

04/1082

Determination Number: AA 424/04  
File Number: AEA 467/04

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

<b>BETWEEN</b>	Rahul Bagchi (Applicant)
<b>AND</b>	Inland Revenue (Respondent)
<b>REPRESENTATIVES</b>	A J McKenzie 21/22 June & Mark Ryan 15 July 2004 for Applicant Peter Churchman for Respondent
<b>MEMBER OF AUTHORITY</b>	Janet Scott
<b>INVESTIGATION MEETING</b>	21 – 22 June 2004 15 July 2004
<b>DATE OF DETERMINATION</b>	23 December 2004

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

Mr Bagchi submits he was unjustifiably dismissed from his employment with Inland Revenue Department (IRD). He seeks reinstatement to his position, lost remuneration and a modest sum in compensation under s.123(c)(i) of the Act. He also seeks costs in the matter.

It is the respondent's position that Mr Bagchi was dismissed for failing to meet the minimum standard of performance for an Investigator - Computer Tax Audit (CTA) and that prior to dismissing Mr Bagchi the Department embarked on an intensive and fair process to lift Mr Bagchi's performance. The dismissal came about because despite the intensive effort to lift Mr Bagchi's performance over a lengthy period his performance did not improve.

**Background**

Mr Bagchi commenced employment with IRD in August 2001. He was employed as an Investigator in the Computer Tax Audit team. As I understand it, the main purpose of the CTA Investigator role is to analyse and describe in a readable written report the computer tax systems of assigned corporate businesses. The role requires an understanding of taxation and accounting and excellent systems analysis skills. It also requires strong communication skills, analytical ability and the ability to describe the taxpayer's system in a timely and comprehensible written report with appropriate flowcharting.

At time of his employment Mr Bagchi's employment was subject an Individual Employment Agreement that was similar in important respects to the Collective Employment Agreement (CEA) between the Department and the PSA. Certainly the provisions governing performance appraisal and performance management contained in the IEA are supported by and expanded on in the

Collective and it is these provisions and those contained in the Department's HR policies which were applied in the assessment and management of Mr Bagchi's performance.

Despite having satisfied the Department in a pre-employment assessment of aptitude it was early in the employment relationship that Mr Bagchi's team leader (Sharon Topliss) began to have doubts about his performance. Initially it was assessed that Mr Bagchi was not making the progress towards full competency that was expected and informal and (later) formal reports of his performance reflect optimism that his performance could be improved through coaching and supervision. As time went by however the concerns regarding Mr Bagchi's ability to do the job grew ever more serious. The same concerns were increasingly voiced by a number of Senior Investigators assigned to work with Mr Bagchi. A common theme comes through the documentation of increasing frustration and despair relating to Mr Bagchi's performance deficiencies, his refusal to accept his performance was deficient, his refusal to accept that senior officers coaching, mentoring and counselling him possessed technical qualifications superior to his own which justified the advice given and the frequent refusal on his part to follow the advice given without argument and/or delay.

The evidence shows that informal coaching and support was augmented with formal training programmes.

After his second annual performance review<sup>1</sup> assessed Mr Bagchi as not meeting the minimum standards of competency a formal performance improvement process was instituted under the disciplinary provisions of the Department's HR manual and in accordance with those provisions. Two formal performance improvement plans were implemented. At the conclusion of the 1<sup>st</sup> programme the employer assessed Mr Bagchi as not having met the standards required and he was given a formal warning. A 2<sup>nd</sup> programme was implemented and Mr Bagchi was provided with the opportunity to have input into the setting of the achievement standards to be demonstrated. The implementation of this programme was complicated by the fact that Mr Bagchi submitted work for assessment in respect of which he had received assistance from other parties (i.e. it was not entirely his own work). The employer instituted a disciplinary inquiry and as a result Mr Bagchi was issued with a final warning. The time for submission of a new piece of completed work for assessment under the performance improvement plan was extended. After Mr Bagchi produced a final piece of work that did not satisfy his manager that he had met the minimum competency standards required Mr Bagchi was dismissed.

Mr Bagchi submits his dismissal was unjustified. It is his position (in a nutshell) that he did meet the performance standards in question and that he has been the victim of systematic ill treatment, deep prejudice and hatred of CTA investigation team members and that he has been subject to cultural/racial discrimination. Despite this Mr Bagchi seeks reinstatement to his former position which he says he loves and he submits he cherishes his colleagues.

The respondent on the other hand submits the applicant was justifiably dismissed for unsatisfactory work performance following a full and fair performance improvement process which incorporated the full range of informal and formal management techniques. It is submitted Mr Bagchi was never discriminated against and that his claims are unsubstantiated and unfounded and offensive. In all the circumstances (including Mr Bagchi's refusal to accept or acknowledge the deficiencies in his performance) it is submitted that it is impracticable to entertain reinstatement.

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<sup>1</sup> August 2003.

## CEA – Performance Assessment and Performance Management Provisions

The Collective Employment Agreement (CEA) concluded between the Department and the PSA provides comprehensive provisions for the assessment of all employees' performance (Cl. 8.1). That provision provides for the formal assessment of an employee's performance on an annual basis. The requirements for a performance plan include the establishment of job expectations, agreement on a performance plan and development plan for each employee (to be set at the beginning of the review year), an interim performance review (to be conducted during the course of the year) and a concluded review at the end of the review year.

In an addendum to the CEA there is a comprehensive description of the performance management cycle, a description of the essential elements of a performance management plan and development plan and the role played by the employee and his or her manager in developing and signing off on these plans together with the process to be followed in respect of the interim review of performance and the concluded performance review at the end of the review year. The assessment of performance overall results in a performance rating expressed as %. A percentage rating of 65-85% of the job expectation reflects a worker who is in the development phase of employment in the job. 100% describes a worker fully competent in his/her role and 110% describes a worker who consistently exceeds requirements. These percentages are directly linked to the remuneration range for the job in question e.g. a worker scoring an overall assessment rating of 100% will be remunerated at the mid point of the remuneration scale for the position in question.

It was submitted by IRD that it is common for new employee to be below 100%. However, usually employees develop within the first two years to achieve a 100% competency rating. The evidence reveals that Mr Bagchi's performance was assessed at 80% competent at the conclusion of the 2001/2 performance year. In the 2002/3 performance year Mr Bagchi's competency rating had dropped to 73%.

The provisions of the CEA relating to performance management are supported by and explained in the Department's HR Manual. The HR Manual also sets out a comprehensive disciplinary policy. Included in this policy is the following policy statement (at Section 9 p 26).

*The performance management system has been designed to ensure that staff are fully aware of how well they are performing in their jobs and of the areas in which improvement is required. At some point though, a decision may be made that the continued management of a person's poor performance under the performance management system is inappropriate. It is envisaged that this would not happen until the full range of performance management techniques had been applied, e.g. performance and development plans, training plans personalised assistance to help them meet the required standard, etc.*

*Managing poor performance within the discipline provisions formalises the process. The person will be made fully aware that continued performance at that level is unsatisfactory and therefore unacceptable and may lead to their employment being terminated.*

## History - Performance Management Process

As I understand it there is little or no dispute between the parties in respect to the history<sup>2</sup> of the performance management process implemented in respect to Mr Bagchi during the period of his employment with the Department. The history is set out below:

**27 August 2001** Mr Bagchi commences employment with Inland Revenue Department. He is employed as an Investigator Computer Tax Audit (CTA).

**August/Sept 2001** Mr Bagchi undertakes the CTA two week induction programme. It is a one on one programme led by Sharon Topliss (Mr Bagchi's Team Leader).

**March 2002** Sharon Topliss raises with her superior, Kris Rapson (Acting Manager – CTA) her concern that Mr Bagchi was not grasping the basic concepts of the job. Ms Topliss continues to provide Mr Bagchi with on the job training.

**4 June 2002** Ms Topliss holds a formal discussion with Mr Bagchi. It is apparent that Mr Bagchi has a different perspective of his competency in the job from that of the seniors he has worked with. Ms Topliss advises Mr Bagchi that she is concerned that he thinks his skills are sufficient whereas feedback from senior colleagues suggests the contrary. Ms Topliss counsels Mr Bagchi. Ms Topliss advises Ms Rapson. Fortnightly coaching sessions between Ms Topliss and Mr Bagchi commence and Mr Bagchi continues to receive on the job training.

**August 2002** Mr Bagchi undertakes the CTA induction programme for the second time – this time in a group setting.

**August 2002** Mr Bagchi's first formal performance review is completed for the period 27 August 2001 – 30 June 2002. The review reports on *Outputs and Deliverables*, *Core Competencies*, *Leadership Competencies*, *Technical Competencies* and records details of coaching, feedback and training undertaken for the period under review.

