Significantly, neither Mr Van Heiningen nor Mr Lawson stated that Mr Lawson had been summoned to appear.

[285] After confirming his name, Mr Lawson stated that he worked for the Agency. He said that it was his role to manage the delivery of all regulatory services for the passenger service industry in Auckland and Northland, which included the taxi industry, which he said was probably the most heavily regulated service out of all passenger and commercial transport services in New Zealand.

[286] He then gave a long description of features of the taxi industry, including licensing requirements and approvals needed to operate as an ATO. Mr Lawson outlined what he described as an extensive list of requirements to obtain an ATO approval, which he said was not easy. He said an approved organisation had a heavy

requirement to manage those driving for it, to ensure its services were safe. Then he referred to Alert's position stating that he was unsure if its rules required the organisation to take a vehicle off the road if there was a potential problem with it, but something would have to be done about it. Then he said "… He cannot allow a vehicle on to the road that is unsafe, otherwise I will prosecute him." The person being referred to in this statement was apparently Mr Van Heiningen.

[287] Then Mr Lawson stated that without maintaining these rules, an ATO would lose its business; not complying with a safety requirement would damage an ATO's "brand", affecting the proprietor, his employees and his "bottom line".

[288] Mr Lawson also said that just prior to the introduction of the taxi camera legislation, he had drafted a set of operating rules which he introduced to the industry.

[289] Then Mr Hendry intervened, stating that he had asked for a representative from the Agency to support him because its staff knew he did not hold a PSL. He also said he had not realised that Mr Lawson was "mates" with Mr Van Heiningen.

[290] Mr Lawson took exception to this remark. He said he was not "mates" with Mr Van Heiningen. I interpolate that he did not say that he was summoned to appear.

[291] When asked by the Referee if his relationship with Mr Van Heiningen was "strictly professional", Mr Lawson said they were both on a project within the taxi industry which involved high level Agency representation. Then he said that within the Agency "I'm seen as the expert in the taxi industry. … there is no one else that knows more about the taxi industry than I do in the New Zealand Transport Agency."

[292] Later, Mr Van Heiningen spoke. He too denied that he and Mr Lawson were "mates". He said he did not want such a relationship with Mr Lawson, and it was important that Mr Lawson was objective. He said that as far as he was concerned, Mr Lawson was extremely professional. He said that he was "… called upon by the Minister to provide advice …".

[293] Then Mr Lawson spoke about the requirements of a person who held a PSL. Earlier, Mr Hendry said he had spoken to Mr Lawson by phone. Mr Lawson said he did not know about Mr Hendry's particular circumstances because, he said, he dealt with "thousands of operators and drivers every day", and it was hard to remember a specific phone call. Finally, he explained the educative role which he said the Agency undertook.

[294] In his evidence, Mr Pearks said that there were a number of comments to be made about this testimony:

a) First, at no time did Mr Lawson or Mr Van Heiningen tell the Referee that Mr Lawson had been summoned – even when Mr Hendry had accused Mr Lawson and Mr Van Heiningen of being "mates".

b) Mr Lawson had stated that the taxi industry was probably the most heavily regulated service out of all commercial transport services in New Zealand; this was incorrect in that it overstated the degree of regulation.

c) Mr Van Heiningen stated that Mr Lawson was called upon by the Minister to provide advice. To the extent that this implied he personally was called on by the Minister to do so, that was not correct.

d) Mr Lawson stated that he drafted a set of operating rules and introduced those to the industry. This implied that he personally had taken those steps; he had been involved in drafting the rules, but the project had been led by another employee of the Agency.

e) Mr Lawson described himself as the expert in the taxi industry, with no one else knowing more about that industry than him. That was also incorrect, as there were a number of other personnel within the Agency who had just as much, if not more, experience and expertise than him.