While it is recorded in the Summary to the Review Report that Rahul has worked hard to make a positive contribution to CTA and the Department the bottom line conclusion is that *"his efforts have not produced work that is of the standard expected in CTA"*<sup>3</sup>

**August 2002** Ms Topliss forwards a memo to the Manager CTA (Karen Piercy) referring to a task undertaken by Mr Bagchi. She notes:

- *Rahul has been in CTA for one year now but is still having difficulty with what should be a simple file conversion.*
- *Rahul has not demonstrated an understanding of the accounting information he is looking at. He did not understand the difference between an opening balance and a brought forward balance and obviously did not think about the consequences of taking a running balance amount instead of the actual transaction amount.*
- *Rahul has just completed the two week CTA training course. However, this does not appear to have helped him. He has demonstrated a complete lack of understanding of how headers work; despite the fact he has been using Auto import for a year now.*

<sup>2</sup> Mr Bagchi does dispute the conclusions reached by the employer as a result of the performance improvement process and makes very serious allegations regarding the employer's motivation and conduct of the process.

<sup>3</sup> In that section of the report reserved for employee comments Mr Bagchi has recorded that he has performed satisfactorily on Outputs and Deliverables and met the requirements of the Core Competencies. He notes he intends to focus on the faster completion of reports and notes he intends to undertake further training.

She concludes:

- *Rahul has not progressed as I would have wished and I now have serious doubts about his ability to perform at any level in CTA.*

**August /September 2002** Ms Topliss continues the fortnightly training sessions with Mr Bagchi and continues to provide him with on the job training.

**September/October 2002** Ms Topliss attends the F...systems audit with Mr Bagchi and another investigator. Mr Bagchi takes an active leadership role in the Accounts Receivable section of the audit and report. Ms Topliss compiles coaching notes in which she comments positively on Mr Bagchi's attitude and the fact he asks good questions (of the taxpayer) and paraphrases responses to check his understanding of the system. However, she records that Rahul is "*still not picking up on tax issues*". She concludes "*Rahul's performance overall might have been acceptable for a very inexperienced CTA investigator but was not at the level I would expect from someone who has now had more than a year in the unit. I have listed below some items that I feel Rahul needs to work on before his next systems audit.*"

- *Interviewing*
- *Tax Focus*".

Mr Bagchi provides feedback in respect to the coaching and feedback provided by Ms Topliss. He thanks Ms Topliss for her feedback and suggests areas for improvement on his part in future and justifies his approach in other respects.

A typing tutor programme is organised for Mr Bagchi to improve his typing speeds.

A Business Writing course is identified. (Mr Bagchi attends this course in April 2003).

**September/October 2002** Both Ms Topliss and Mr Bagchi are finding the ongoing fortnightly coaching sessions difficult and frustrating. Ms Topliss finds Mr Bagchi does not respond to feedback in a positive way. He becomes argumentative or withdraws<sup>4</sup>. Mr Bagchi approaches her and expresses his distress about these sessions. As a result Ms Topliss approaches Ms Rapson and advises the meetings are not having the desired affect (improvement in performance). Ms Rapson agrees that the meetings will end.

**November 2002** Fortnightly coaching by Ms Topliss is replaced by individual on the job coaching with other seniors drawn from the Auckland and Wellington offices including Mr Nimmo and Ms Liao.

**August 2003** Mr Bagchi's performance appraisal is finalised for the June 2003 year. This appraisal is carried out by Ms Topliss and Mr Nimmo.<sup>5</sup> Mr Bagchi's team leader (Ms Topliss) makes positive comments about Mr Bagchi's attitude to and focus on improvement and notes that Mr Bagchi can handle most GL downloads confidently and that he can handle straightforward file conversions. Overall, however, it is recorded that Mr Bagchi did not yet meet the technical standards for systems audit work. Mr Bagchi's has a contrary view of his performance and records in his comments to the report that he has achieved the desired outputs within the determined quality standards.

<sup>4</sup> At the investigation meeting Mr Bagchi described the feedback he received from Sharon Topliss as "*unhelpful*". On further questioning he revealed he found it unhelpful because he did not agree with it.

<sup>5</sup> Ms Topliss was due to take maternity leave and Mr Nimmo was requested to take over as Mr Bagchi's team leader.

**August/September 2003** Based on the August 2003 performance appraisal, Ms Rapson institutes a formal performance management process with Mr Rahul. She believed this was the only avenue left as the less formal approaches to lifting Mr Bagchi's performance had not worked. It was a concern that Mr Bagchi seemed to be in denial regarding his poor performance.

**12 September 2003** Ms Rapson met with Mr Bagchi and his team leader, Mr Nimmo. The discrepancies in Mr Bagchi's performance are identified (headings: *competency, understanding, timeliness, attitude to feedback and quality of written work*) and he is asked for his view as to his performance. Mr Bagchi accepts some of the concerns raised but overall considers he is meeting expectations. There is a discussion on this perception of differences. Mr Bagchi is advised that a formal performance management process/plan is to be instituted. The plan will have a formal review of the outcomes and expectations after three months and Mr Bagchi is advised that the areas the performance plan will focus on is *completing downloads, systems audits and report writing*. He is also advised that if his performance does not meet the required standard, then a warning may follow. In that case a second set of targets would be set and if they were not met dismissal might be a consequence.

**22/29 September** A performance approval plan for Mr Bagchi is signed off by Mr Bagchi, Mr Nimmo (team leader) and the manager of CTA (Ms Rapson). The plan covers the period 15/9/03-15/12/03. It sets out clear expectations in respect of *Electronic Data Downloads, Systems Audits and Report Writing*. A process is agreed for Mr Bagchi to advise of any health or other issues that may affect his output and he is advised that EAP or other (performance enhancing) assistance will be made available as required. A formal review is set for the week 15 December 2003 and the parties agree that informal reviews will also be held monthly. The plan records that each party is entitled to bring a support or advisory person to both formal and informal meetings.

**September/October 2003** Mr Nimmo's evidence is that after he became Mr Bagchi's team leader he found he had to spend a significant time with Mr Bagchi at the expense of his other team members and his other duties. Mr Bagchi required guidance on all work he undertook and close supervision. In September Mr Nimmo critiqued a systems audit report undertaken by Mr Bagchi – it required three critiques before it attained the required standard. Mr Nimmo found that Mr Bagchi had difficulty accepting constructive feedback and refused to accept that Mr Nimmo's technical knowledge was superior to his own.

Mr Nimmo loses confidence in Mr Bagchi's ability to do the job. Mr Nimmo reports that a stress related condition he suffers is escalating in severity as a result of Mr Bagchi's unreasonable conduct and he commences taking higher doses of medication.

**October 2003** Mr Nimmo advises Ms Rapson of the difficulties he is experiencing and effect it is having on his health. She is concerned about his health and Mr Nimmo is referred to EAP counselling. Mr Nimmo advises he cannot continue mentoring Mr Bagchi and if he is not relieved of the role he will have to consider leaving the Department.

**10 November 2003** Ms Rapson takes over from Mr Nimmo as Mr Bagchi's reporting officer. To facilitate her role as Mr Bagchi's reporting officer Ms Rapson is in contact with Mr Bagchi at least once a week.

**3 December 2003** Ms Rapson confirms a formal meeting on the 1<sup>st</sup> Performance Improvement Plan is set for 15 December. The performance review was based on the feedback received by Ms Rapson from seniors involved in three jobs undertaken by Mr Bagchi over the period of the review. Ms Rapson also carried out a critique of the L.... report prepared by Mr Bagchi. Ms Rapson's conclusion was that Mr Bagchi had not met the minimum performance standards required of a CTA

investigator. She considered Mr Bagchi still had difficulty obtaining appropriate information from taxpayers during interviews; he had difficulty identifying which tests to run on the data for the issues identified; and he had difficulty completing a readable report within the determined timeframe.

**11/12 December** Ms Rapson provides Mr Bagchi with her written comments.

**15 December 2003** Ms Rapson meets with Mr Bagchi at 10am to go through the analysis. Mr Bagchi who is accompanied by his union delegate is reminded that the performance process was being conducted in the context of the applicable disciplinary procedures. Ms Rapson formally advised Mr Bagchi that she was considering there may have been breaches of the Department's Code of Conduct:

- To provide a professional service at all times to the Minister, the public and your colleagues; and
- To perform your work to an agreed standard as encompassed in the Performance Management process.

Mr Bagchi was invited to comment on the outcome of the 1<sup>st</sup> Performance Improvement Plan. Mr Bagchi provides a verbal response.

Following that meeting Ms Rapson considers Mr Bagchi's verbal responses<sup>6</sup>. Later that day the parties meet again and Mr Bagchi is given a first warning of dismissal. The warning is to have effect for six months and Mr Bagchi is advised that further breaches of the code of conduct may require further disciplinary action which could lead to his dismissal. Mr Bagchi is provided with a letter which confirms the warning. It also sets out the background to the performance improvement process, the outcome of the 1<sup>st</sup> Performance Improvement Plan, Mr Bagchi's explanations, Ms Rapson consideration of those explanations and the mitigating factors considered by Ms Rapson in arriving at her decision to issue the warning.

Mr Bagchi is advised that a 2<sup>nd</sup> Performance Improvement Plan will be negotiated with him to assess his performance over the period 5 January to 5 March 2004. Ms Rapson closes by reiterating the purpose of the plan is to set in place a positive and mutually rewarding employment relationship. Mr Bagchi is reminded of his right to pursue a personal grievance. **Note:** On 4 March 2004 Mr Bagchi responded to this warning as follows:

*"I acknowledge receiving the letter dated 15/12/03, however I do not accept the comments made in the letter nor the way in which the Performance Improvement Plan (15/9/2003 to 15/12/2003) was conducted and my performance evaluated. I will be requesting a withdrawal of the warning notice and reserve my options as far as a Personal Grievance is concerned"*

**15 December 2003** After an adjournment the parties met to discuss the 2<sup>nd</sup> Performance Improvement Plan. Mr Bagchi requested that Pin-Ying Liao (Senior Investigator - Wellington) be his mentor for the 2<sup>nd</sup> Performance Improvement Plan. As Ms Liao had English as a second language Ms Rapson felt Mr Bagchi might respond to her better and this was agreed (after Ms Liao agreed to put aside her reservations on the matter).

Mr Bagchi requested more input into the setting of the objectives for the 2<sup>nd</sup> Performance Improvement Plan. This proposal was agreed to.

<sup>6</sup> Mr Bagchi submits Ms Rapson did not consider his explanations and also considers the warning which followed had been drafted before the meeting.

At the suggestion of Mr Bagchi's delegate English language tutelage was arranged for Mr Bagchi. This commenced in February 2004.

**January/February 2004** Ms Rapson requests Mr Bagchi to advise the changes he wished to see in the performance expectations. It was only after a meeting between Ms Rapson and Mr Bagchi and his PSA representatives on 5 February that progress was made on defining the changes sought by Mr Bagchi. These changes are negotiated and included in the formal plan signed off on 27 February 2004.

**27 February 2004** Mr Bagchi travels to Wellington for the Interim Performance Appraisal that IRD was required to carry out pursuant to the employment agreement between the parties<sup>7</sup>. Having reviewed Mr Bagchi's performance for the interim phase of the 2003/4 performance review year, Ms Rapson concluded that Mr Bagchi's performance was below the minimum standard for an Investigator - CTA. Ms Rapson also concluded that Mr Bagchi still did not appreciate that he was not performing to the required standard.

At the end of the meeting Ms Rapson discussed with Mr Bagchi how difficult it must be for him and that he must be stressed. Ms Rapson's evidence was that Mr Bagchi advised the following:

- He was not stressed.
- He felt guilty because he made others stressed.
- He did not want to be part of CTA and he was only remaining to make the Department go through the process.
- He knew after six months the Department did not want him.

A discussion followed where Ms Rapson assured Mr Bagchi that there had been no decision to get rid of him and the Department was focussed on his achieving the necessary competencies in the job. Mr Bagchi said he knew he would be going but he was sure God had a purpose for him to be going through this and he wanted to find out what that purpose was.<sup>8</sup>

Ms Rapson felt upset by this disclosure but decided Mr Bagchi's comments may have been a gesture of self defence. She hoped it might still be possible to turn the situation around and confirm Mr Bagchi as a productive team member. However, she did find herself questioning his integrity after this and prepared a file note on it.

**27 February 2004** The 2<sup>nd</sup> Performance Improvement Plan between the parties is concluded. The period for evaluation of Mr Bagchi's performance under this plan was amended to 5 February-5 April 2004. This plan concentrates on the same issues as the 1<sup>st</sup> Performance Improvement Plan. (Mr Bagchi's input into how achievement of the expectations will be assessed is recorded in the plan). The availability of EAP and other assistance is recorded as is the right to representation at formal and informal meetings.

**5 March 2004** Mr Bagchi provides Ms Rapson with the C... report for her to critique. At first sight this report is a distinct improvement over other written work submitted by Mr Bagchi and Ms Rapson gives feedback to this effect to Mr Bagchi.

<sup>7</sup> This report concludes with a positive note about Mr Bagchi's wish to improve his performance. However, it is also noted "Mr Bagchi does not accept that he is not demonstrating the required competencies to fulfil the role nor that he may not have the right attributes for the role".

<sup>8</sup> Mr Bagchi submits he would not be making such a determined effort to regain his job if he did not like his position. He submits he advised Ms Rapson he wanted to see what the logical outcome of the process adopted would be.

**11 March 2004** Ms Rapson meets with Mr Bagchi to discuss the report. It emerges at this meeting that Mr Bagchi has had assistance from Ms Lim (an investigator with CTA) in the preparation of the report. He has also submitted the report to his English language tutor who has assisted him with the presentation of the report.

Ms Rapson is concerned that a report submitted by Mr Bagchi as his own work - in circumstances when his performance is under review - is not, in fact, his own work. She is also concerned she was not advised of the assistance received by Mr Bagchi at the time he submitted the report for assessment.

**12 March 2004** A formal disciplinary investigation is commenced. Mr Bagchi is invited to a meeting 16 March 2004 where his explanations and comments will be heard. He is advised no decision will be made until he has had the opportunity to be heard. However, he is put on notice that depending on his explanations disciplinary action including dismissal could follow. Mr Bagchi was strongly advised to arrange representation.

Ms Rapson interviews Ms Lim (twice). The original report submitted by Mr Bagchi for Ms Lim's cleansing and latter assessment and advice is no longer available. There is a dispute about the extent of assistance provided by Ms Lim in the preparation of the report.

The English language tutor is interviewed. The original report submitted to her is available. It reveals extensive amendments have been made to the draft submitted.

**16 March 2004** The issues are addressed at the disciplinary meeting. Both parties are assisted with representation. The meeting is taped and a typed transcript prepared.

On the central issue it emerges that there is a clear difference between Ms Rapson and Mr Bagchi as to whether or not Mr Bagchi was permitted to obtain assistance in the preparation of his report prior to the submission of the report to Ms Rapson in accordance with the Performance Improvement Plan. Mr Bagchi also disputed the extent of the amendments suggested by Ms Lim as advised in the interview between her and Ms Rapson in the course of the investigation. Mr Bagchi fervently represents that it was never his intention to deceive and that he had openly acknowledged assistance received when asked.

**29 March 2004** Having considered Mr Bagchi's explanations Ms Rapson decided to issue Mr Bagchi with a final warning on the basis that Mr Bagchi had breached the Inland Revenue Code of Conduct regarding providing a professional service and behaving in an ethical manner. Mr Bagchi was provided with a comprehensive letter setting out the background to the performance improvement process, the disciplinary investigation, Ms Rapson's findings<sup>9</sup> and the outcome. Mr Bagchi was advised that further breaches may lead to a further investigation/disciplinary action which could result his dismissal.

**29 March 2004** By separate letter on the same day Ms Rapson picks up on the ongoing Performance Improvement Plan and confirms the future arrangements in respect to this plan. Mr Bagchi is advised that that the assessment period for Mr Bagchi to show improvement has been extended to allow him to complete and submit another report for critique. Mr Bagchi is advised that Ms Rapson cannot consider the earlier report as part of the assessment because it is not Mr Bagchi's

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<sup>9</sup> Ms Rapson specifically turned her mind to the question that Mr Bagchi may have genuinely misunderstood her instruction that he was to submit his work directly to her and without assistance from others. She expresses a finding he did understand her instruction and concludes that even if he did misunderstand her instruction he had demonstrated a serious lack of judgement in submitting, for assessment, work that had had significant input from two other people when it was his work that was under assessment.

own work. However, because there are only two reports available to be considered in this period Ms Rapson advises she will consider Mr Bagchi's earlier version of the C...report<sup>10</sup> (as it was submitted to the English tutor).

Mr Bagchi is reminded of the time his performance has been under review and the fact his performance is now being managed through IRD's disciplinary processes. Mr Bagchi is advised that if his performance continues to be unsatisfactory his employment may be terminated.

**16 April 2004** Ms Rapson provides Mr Bagchi with her written analysis of the 2<sup>nd</sup> Performance Improvement Plan. She requests Mr Bagchi to provide comments on her assessment. Ms Rapson's assessment is that Mr Bagchi has not met the critical expectations set in the plan. Mr Bagchi's assessment is that he has met all expectations set.

**26 April 2004** The parties and their representatives meet to consider the outcome of the 2<sup>nd</sup> Performance Improvement Plan and in particular to allow Mr Bagchi to provide such further information as he wished to have considered in relation to this plan.

This meeting lasts for two hours. At the conclusion of the meeting it is advised that Ms Rapson must now make a decision and that Mr Bagchi's feedback will be considered in making that decision.

**26/27 April 2004** Ms Rapson's evidence is that she spent the considerable time reflecting on the comments Mr Bagchi had made on the assessment of the 2<sup>nd</sup> Performance Improvement Plan. In the end, however, those comments did not change her assessment that he had not met the minimum performance standards of an Investigator - CTA.

**27 April 2004** The parties meet and Mr Bagchi is informed that he was being dismissed because he had failed to meet the minimum performance standards for a CTA investigator. He was paid one month's salary in lieu of notice – the Department advised that it did not consider it was appropriate that Mr Bagchi work out his notice.

The Department stated that it recognised this was a difficult situation for Mr Bagchi and he was advised the Dept would pay for EAP Counselling (three sessions).