[295] As these are all obvious criticisms that can legitimately be made, I accept Mr Pearks' evidence. I also consider that the manner in which Mr Lawson gave his evidence contrasts significantly with the manner in which he provided information when interviewed in the course of the review process conducted by Mr Henderson, and the disciplinary process conducted by Mr Pearks. When giving evidence to the Tribunal, it is apparent that Mr Lawson intended to and did exaggerate the points he made. I find that this was with the intention of supporting the proposition that Alert companies needed to maintain very high standards in order to maintain their ATO approvals. The clear implication was that Mr Hendry's allegations to the effect that Mr Van Heiningen's taxi operation had not maintained appropriate standards were inherently unlikely.

[296] It was also the case that the evidence given by Mr Lawson went well beyond him simply stating what his role was and what the Agency did, which was the description of his evidence that he gave to Mr Henderson. Mr Lawson had also told Mr Pearks that he was at the hearing only to state his name, his role, his responsibilities, and outline the obligations that are on the taxi industry from the point of view of the industry as the regulatory body. His responses to Mr Henderson and to Mr Pearks tended to suggest that he had been required to attend and to answer questions in an independent way about the responsibilities of the regulator. As I have found, his evidence was given in an exaggerated fashion.

[297] Had this information been available to the Agency at the time of the disciplinary process, it is likely the third allegation which had been brought against Mr Lawson would have been upheld. More significant for present purposes, I accept the Agency's submission to the effect that the disputed statements to the Tribunal were misleading and wholly inappropriate for a senior employee of a regulator, since the statements were made in the context of a quasi-judicial process.

Other misconduct

[298] When considering issues as to remedies, consideration must also be given to the known actions of the employee which gave rise to the established personal grievance.

[299] Having regard to the evidence Mr Lawson gave to the Disputes Tribunal, I find it is more likely than not that when the Agency investigated Mr Hendry's complaint of March 2014, Mr Lawson realised he had overstepped the mark when giving evidence and that there was an inappropriate conflict of interest. Despite Mr Hendry having originally raised concerns about Mr Van Heiningen and Alert with the Agency, and despite Mr Lawson telling Mr Collie that he should not attend the Disputes Tribunal hearing without a summons, he had done just that in a way that in effect supported Mr Van Heiningen's position.

[300] Mr Lawson's initial responses to the Agency when it instituted a review as to what had occurred implied that there was a formal summons. Indeed, at about this time he told Mr Hendry that he had been "legally summonsed". However, I find that when Mr Hendry lodged his OIA request stating that no formal summons existed, Mr Lawson altered his account to state that the summons must have been informal in nature, and that he had by mistake not checked that this was the case. The Agency concluded that this explanation was untrue. I consider on the basis of all the evidence before the Court that the Agency's conclusion was correct for the reasons given by Mr Pearks. The story about the summons was fictitious.

[301] For present purposes, I would have reached that conclusion even without the evidence of Mr Collie as to what occurred when he visited Mr Lawson at his home on 24 March 2014. This was to the effect that Mr Lawson told him there was no summons; and that he then heard Mr Lawson effectively coaching Mr Van Heiningen as to what he should say.

[302] But turning to that evidence, the question of whether it should be accepted requires the assessment of the reliability of Mr Collie's evidence on the one hand, and the reliability of Mr Lawson's and Mr Van Heiningen's evidence on the other. This is an assessment which must be made according to standard credibility principles.

[303] Briefly, when assessing credibility, the Court must carefully evaluate all the evidence, looking for inconsistencies between witnesses, and whether there are any external indications which can assist in a determination as to what occurred. As has

frequently been observed in the past, the evidence has to be evaluated in a commonsense but fair way. All aspects of the evidence have to be assessed. A finding of credibility is unlikely to be based on only one element to the exclusion of all others, and will instead need to be based on all the factors by which it can be tested in a particular case.[24] The Court must also bear in mind whether a given witness is correct on some matters and incorrect on others.

[304] This is not a case where the demeanour of witnesses when giving their evidence is determinative. There are well recognised difficulties in assessing credibility through demeanour alone. Important also are contemporary materials, objectively established facts and the apparent logic of events.[25]

[305] Applying those principles, I consider first the evidence of Mr Lawson. It was inaccurate and even misleading on a number of matters. Three key illustrations may be given. The first relates to the issue of whether he was a director of Korucabs Sub Franchising Ltd. Even when shown the relevant records from the Companies Office, he continued to say that he was not a director of that entity. It was apparently his point that he was not an "operating director" of that company. But it was only when it was pointed out to him that he was not being asked that question, he finally agreed that his name was shown as being a director on formal documents which had been filed with the Companies Office.