## **Parties' Positions – A Synopsis**

### **The Applicant – Mr Bagchi**

Mr Bagchi acknowledges that he was dismissed for failing to meet the minimum performance standards of an Investigator – CTA. Mr Bagchi submits that his dismissal is unjustified. The grounds cited by Mr Bagchi in support of the position that he was unjustifiably dismissed are summarised below.<sup>11</sup>

<sup>10</sup> This offer was rejected by Mr Bagchi through his representative.

<sup>11</sup> Mr Bagchi's evidence was voluminous, disorganised and repetitive. It included a minute analysis of technical aspects of the numerous tasks undertaken by him and analysis of his demonstrated competencies and the deficiencies in the performance of senior investigators associated with the tasks in question. It also contains extensive and detailed personal criticism of CTA personnel in the nature of ill treatment, bullying, bias, predetermination and discrimination suffered by him at the hands of CTA staff. It is neither necessary or helpful in determining this matter that Mr Bagchi's evidence be recorded in detail and I have summarised it to provide an accurate overview of Mr Bagchi's position.

### Performance Assessments

Karen Rapson's assessment of his performance based on the 1<sup>st</sup> and 2<sup>nd</sup> performance improvement plans was unfair, unjust and unprofessionally done.

It was Mr Bagchi's position that Ms Rapson's assessment of his performance is incorrect from a tax technical perspective and this probably results from her mistaken understanding of the CTA's systems audits basic concepts. In his evidence Mr Bagchi expanded on this point to criticise the technical competence of a number of the Senior Investigators who critiqued his work and/or who had input into the performance assessment process.

In respect to Ms Rapson's assessment of his written reports Mr Bagchi submits that Ms Rapson substituted her judgement on the criteria (*that it will be sufficiently clear for a competent investigator to understand how the system works*) rather than putting it to a competent investigator for assessment. (Mr Bagchi reported he had heard of positive feedback on his work being received from Investigators).

Mr Bagchi was also critical of the fact Ms Rapson had criticised his use of acronyms and capitals – which are trivial aspects of his written work.

Mr Bagchi criticised what he sees as unreasonable deadlines for the submission of written work.

Mr Bagchi noted the positive aspects of his performance assessments. He considers these had not been weighed appropriately.

In summary on the question of assessment of his performance Mr Bagchi considers his work was not assessed in accordance with the Code of Conduct governing ethical conduct – that assessments be based on equitable, naturally just and sensible factors. If a fair assessment had been carried out (and Ms Rapson should have ensured the assessment was carried out by an Investigator who was not under her direct control) then that assessment would have shown he met the competency standards for the job.

### Unfair Process

Mr Bagchi submits he was pressured into signing the Performance Improvement Plans signed off in September 2003 and February 2004). He submits that pressure almost amounted to duress.

Mr Bagchi submits he was not advised of his right to representation prior to meeting with Ms Rapson and Mr Nimmo on 12 September 2003 where the 1<sup>st</sup> Performance Improvement Plan was discussed and later signed off – a process whereby the management of his performance was brought within the scope the Department's disciplinary procedures.

Mr Bagchi submits he was subjected to two unjustified warnings. He focussed particularly on the second of those warnings and emphasised his belief that he was permitted to obtain assistance with the C..... report from another investigator (by way of peer review) and that he had specific permission from Karen Rapson to show reports to his English language tutor prior to submitting them for critique.<sup>12</sup> He also noted there had been no intention to deceive on his part and submitted that he had immediately acknowledged (when asked) that he had had some help with this report

<sup>12</sup> In this regard the fact that Ms Rapson could not point to a specific *written* instruction that he was to submit reports for critique prior to seeking third party assistance is criticised as a process failure.

from his language teacher and a colleague. Mr Bagchi disputed the amount of assistance said to have been provided by his colleague Agnes Lim.

When it came to the decision to dismiss him Mr Bagchi submitted that Ms Rapson did not keep an open mind, did not listen to his explanations given in respect of the critique of his final report or the explanations given by him at the meeting of 26 April 2004. Ms Rapson did not provide comment on the explanations given by him on these occasions prior to communicating to him the decision to dismiss him on 27 April 2004.

Mr Bagchi was concerned that he was not allowed to work out his notice and in particular that he could not say goodbye to his colleagues. He considers he was subjected to humiliating treatment in this regard.

Lastly, Mr Bagchi submits that no opportunity for redeployment was made available to him.

### Training

Mr Bagchi acknowledges he received considerable training whilst in his employment with IRD. However, he is critical of the fact that much of that training was undertaken by him at his own initiative and that it was internal, self directed training. He is critical that the only paid training he received was the English language tuition the Department arranged for him and notes that he was dismissed prior to the completion of this training. Mr Bagchi described requesting specific training (SAP training and training in taxation and accounting) and submits he was specifically denied access to this requested training.

In respect of the on the job training provided by team leaders Mr Bagchi criticised certain team leaders as providing minimal support, assistance or on the job training (Ms Topliss). On the other hand he criticised the fact that guidance given was subsequently used as evidence that he was not competent to do the job (Mr Nimmo).

### Disparity of Treatment

Mr Bagchi submits there were two other staff that did not meet the 100% competency performance standard. He submits, however, that he was the only one who was singled out for a performance management system designed to lead to dismissal.

### Bias/Ill treatment/Cultural and Racial discrimination

It is an overarching theme of Mr Bagchi's evidence that during his employment he was subjected to bias, deep prejudice and hatred from CTA investigators along with systematic ill treatment, bullying and cultural and racial<sup>13</sup> discrimination.

### Conspiracy

It is Mr Bagchi's position that the performance improvement programme instituted by the Department was designed to set him up for dismissal rather than an improvement in his performance.

Mr Bagchi submitted the root cause of his problems lay in the deep bias and prejudice of his first team leader (Sharon Topliss). He cites the memorandum sent by her to her superior on 22 August

<sup>13</sup> I note that Mr Bagchi has not formally pleaded that he was subject to unlawful discrimination within the meaning of s.104 of the Act. Nevertheless the issue hung over the submission of grievance and the investigation meeting.

2002 in which she states "*Rahul has not progressed as I would have wished and now I have serious doubts about his ability to perform at any level in CTA*". Mr Bagchi submits this memorandum demonstrates a breach of good faith by the Department. Before submitting such serious and fatally damaging remarks against him he should have been given an opportunity to explain.

Ms Topliss' demonstrated attitude was critical because she is amongst the oldest CTA staff and she enjoys blind, friendly loyalty from CTA staff including Kris Rapson. It is on this basis, Mr Bagchi argues, that the conclusion can be drawn that CTA management (criticised in trenchant terms) predetermined a decision to dismiss him and then put in place a strategy to systematically humiliate and harass him so that he would leave of his own accord. They also adopted a strategy (in the alternative) that they would put him under a performance management process in a disciplinary setting with the intention (as they were the arbiters of his performance) to deem his performance below the acceptable standard and dismiss him.

This is what they did and on 27 February when he was dismissed his Union organiser summarised the Department's actions stating that he (Rahul) had been subjected to microscopic examination well beyond his peers, harassment and bullying and that the Department's actions were illegal in that they amounted to cultural/racial discrimination. (Paraphrased).

Despite all this Mr Bagchi seeks reinstatement to his former position because "*I love my job and I am competent in my job*" and "*I cherish my work mates*".

### Closing submissions

Two sets of closing submissions were received by the Authority on behalf of Mr Bagchi. His counsel Mr McKenzie provided closing submissions at the end of the first two days assigned to the Investigation Meeting. However, Mr Bagchi indicated he wished to have other witnesses attend on his behalf and he asked that the meeting be reconvened in Auckland to allow those witnesses to attend and be questioned. An opportunity to present closing submissions relating to the issues raised in the 3<sup>rd</sup> day of the hearing was provided. In the event, Mr Bagchi made his own closing submissions (he is no longer represented by Mr Ryan). Those submissions canvassed the entire case for Mr Bagchi. Counsel for the respondent has replied.

The first set of submissions for Mr Bagchi concentrate (in the main) on alleged flaws in the performance improvement process as it was implemented in accordance with the Department's disciplinary procedures.

The first procedural challenge relates to the provision of the HR guidelines (Section 9) which addresses those circumstances where the performance of an employee cannot be managed through the normal performance appraisal system. It is provided that:

*"At some point though, a decision may be made that the continued management of a person's poor performance under the performance management system is inappropriate" And "Managing poor performance within the disciplinary provisions formalises the process"*.

It is argued for Mr Bagchi that the formal process (page 27) requires the respondent:

*"Prior to the meeting. The staff member must be advised prior to each meeting, of their right to request employee representative assistance and/or representation at any stage"*

It is submitted for Mr Bagchi that this provision was not adhered to prior to Mr Bagchi's meeting with Ms Rapson and Mr Nimmo on 12 September 2003 where the 1<sup>st</sup> performance improvement plan was discussed for implementation. It has long been the law it is argued that an employer must follow its own procedures. It is submitted this is a fatal flaw in the process adopted by the Department when it implemented the performance improvement process with Mr Bagchi.

The second procedural point argued for Mr Bagchi is that he was misled by Ms Rapson (in respect to the C.... report submitted by him under the 2<sup>nd</sup> performance improvement plan (submitted on 5 March 2004) into believing Ms Rapson accepted the report as a great improvement over work previously submitted by him. As a result Mr Bagchi did not avail himself of representation at the meeting with Ms Rapson and was ambushed at that meeting and pressed into providing explanations which were subsequently used against him. It was also submitted the applicant was not sufficiently put on notice (prior to the disciplinary meeting) regarding the allegations against him in regard to this incident, the investigation process was itself unfair and tainted by bias and Ms Rapson failed to appreciate the mitigating factors.

It is also submitted that the dismissal itself is unjustified for want of procedural fairness. Among a number of points made under this head are claims, the process was unfair, the applicant's explanations were not listened to, the applicant was not provided with adequate training or opportunity to improve. It was also argued the dismissal was effected in an unfair manner. The applicant did not give informed consent to leaving immediately and he was humiliated as a result of having to leave the workplace immediately with no opportunity to say goodbye to his friends.

Neither did the respondent exhaust all possible alternatives (including redeployment) to dismissal prior to taking the decision to dismiss Mr Bagchi

On the matter of the applicant's desire for reinstatement the Authority is reminded that this is the primary remedy under the Act and is also reminded that Mr Bagchi is willing to be reinstated to a suitable alternative position.

The second submission (submitted after the 3<sup>rd</sup> day of the investigation meeting) repeats the substantive allegations set out in Mr Bagchi's evidence and canvasses and challenges in depth processes adopted by the respondent in managing Mr Bagchi's performance. This submission is not summarised here but will be referred to where appropriate in my determination of the matter.

### **The respondent's position**

The respondent's position is summarised in closing submissions which are supported by the evidence of the respondent's witnesses and the significant documentary evidence which has been made available to the Authority. The respondent's position is that:

- The applicant was justifiably dismissed for unsatisfactory work performance on 27 April 2004, following a full and fair performance improvement process which incorporated the full range of informal and formal performance management techniques.
- The applicant was fairly and justifiably issued with written warnings which incorporated the full range of informal and formal management techniques.
- The applicant was never discriminated against during his employment with IRD.

- That the applicant's other general claims (including systematic, ill treatment, bullying, harassment, predetermination, disparity and treatment) are unfounded, unsubstantiated, wholly spurious and offensive.
- The applicant has an entirely unrealistic view of his abilities and refuses to acknowledge that his own limitations have given rise to the situation he finds himself in. The respondent did all it possibly could do to assist the applicant to meet the necessary performance standards, but the applicant failed to achieve those standards.
- That in the circumstances it would be completely inappropriate for the applicant to return to the Respondent's workplace. This is because the applicant holds the belief that all of the respondent's managers and staff that attempted to assist him with his performance are wrong on technical matters and that he is right. He also continues to hold to the false belief that his performance is on par with the best of CTA investigators. The applicant's inability to accept or even acknowledge the reality of the situation makes reinstatement an impracticable proposition.

In response to the allegations that this dismissal must be vitiated for want of procedural fairness, the respondent highlighted the findings of the Court in *Hawkes v DML Resources Ltd* AEC 73/97. There Colgan J. found the Court was not required to determine whether:

*".....it could discern some element of unfairness in the procedure, but whether the procedure was so unfair that the dismissal should be set aside regardless of its substantive merits."*

It is the respondent's position that it undertook a lengthy, impartial and fair performance management process with the applicant. To that end the Mr Bagchi was:

- Clearly informed of the respondent's dissatisfaction with his performance - the information being communicated in a objective manner appropriate to the each stage of the process adopted to assist Mr Bagchi to improve his performance
- Readily comprehensible and objective criticism was provided and objective standards for improvement were set. Mr Bagchi was provided with the opportunity to have input into the objectives set in respect of the 2<sup>nd</sup> plan implemented.
- The applicant was allowed more than reasonable time to achieve the improvement sought.
- The applicant was provided with on the job coaching, counselling and training appropriate to his needs.
- He was provided with support and mentoring by a variety of senior investigators including an investigator he specifically requested as a mentor and who had English as a second language. This support was provided at significant extra cost to the Department as Ms Liao was required to travel from Wellington act as Mr Bagchi's mentor.
- The respondent worked through two performance improvement plans with the applicant over three months (1<sup>st</sup> plan) and two months (2<sup>nd</sup> plan). The process was attended by all the appropriate advice relating to access to representation and warnings of the consequences of a failure to improve. Mr Bagchi was provided with constant feedback and given the opportunity to comment and provide explanations in respect of the respondent's interim findings as they unfolded.

- In April 2004 the respondent turned its mind fairly to the question of whether or not the applicant had met the standards set for him.
- Before dismissing the applicant the respondent exhausted all possible remedial steps by way of coaching, counselling, provision of training, the adoption of formal and informal performance improvement processes undertaken by a variety of senior staff.
- The respondent did consider redeployment but given Mr Bagchi did not possess strong tax and accounting skills there was no suitable alternative position available to redeploy him to.

In closing the respondent submitted that taking into account all the steps the respondent took over the period of the applicant's employment to assist the applicant to lift his performance, not to mention the resources utilized and the costs incurred the respondent was justified in dismissing the applicant on the information available to it at the time the decision to dismiss was made.

## Legal Principles

The most comprehensive statement of principles applicable in situations of dismissal for poor performance is that set out in *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ, 659. Those principles are summarised in the head note to that case.

*"(1) the test for any justified dismissal is the same, "what was it open to a fair and reasonable employer to do?" A dismissal for poor performance is fundamentally no different from one for misconduct. In both cases the question is whether the employee's behaviour was a breach of the contract and was so serious that the employer was entitled to accept the repudiation of the contract.*

*(2) The same requirements of fair and reasonable treatment apply in both situations. These requirements mean that the employee, who may potentially be dismissed for poor performance, must be given specific reasons for the dissatisfaction and a reasonably specific and measurable improvement should then be demanded by the employer, giving a reasonable period to establish whether the employee is able to achieve the improvement. The trial of the employee's work must be fair and the results at the end of the trial period considered dispassionately. The employer should take into account an employee's previous good record and the possibility of redeployment.*

*(3) Without a fair trial of the employee's capacity the employer has no reasonable basis for reaching a conclusion adverse to the employee and must be treated as if it had not in fact reached such a conclusion. Airline Stewards & Hostesses of NZIUOW v Air New Zealand Ltd [1990] 3 NZILR 584 (CA).*

*(4) If poor performance is established by a fair trial/investigation, the employer must still consider whether the employee is so deficient as to entitle a fair and reasonable employer to dismiss.*

*(5) Warnings for poor work performance should be explicit and fair. They should describe how an employee's behaviour is deemed to be unsatisfactory, give clear information about what improvement will meet the employer's requirements, and how improvement will be measured. Their purpose is to give an employee an opportunity to improve, and to enable dismissal to be averted. They may not be used to create a pretext for dismissal.*

*(6) The following list (not necessarily exhaustive) of questions should be asked when considering dismissal for poor performance:*

- (a) *Did the employer in fact become dissatisfied with the employee's performance?*
- (b) *Did the employer inform the employee of the dissatisfaction and set out the expected standard?*
- (c) *Were the criticisms and future requirements objective and readily comprehensible by the employee?*
- (d) *Was reasonable time allowed for the attainment of the required standards?*
- (e) *After the above had been done, did the employer turn its mind fairly to the question whether the employee had achieved what was expected, including:*
- (i) *Using an objective assessment of measurable targets*
  - (ii) *Giving the employee an opportunity to answer the conclusions arising from the trial period;*
  - (iii) *Listening to the employee's explanation with an open mind;*
  - (iv) *Considering the explanation and all favourable aspects of the employee's service record and any fault on the part of the employer in terms of poor training, management, or promotion;*
  - (v) *Exhausting all possible remedial steps such as training, counselling, and redeployment?"*

On the matter of assessing the fairness of the process followed in this matter I note that where there is provision for a procedure or code which is to be followed in the event of disciplinary action, it is a term or condition of the employment that the employee will not be dismissed without the established procedure being first followed, and a good and conscientious employer will follow it. However, the employer's conduct of the disciplinary process is not to be put under a microscope or subjected to pedantic scrutiny nor are unreasonably stringent procedural requirements to be imposed.