[306] A second example related to Mr Lawson's assertion that Mr Collie's performance appraisals had been embellished. He claimed that he had not given Mr Collie a performance rating of "Exceeding" in 2013. He insisted that the process had changed that year and such ratings were not to be given. In response, Mr Collie was sure he had received such a rating, explaining the pay increase that he received as a consequence. When the documents were subsequently produced to the Court, it transpired that Mr Collie was correct, and that Mr Lawson had written to him confirming the rating. His claim that the performance appraisals had been embellished and were inaccurate was plainly wrong.

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24 *Farnya v Chorny* [1952] 2 DLR 354 (BCCA) at [8] - [9]. See also the comments of O'Halloran, JA in the same case.

25 *Onassis v Vergotties* [1968] 2 Lloyd's Rep 403 (HL) at 431 per Lord Pearce.

[307] A third and related example relates to Mr Lawson's attempt to suggest that Mr Collie had attempted to discredit him because Mr Lawson had prevented him from being promoted. Mr Lawson relied on an email Mr Collie had sent him in August 2013 when he said he was disappointed and disillusioned that he had not been appointed to the position of Senior Transport Officer. I consider, however, that Mr Lawson exaggerated this issue. Mr Collie's email was balanced and expressed in moderate terms. It did not suggest that he bore any grudge towards Mr Lawson on this issue. Neither the email, nor his evidence to the Court establishes that Mr Collie set out to deliberately discredit Mr Lawson by misrepresenting Mr Lawson's interactions with Mr Van Heiningen because he had not been promoted.

[308] A striking feature of Mr Lawson's evidence was that he had persuaded himself that he was correct on issues such as this, even when the evidence was clearly to the contrary. He was also at times evasive and unduly defensive. He was willing to develop conspiracy theories as to the evidence of others – particularly Mr Collie, but also Mr Henderson. In his opinion, each of those persons failed to tell the truth. All of these factors served to undermine key aspects of his evidence.

[309] Mr Van Heiningen's evidence was also unreliable on the summons issue. I accept the submission that he presented as someone who was trying to help a friend and had been told what he should say, as was demonstrated by numerous inconsistencies in his evidence. These included variations between what he had told the Authority about relevant events, and what he told the Court. When giving his court testimony he initially said that he had met Mr Lawson only formally and infrequently; then he said they had met regularly; and then he reverted to his earlier statement that they met infrequently. I have already rejected Mr Van Heiningen's assertions as to the accuracy of Mr Henderson's interview notes.

[310] Against that evidence, I must assess that of Mr Collie. I have considered, but was not assisted by, the evidence which was led as to how certain issues relating to Green Cabs and Korucabs were dealt with. The Court did not have a full account of these matters: for example, with regard to the issues relating to disclosure of documents in 2009 in connection with a potential prosecution against Green Cabs, the Agency subsequently conducted an in-house investigation which might have

provided a more complete picture, but direct evidence of this was not placed before the Court.

[311] Mr Collie also asserted that Mr Lawson had seemed to protect Korucabs by not causing that entity's activities as an ATO to be required. He referred to a meeting which he said occurred some five years ago, in 2012, where this was evident. Having regard to evidence led by Mr Lawson from other Agency staff members, I am not satisfied that Mr Collie was correct on this point. That said, I find that it is more likely than not that he was correct in stating that Mr Lawson had indeed told colleagues he was a director of Korucabs, because in fact he had been.

[312] Mr Collie's evidence also proved to be right on the issue as to whether he had been the subject of a positive performance review in 2013/2014; the contemporaneous documents which were produced later in the court hearing established that his evidence was correct.

[313] On another important point, his evidence as to whether Mr Lawson had told him there was no summons is plausible. He said Mr Lawson made this statement in response to the words which he had written on Mr Hendry's OIA letter.[26] Mr Collie said he read these as "neva had", and queried him about this notation. That such a question of clarification would be asked, leading to Mr Lawson's reported response, makes sense; it is also consistent with the events which occurred before and after.

[314] He also made appropriate concessions when giving evidence: for instance, accepting in hindsight that he should have acknowledged that he failed to file Mr Hendry's complaint when it was first made.

[315] I have concluded that his evidence can be relied on in its essentials by the Court. In my assessment, Mr Collie's evidence on the whole was given in a balanced and reliable way. His evidence, once accepted, reinforces the conclusion that there was no summons, and that there was a coaching of Mr Van Heiningen by Mr Lawson.

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[26] At para [62] of this judgment.

Conclusion as to remedies

[316] In my view, there is very significant misconduct which has to be taken into account when considering the issue of remedies.

[317] It is necessary to conclude that Mr Lawson was the author of his own misfortunes. He gave evidence to the Disputes Tribunal when there was a significant conflict of interest; he did so in a fashion which was intended to enhance Mr Van Heiningen's position over that of Mr Hendry's, thereby potentially affecting the outcome of that proceeding. When his employer set about reviewing and investigating these issues, he said he had made a mistake by not discovering that the document given to him was not a formal summons. However, he did not tell the truth, because there was no such document.

[318] I have found that there were procedural flaws in the final stages of the Agency's disciplinary process, with the result that Mr Lawson was dismissed in respect of two out of the three allegations that were investigated. The two established allegations led Mr Pearks to conclude that Mr Lawson should be dismissed; the lesser option of a final warning was not discussed.

[319] However, had the Agency possessed a copy of the Disputes Tribunal transcript, it is probable that the third allegation would have been upheld. In those circumstances, had there been no procedural error I would have concluded that dismissal was justified. Such a finding may be made, however, only because the transcript has become available allowing a conclusion to be reached on the basis of subsequently discovered misconduct of a significant nature.

[320] That misconduct, together with the misconduct of which the Agency had knowledge prior to dismissal, leads to a conclusion that the totality of inappropriate behaviours was sufficiently egregious as to warrant a finding that there should be no remedies under s 123 of the Act.

[321] In reaching this conclusion, I have been assisted by considering the outcome in *Ioane*, a judgment to which I referred earlier.[27] It involved serious misconduct justifying dismissal, but procedural errors had established the employee's personal grievance. Since he was in the main the author of his own misfortune, there was a reduction of remedies by approximately 75 per cent.

[322] On the basis of the known conduct which was considered by the Agency, a similar conclusion could have been reached here, even although it would amount to an unusually high finding under s 124. However, I consider that the subsequently discovered misconduct is a significant additional factor. The totality of the misconduct is such that the application for remedies should be declined.

[323] Findings of this nature are likely to be rare; however, I consider that the circumstances of the present case are so unusual that equity and good conscience requires this conclusion.

Disposition

[324] Although I have found that Mr Lawson's dismissal was not justified because of procedural errors so that his personal grievance is established, I consider this is such an unusual case that it is appropriate to conclude that no remedies should be awarded. Accordingly, I dismiss the challenge.

[325] I reserve costs. If these are to be raised, they should be discussed in the first instance between the parties in light of the findings I have made. If there are outstanding issues, an appropriate application should be made, supported by evidence, by 31 January 2017. Any response, supported by evidence if appropriate, should be filed and served by 21 February 2017. The question of what order should be made in respect of the funds paid into Court by Mr Lawson will also need to be resolved.[28]

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[27] *Waitakere City Council v Ioane*, above n 23 at paras [279] – [280] of this judgment.

[28] In accordance with the judgment of Judge Inglis in *Lawson v New Zealand Transport Agency* [2015] NZEmpC 168, at [27].

[326] Mr Lawson has challenged the Authority's costs determination. That issue should also be discussed between the parties in light of my findings. If any application is necessary in respect of the challenge following discussion, it should be filed and served by 31 January 2017. A response should be filed and served by 21 February 2017.

B A Corkill
Judge

Judgment signed at 2.45 pm on 13 December 2016