*"Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person" NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd ERNZ 582/595 (pre-1991 Sel Cas). On this subject I note too the Court's findings in Air New Zealand and Ltd v Sutherland [1993] 2 ERNZ 10/18 that the employer's investigation should not be subject to 'minute or pedantic scrutiny' but should have regard for fairness from the perspective of both parties:-*

Mr Bagchi submits he was subject to bias, deep prejudice and hatred from CTA investigators. Case law relevant to allegations of bias is to be found in *NZ Educational Institute v Board of Trustees of Auckland Normal Intermediate* [1992] 3 ERNZ 243, 272-276. There bias is described as;

*"Bias [at law] includes situations where it appears persons charged with the responsibility of making decisions have so conducted themselves to lead an objective observer to conclude they have closed their minds and were no longer giving genuine consideration to the issues before them. It relates not merely to the existence of some pecuniary or other interest in the subject matter of litigation but also to any*

*predetermination of the issue sufficient to show a real probability that the issue will not be determined in an unbiased or impartial manner. The existence of bias or predetermination may cause a dismissal to be unjustified”.*

Mr Bagchi himself has made contradictory statements on the matter of having been subject to racial discrimination. Certainly an unequivocal allegation to that effect was made on Mr Bagchi's behalf by his representative (Mr Duffy) on 8 April 2004 when a disadvantage grievance was notified to the employer. A similar allegation was stated by Mr Duffy on the day Mr Bagchi was dismissed and the allegation loomed over the investigation meeting where Mr Duffy described Mr Bagchi having been subjected to 'indirect' racial discrimination<sup>14</sup>. It is necessary for the sake of completeness then to name this allegation which undoubtedly informs Mr Bagchi's view and deal with it.

The leading case on the subject of prohibited discrimination (s.104 Employment Relations Act 2004) is *NZ Workers Union IUOW v Sarita Farm Partnership* [1991] 1 ERNZ 510. The Chief Judge stated there:

*The question for the Court is whether it has been shown that, but for one of the reasons mentioned in the section the worker would not have been dismissed.....(Emphasis mine).*

And

*...the Court also looks also for proof of a causal connection between them in the sense that the head of prejudice in issue must be shown to have been the reason which actuated the dismissal, the reason 'but for' which the dismissal is unlikely to have taken place.*

However, in considering such claims it is important to:

*“.....guard against the possibility of an oversensitive grievant attributing to discrimination a consequence that would have flowed in any event and therefore without discrimination”*

The onus rests with Mr Bagchi to convince me that the employer's explanation for Mr Bagchi's dismissal is unsatisfactory and that he has been discriminated against on the grounds of race.

A similar onus rests with Mr Bagchi to demonstrate he has been the victim of bias, deep prejudice and hatred against him. In *Ramankutty v The Vice-Chancellor of the University of Auckland* [2002] 1 ERNZ 586 the applicant, Dr Ramankutty was dismissed for unsatisfactory performance. Dr Ramankutty's position was that the University's expressed views relating to his performance were in reality a *“malicious cooked up story based on the prejudice and animosity of colleagues”*.

The Chief Judge had the following to say in that case. It is relevant to my determination in this matter.

*“The applicant alleges that the Vice-Chancellor was biased. This is a serious allegation and needed to be established by means of concrete evidence and not by general rhetoric. It is easy to say that someone is biased when that person is merely exercising discernment after gathering all the facts. It may be difficult to refute such an allegation. The fact of the matter in this case is that the allegation made by the applicant does not begin to get off the ground. All the indications are the other way. The applicant had a fair crack of the whip or as we say in the Antipodes, was given a fair go. That he case went against him may be due to the fact that it went against him according to its merits. The appellant is plainly reluctant to admit or even reflect on that possibility”.*

<sup>14</sup> Not particularised or distinguished from his earlier allegations of racial discrimination.

## Discussion and Findings

### Credibility

It could be the case that there is not one allegation or possible ground on which a dismissal may be challenged that Mr Bagchi has not gathered up and hurled at his former employer and the senior staff involved in this matter. However, for all the energy demonstrated by Mr Bagchi in mounting his challenge, in respect of the serious allegations of bias, deep prejudice, hatred and cultural/racial discrimination, that challenge is limited to rhetoric and there is not one shred of corroborative evidence to support the allegations.

Despite the serious allegations made against them – allegations they find deeply offensive and hurtful – the senior CTA investigators involved in mentoring and managing Mr Bagchi's performance and his ultimate dismissal for poor performance remain able and willing to acknowledge Mr Bagchi's strengths. He was described as intelligent, kind and demonstrating a willingness to improve his performance. This attitude is commendable in those senior staff, who at all times in this investigation demonstrated a balanced perspective despite the compelling evidence given by them of the personal cost (in time and stress) experienced by them in managing Mr Bagchi's performance and attempting to lift that performance. Ms Rapson described herself as '*spent*' as a result of this process. It would be fair to say all the senior IRD staff that gave evidence at this investigation meeting presented (four months after Mr Bagchi's dismissal) as exhausted by the process they have been through, saddened by the outcome and not a little offended at the nature of the allegations that are now directed against them. Sadly, they have one and all lost all trust and confidence in Mr Bagchi.

In a somewhat bizarre twist to this story (a twist difficult to fathom given the serious allegations Mr Bagchi now makes against his former colleagues) Mr Bagchi's stated position is that he "cherishes his colleagues" and wants to be reinstated. He believes that if he is reinstated "they will be humbled" and relationships will be repaired. These are contradictory positions that defy rational explanation<sup>15</sup>.

In all I found the evidence of employer's witnesses measured, balanced and supported by a sound documentary trail. Mr Bagchi, on the other hand, did not produce a jot of evidence to corroborate the serious allegations made by him and that negatively affects my view of his credibility, particularly as he can see as well as I that the weight of the documentary evidence makes the employer's explanation for Mr Bagchi's dismissal altogether more probable than his own fanciful and unsupported account of the reasons for his dismissal.

Where the respondent's evidence differs from that of Mr Bagchi's it is the evidence of the respondent's witnesses that I prefer.

### Findings

To support my findings I have set out the timeline and associated processes adopted by the Department in its attempts to address and lift Mr Bagchi's performance over the two years and eight months of his employment. That history is set out commencing at page 3 of this determination. Having regard to this description and all the evidence I make the following findings:

<sup>15</sup> These are not the only contradictory positions adopted by Mr Bagchi that deny rational explanation. Note the fact that he told Kris Rapson on 27 February 2004 that he didn't want to be with CTA and that he was only hanging on to make IRD go through the process. This does not gel with his determination to be reinstated.

The employer developed concerns regarding Mr Bagchi's performance from early in the employment relationship. At first the concerns in question were advised to Mr Bagchi and dealt with through discussion, counselling and on the job coaching and training. The evidence reveals there was optimism between the parties that these formal and informal measures would result in an improvement in Mr Bagchi's performance.

In accordance with its contractual obligations (applicable to all its employees) I find the respondent set clear and understandable performance expectations for Mr Bagchi in consultation with him and assessed his performance against those expectations using objective criteria in an open and constructive process giving positive feedback where possible and always expressing conclusions in objective and moderate language. Mr Bagchi was entitled to and did provide feedback on the informal and formal performance assessments carried out. The formal performance management process was augmented by one on one coaching and training appropriate to his needs.

Mr Bagchi was, I find, ably supported and mentored in the early stages of the performance management process by his team leader Sharon Topliss. Despite all the support, including fortnightly coaching sessions and ongoing training provided to Mr Bagchi his performance did not improve. Both Ms Topliss and Mr Bagchi became frustrated with the intensive effort required of them – effort which did not result in the desired improvement in Mr Bagchi's performance<sup>16</sup>. The fortnightly coaching sessions were replaced by individual coaching sessions provided by Senior Investigators from the Wellington and Auckland offices including Mr Nimmo and Ms Liao.

In August 2003 Mr Bagchi's second annual performance assessment was completed. It is recorded that Mr Bagchi has not met the technical standards for systems audit work. Mr Bagchi records his disagreement with the assessment.

From August 2003 Mr Nimmo had taken over as Mr Bagchi's team leader. He is a very experienced CTA investigator. He approached the role of mentoring, coaching and providing appropriate feedback to Mr Bagchi very seriously. Despite his best efforts he could not secure from Mr Bagchi the performance improvements sought. An early trait demonstrated by Mr Bagchi – of argument, delay and denial of performance deficiencies was now developing into a well established pattern. Paradoxically, whilst the evidence shows that Mr Bagchi was keen to learn and extremely willing to please he was, on the other hand, argumentative and he failed to accept advice which was designed to assist him to improve his performance. When he did accept advice it was only after delay and/or argument and he seemingly could not transfer learning achieved to new tasks. As time progressed Mr Bagchi dealt with the ongoing feedback on his performance and the fact that he was not achieving expectations by denying his poor performance and formally recording his disagreement with performance assessments.

I find Mr Nimmo's health began to suffer as a result of the debilitating difficulties he faced in managing Mr Bagchi's performance. I say debilitating because a most unusual set of circumstances prevailed here. Both parties were acting in good faith. The Department (in this instance involving the good offices of Mr Nimmo) was genuinely taking every step available to it to assist Mr Bagchi to lift his performance to the required standard. Mr Bagchi was most willing to please but in the execution of the desired improvements he fell short despite the intensive assistance through coaching, training, counselling and feedback provided to him. It was undoubtedly made all the more difficult by the entrenched pattern of argument, delay and the increasing incidence of Mr Bagchi

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<sup>16</sup> I specifically find it was entirely appropriate for Ms Topliss to keep her own supervisors abreast of her concerns regarding Mr Bagchi's performance. She was not required as part of this internal reporting process to put these concerns to Mr Bagchi for an explanation prior to reporting to her supervisors. Mr Bagchi was, in any event, aware of his team leader's concerns through feedback received on his performance and had the opportunity to express his own views on that feedback through the informal and formal assessment processes he took part in during 2002 and 2003.

denying his performance deficiencies. The parties became locked into a circular routine that had no positive outcome with the draining and ultimately debilitating effect of a deterioration - to a greater or lesser degree - in the well being and health of those involved.

I find in all probability Mr Bagchi was not himself unaffected by the unsuccessful efforts put in to help him lift his performance. Mr Bagchi was extremely sceptical that IRD managers have reported health problems associated with their involvement in the performance management measures designed to lift his performance. However, he advised at the hearing that he was suffering from stress and he believes he may have developed an ulcer. It is, therefore, likely that Mr Bagchi has also suffered health problems albeit he has not sought professional advice.

Mr Nimmo faced the consequences of the reoccurrence of a pre - existing condition by asking to be relieved of his role as Mr Bagchi's team leader. He advised that if was not relieved of his role he would have to consider leaving his job. Mr Nimmo said at the Investigation Meeting this would have been a '*devastating*' outcome for him. It is, I find, a measure of the developing desperation affecting all of those intimately involved in this matter that Mr Nimmo would seriously consider giving up a job he loved and excelled at rather than continue with the increasingly fruitless attempts to assist Mr Bagchi in meeting the performance expectations of the job.

Ms Rapson took direct responsibility for Mr Bagchi. (Mr Nimmo continued to work with Mr Bagchi on assigned tasks but was no longer his responsible officer). Mr Bagchi considers Ms Rapson took over as his responsible officer to establish "*absolute functional and administrative control*" over him. I find that is not the case. Ms Rapson took over the role to relieve Mr Nimmo of that role.

It had also been decided following the August 2003 performance assessment that it was necessary, because all other informal and formal performance management steps had failed to bring about a consistent overall improvement in Mr Bagchi's performance, to bring the future management of Mr Bagchi's performance under the Department's disciplinary processes in order to clarify that continued poor performance was unacceptable and that it could lead to his performance being terminated.

I find that from this point the Department formalised its efforts in setting objective and achievable expectations, providing ongoing coaching, counselling, appropriate training and feedback. It was, however, now accompanied with formal notice to Mr Bagchi that his performance was unsatisfactory. He was provided with the time and appropriate support to lift his performance and advised that he was expected, within a set timeframe, to perform to expectations. The consequence of a failure to meet the expectations set was clearly set out - that it might affect his continued employment.

All this was set out in the first Performance Improvement Plan signed off between Mr Bagchi, Ms Rapson and Mr Nimmo on 22 and 29 September. The evidence does not support a finding that Mr Bagchi was subject to duress in the development of and signing off of either of the Performance Improvement Plans (September 2003 and February 2004). Mr Bagchi was advised at the time the 1st Plan was developed and signed off that from this point on he was entitled to representation at all formal and informal meetings held in respect of his performance. It is the applicant's position that he should have been advised of the right to representation at the meeting held between the parties in Wellington on 12 September 2003 to discuss and set in place the 1<sup>st</sup> Performance Improvement Plan. Certainly, the HR Manual states that prior to each meeting that is disciplinary in nature employees must be advised of their right to representation and that the meeting concerns a disciplinary matter, that it is serious and that dismissal may be a consequence. This notification was not given to Mr Bagchi prior to the 12 September meeting where agreement was reached on the 1<sup>st</sup> Performance Improvement Plan. I do not consider this failure vitiates the decision to dismiss Mr

Bagchi because in almost all other respects the process followed by the respondent (for a lengthy period from September 2003 to April 2004) was impeccable and there is no doubt that Mr Bagchi was clearly advised of the disciplinary nature of the process he was now part of and of the consequences of a failure to improve his performance. No disadvantage was suffered by Mr Bagchi through the Department's failure to make the appropriate notification prior to the first meeting in that lengthy process and Mr Bagchi did not suffer any disadvantage. He was certainly put on appropriate notice from that time on and reminded at appropriate times thereafter. I note, too, there was no issue raised by Mr Bagchi or his Union advisors regarding this matter until March 2004 when Mr Bagchi submitted a pro forma style objection to the first warning given to him and laid a general complaint about the process adopted for the 1<sup>st</sup> Performance Improvement Plan. It was not until 8 April 2004 (shortly before Mr Bagchi's dismissal) that a personal grievance was formally raised. Even when a grievance was submitted on Mr Bagchi's behalf that submission focussed on the final warning given to Mr Bagchi and stated the Department's behaviours constituted unjustifiable action and discrimination on the basis of race to Mr Bagchi's disadvantage.

In December 2003 the results of the 1st Performance Improvement Plan were assessed. Mr Bagchi had not met the standards set. I find specifically that Ms Rapson was well qualified to make the assessment she did and there is no merit in Mr Bagchi's claims that Ms Rapson did not possess the technical skills required to make the assessments. Ms Rapson provided Mr Bagchi with her assessment and on 15 December the parties met with representation to consider the assessment and hear Mr Bagchi's responses. Mr Bagchi's comments were considered and the respondent determined that a warning was warranted. I find the review process was conducted fairly (notice, representation, opportunity for explanation) and was conducted in accordance with the Department's established procedures. Unfortunately, having heard Mr Bagchi's comments it was determined that a warning was appropriate and it was delivered in accordance with the Department's procedures later that day (15 December). This action was open to the employer on the evidence before me and Mr Bagchi was treated fairly throughout the process.

A second performance improvement plan was planned to run from 5 January 2004 to 5 March 2004. At Mr Bagchi's request the Department agreed to allow him to have input into how the achievement of future job expectations would be assessed. The Department also agreed (at the request of Mr Bagchi's delegate) to provide English language tutelage to Mr Bagchi and it agreed to Mr Bagchi's request that Ms Liao be his mentor for the duration of this performance improvement process. I find the Department bent over backwards to meet all the reasonable requests made by Mr Bagchi that could assist him to lift his performance and so secure his future as a competent Investigator – CTA.

There was some considerable delay in signing off the 2<sup>nd</sup> plan – delay I find which was occasioned by Mr Bagchi's failure to promptly address those aspects of the plan he was to have input on. The plan was signed off on 27 February 2004 and the timeframe for the plan was amended to cover the period 5 February – 5 April 2004.

On 27 February the parties also conducted an interim performance appraisal in accordance with the contractual requirement to assess performance on an annual basis (with an interim assessment mid way through the performance year). It was at this meeting that Ms Rapson empathised with Mr Bagchi and stated the process must be difficult for him. I accept Ms Rapson's evidence that Mr Bagchi said he was only remaining with the Department to make it go through the process. This statement was disconcerting to Ms Rapson and called into question her trust and confidence in Mr Bagchi. It is to her credit she decided to take the view the statement may have been a defensive reaction on Mr Bagchi's part to the difficult situation he was facing.

On 5 March 2004 Mr Bagchi submitted work to Ms Rapson, for assessment in accordance with the 2nd Performance Improvement Plan. This work had had, I find, significant input from a colleague

and his English language tutor prior to submission to Ms Rapson. Mr Bagchi did not tell Ms Rapson at the time he submitted this work of the help he had had in its preparation. I find Mr Bagchi was not misled by Ms Rapson with respect to her assessment of the C...report. Ms Rapson was entitled to communicate to Mr Bagchi on receipt of the report that it looked, on an initial assessment, to be a significant improvement on earlier work submitted by him. She was also entitled to voice concern to Mr Bagchi at their 11 March meeting when it was revealed that the work submitted was not Mr Bagchi's alone and to initiate a disciplinary investigation on the matter. Mr Bagchi may have been surprised that Ms Rapson was concerned that he had received assistance with the report but he should not have been<sup>17</sup>. I specifically find there was no ambush by Ms Rapson to Mr Bagchi's disadvantage and he was given every opportunity through the subsequent investigation to explain the amount and type of assistance he received in preparing the report in question.

A formal disciplinary investigation was commenced when Ms Rapson became aware that the work submitted was not Mr Bagchi's work alone. That investigation was conducted fairly and in accordance with the Department's procedures and Mr Bagchi was given a final warning on 29 March 2004. Much of the evidence and submissions focussed on this episode and the challenges to the process and outcome were many and pedantic. At the heart of the issue was an assumption on Ms Rapson's part, based on instructions given by her to Mr Bagchi, that the work he submitted for critique would be his own. Mr Bagchi is adamant he had no intention to deceive and believed it was appropriate to obtain the assistance he did. I find that the difference between the parties on this point highlights an irresolvable gulf between the Department's expectations and Mr Bagchi's ability to understand and deliver on what was required of him. Regardless of the how precise the instructions given to Mr Bagchi or whether or not they were recorded in the volumes of paper that are associated with this matter<sup>18</sup> it is axiomatic that work prepared for assessment in accordance with a performance improvement plan will be the work of the employee whose performance is under assessment. It may be the case that Mr Bagchi misunderstood what was required of him. If he did then the prognosis for the Department having trust and confidence in Mr Bagchi to deliver on its expectations of him was as dismal as it would have been had he deliberately submitted, for assessment, work that was not his own. If nothing else it indeed shows a serious lack of judgment on Mr Bagchi's part and I find it was open to the Department to give Mr Bagchi a final warning after carrying out a full and fair investigation (which it did) and considering all the information before it, including Mr Bagchi's explanations.

Mr Bagchi was then invited to submit another piece of work for assessment in accordance with the 2<sup>nd</sup> Performance Improvement Plan. Mr Bagchi submitted that report and on 16 April Ms Rapson provided him with a written assessment that concluded he had not met the critical expectations set in the plan. Mr Bagchi provided comment to the effect he had met the expectations required. On 26 April the parties met to consider the assessment and to hear Mr Bagchi's comments and explanations. Both parties were represented and the meeting lasted for two hours. For the rest of that day and into the 27th Ms Rapson considered all the information before her. She arrived at the conclusion that dismissal was warranted and at a meeting between the parties on 27 April she communicated the outcome to Mr Bagchi. Mr Bagchi was given one month's pay in lieu of notice and the Department advised that it is not considered appropriate that Mr Bagchi work out his notice. The last day of his employment was 27 April 2004.

## Conclusion

The test of a dismissal for poor performance is the same as that for any dismissal "*what was open to a fair and reasonable employer to do*"

<sup>17</sup> See my findings below (same page).

<sup>18</sup> This instruction was not recorded.

I find, having evaluated the evidence before me that the respondent's decision to dismiss Mr Bagchi for poor performance was a decision open to it given he was unable to lift his performance despite the intensive efforts put into assisting him to do so. The process followed by the Department was, on the whole, impeccable and closely followed contractual and Departmental policies. In saying this I recognise that as the process crawled towards a conclusion it had a grinding and adversarial air about it. The Union considered that Mr Bagchi's performance had been subject to pedantic scrutiny beyond anything his peers had been subjected to and put this down to discrimination on the basis of culture/race. It would appear from the evidence Union representatives gave at the Investigation Meeting (two of those witnesses admitted to not knowing why Mr Bagchi was dismissed) that the Union representatives had done little or nothing to appraise themselves of the history of the performance management processes that had been followed by the Department for the two years prior to its involvement. It is to be expected that representatives in a disciplinary setting will adopt a robust approach to advocating a client's position. Such a position should however be fully informed and that was not the case here.

I find the disputatious and scripted air the process took on in the latter stages had nothing to do with discrimination on the basis of race or a lack of open mindedness on the part of senior Inland Revenue staff. It had all to do with the fact that Mr Bagchi was in denial of the deficiencies in his performance and he and his representatives were resorting to ever more desperate measures to challenge the process, the integrity of IRD managers and to lay blame for deficiencies in Mr Bagchi's performance at any door but his own. In dealing with this conduct the respondent increasingly relied on a scripted approach in its meetings with him. I note, however, that as difficult as the process was it was a process that the employer was contractually obliged to follow and one Mr Bagchi was committed to ensuring the employer did follow. In particular, I find, there was no conspiracy or predetermined plan on the part of IRD to get rid of Mr Bagchi by one means or another. He was not subject to bias, deep prejudice or hatred by senior IRD staff and neither was he subject to cultural or racial discrimination. On the contrary IRD, through a number of qualified senior staff, provided extensive support, coaching, training, counselling and feedback to Mr Bagchi with the sole aim of helping him to lift his performance. They persevered with this at some considerable personal cost to themselves, over a considerable period<sup>19</sup> and at financial cost to the Department. The Department's officers maintained a fair and open minded approach throughout.

There is only one issue that has given rise to a question on my part in respect to the employer's conduct in this matter. It was the last step taken by respondent in failing to allow Mr Bagchi to work out his notice. Mr Bagchi was engaged on an IEA which allowed for payment in lieu of notice. However, he joined the PSA in 2003 and (as I understand it) became subject to its provisions and the provisions of his IEA (where they were not inconsistent with the collective). The CEA provides that permanent employees will be given one month's notice of termination. There is no provision which gives the respondent the right to terminate with notice in lieu.

In common law a summary sending away without payment of contractual notice amounts to a wrongful dismissal but where notice is paid in lieu it anticipates and remedies any potential damages action for wrongful dismissal. Employment law in this country has moved beyond the concept of wrongful dismissal where the wrong is fully rectifiable through the payment of damages i.e. the amount of notice payable. In the absence of a contractual provision which allows payment in lieu of notice it is considered that fairness requires that a worker given notice be allowed to work out that notice in order to allow a dignified departure. The summary sending away of Mr Bagchi (albeit notice was paid in lieu) deprived him of the opportunity to depart the organisation gracefully and in a manner untainted by a hint of wrongdoing on his part.

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<sup>19</sup> Mr Bagchi was provided ample time to show improvement in his performance.

I have not received submissions in respect to how the provisions of IEA's mesh with those of CEA's in the ER Act environment or in respect to the notice provision applicable in this particular case and so I express no concluded view. On balance, however, I have decided this was a case where a "clean break" was warranted in all the circumstances and I rely on the comments of the Court of Appeal in *Aotearoa International v Madden* 1 ERNZ 511 in support of this position (albeit there the Court was referring to a management employee). The question is always what was fair and reasonable in the particular circumstances (being fair and reasonable to both parties). Mr Bagchi was a senior employee. He was part of a very small team undertaking specialised work requiring a high degree of technical competence. Over a lengthy period and despite intensive input on their part, the senior members of that team had lost all trust and confidence in Mr Bagchi's ability to competently do that work. There was, realistically, no CTA task he could reasonably be assigned to undertake during the month he worked out his notice. Further, Mr Bagchi was denying deficiencies in his performance and a personal grievance had been submitted on his behalf raising, I have found, completely unfounded claims of racial discrimination by senior officers of the Department – officers who would be required to supervise Mr Bagchi for the period of his notice. In addition, the Department had faced a determined challenge from Mr Bagchi and his advisors relating to the confidentiality of the performance assessment process with Mr Bagchi and his advisors wishing to inform other Departmental employees to gather support for Mr Bagchi's position<sup>20</sup>. Putting all this together I find a clean break was warranted albeit Mr Bagchi's departure from the Department was abrupt.

In concluding this determination I will dispose of one or two of the other allegations made by Mr Bagchi. For the sake of certainty in this matter I note allegations not specifically dealt with by me are dismissed as lacking merit – many of them being in the nature of pedantic scrutiny of the employer's conduct which the Courts have expressly frowned on.

Training. Mr Bagchi's submission that he was not provided with sufficient training is simply not supported by the evidence. The evidence shows that Mr Bagchi was provided with 409 hours training during his employment with IRD. This was far in excess of the training provided to comparable employees. In particular I find that Mr Bagchi was provided with training in taxation and accounting to the level that was required for his role as a CTA Investigator. There can be no criticism of the Department in providing internal training focussed to the needs of the job and the development of especially tailored programmes surely incurred a cost to the Department.

Redeployment I find the Department did consider the redeployment of Mr Bagchi. The evidence shows this happened after the first Performance Improvement Plan. The conclusion arrived at was that Mr Bagchi did not have the in depth knowledge of tax and accounting required for other roles in the Department. Nothing about that had changed by the time the Department came to make the final decision to dismiss Mr Bagchi and its failure to turn its mind to the question again does not vitiate the decision to dismiss Mr Bagchi.

#### Disparity of Treatment.

Mr Bagchi submits two other employees did not meet the 100% competency performance standard but they were not subjected to a performance management system designed to lead to dismissal. I

<sup>20</sup> It was argued that the internal recipients of Mr Bagchi's work should be a) the ones to assess aspects of his work under the PIP's and b) that the internal recipients of Mr Bagchi's work found it acceptable and should be canvassed to have their views weighed in the disciplinary process. I reject these points for the reason that internal recipients of Mr Bagchi's work had never seen that work without the substantial reworking and amendment required to get it into the state it could be released to internal recipients. They could have no knowledge of the Mr Bagchi's baseline work on which to provide input to the process and the only outcome of their being advised of the disciplinary process in train would be to destroy the confidentiality of the process and create an internal free for all on the rights and wrongs of the process and the subsequent dismissal of Mr Bagchi.

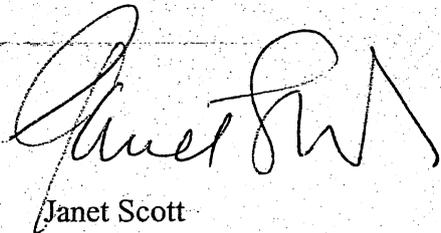
have found Mr Bagchi was not the subject of a predetermined plan designed to get rid of him. He has not otherwise established a prima facie case of disparity of treatment that the employer would be called upon to explain any difference in treatment between himself and other employees.

### **Determination**

Mr Bagchi's dismissal was justified. He does not have a personal grievance and is not entitled to the remedies sought.

### **Costs**

Costs are reserved. The parties are directed to file and serve submissions to allow the issue to be determined.



Janet Scott  
Member of Employment Relations Authority

