



(1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against an employer or former employer because of a claim -

(a) that the employee has been unjustifiably dismissed; or

(b) that the employee's employment, or 1 or more conditions of the employee's employment ... is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

...

[3] APN denies all of the claims.

## **Background**

### 1. Introduction

[4] APN publishes the 'Herald on Sunday'. It employed Mr Cook as the paper's assistant editor. Mr Cook was also a senior journalist and was to focus his efforts on writing topical news items and feature articles, at the same time retaining an editorial strategy and management role.

### 2. The alleged breach of privacy

[5] On the morning of 5 September 2008 two plain-clothes police officers attended at the paper's offices. The officers were said to be detectives in the drug squad, and had observed a vehicle registered to APN outside or near an address that was of interest to them. It was not clear how they identified Mr Cook as the driver, but the vehicle was the one Mr Cook used and to which he was entitled under the parties' employment agreement. The officers wanted to speak to Mr Cook.

[6] Mr Cook was not available, being at home on sick leave. The officers were referred to the paper's editor, Shayne Currie. Mr Currie sought unsuccessfully to ascertain why they wished to speak to Mr Cook, saying in evidence he was advised of little more than that Mr Cook's vehicle had been seen parked at an address they had under observation. He gave the officers Mr Cook's home address, assuming it would be readily ascertainable in any event.

[7] The officers visited Mr Cook at his home the same day. According to Mr Cook, the senior officer informed him the police were conducting a drug-related investigation into a man who worked at the address where Mr Cook's work vehicle had been observed.

### 3. Events leading to a meeting on 18 September

[8] Mr Currie telephoned Mr Cook on the evening of 5 September to advise of the police visit to APN and ask Mr Cook what it concerned. Because Mr Cook was ill he did not wish to discuss the matter at the time. Both said they would take advice, and subsequently did so. They agreed to meet and discuss the matter the following Tuesday, 9 September.

[9] Accordingly on the morning of 9 September Mr Cook informed Mr Currie he had taken legal advice and could report that he had done nothing wrong. He confirmed his vehicle was the one seen at the address, but said he was not involved in drugs. When asked if he was at the address for work purposes, he said he was. He declined to say any more. Mr Currie was concerned at what appeared to be an unwillingness to talk, while Mr Cook was concerned because he felt a 'witch hunt' was unfolding. Both said they would seek further advice.

[10] It was an exaggeration to believe a witch hunt was unfolding. The employer had concerns, which it was entitled to follow up. The concerns could and should have been followed up quickly and quietly. Unfortunately that did not occur.

[11] By letter dated 10 September 2008 Mr Currie sought a meeting to discuss the concerns, as he was entitled to, about:

- (a) Mr Cook's use of a company vehicle in work time and for purposes unrelated to his employment; and
- (b) The potential for Mr Cook's association with persons known to the police to damage the parties' relationship of trust and confidence, and bring APN into disrepute.

[12] Disciplinary action up to and including dismissal was raised as a possibility.

[13] The meeting went ahead on 18 September. The parties and their representatives attended. The meeting was tape recorded - albeit without APN's knowledge or consent - and a transcript was provided to APN in or about December 2008.

[14] Mr Comeskey had prepared a letter setting out Mr Cook's position, the contents of which he addressed at the meeting. He spoke at length of Mr Cook's dissatisfaction with the provision to the police of Mr Cook's address, to the extent that he considered the circumstances bordered on constructive dismissal. He pointed out that the stories on which Mr Cook works often require him to speak to people of dubious character. Importantly as far as the legitimate interests of APN as employer were concerned, he indicated that a preferred course of action would be for Mr Cook to report to the company in writing about his involvement. At the time a written response was not considered necessary, although a request to that effect was later made. Mr Comeskey went on to indicate the police had been interested in the people to whom Mr Cook was talking. There was to be a meeting with the police that afternoon, during which issues concerning Mr Cook's possible role as a witness were to be discussed.

[15] Mr Cook said he had been at the address some half dozen times because he was working on a story about a once-thriving business destroyed by family infighting. There had been violent incidents and charges of assault had been filed. Because the planned story was in its early stages, Mr Cook had not yet informed Mr Currie of it. He had been working on it for some two – three months.

[16] As a result of this indication from Mr Cook Bevan Gibbs, APN's in-house counsel, asked if Mr Cook had notes and a draft of the story for APN to look at. Mr Cook said he had brief notes at his home, but the rest of the material was in Mr Comeskey's possession. Mr Comeskey was acting for a member of the family concerned, as well as another person, on the assault charges. Mr Cook was referring to material obtained either from the police or Mr Comeskey in that context.

[17] There was considerable debate in the evidence about whether APN asked Mr Cook to produce the notes. The transcript does not record such a direct request, although Mr Currie was insistent that he made one. He suggested the tape had not

captured the request as it was an aside in the discussion, and the recording was being made by a dictaphone which was hidden. Because of the way in which the matter was pursued later I do not consider it necessary to resolve the conflict, rather note that the matter was at least raised.

[18] The next part of the exchange seems to me to encapsulate the problem here. Mr Gibbs explained APN's concern about Mr Cook's perceived unwillingness to talk about why the police had sought to contact him. Mr Cook indicated the matter was not one of unwillingness, simply that both parties were seeking advice.

[19] Mr Comeskey added that Mr Cook was annoyed at the approach from the police and now believed the employer was out to get him. Mr Cook had reason to be annoyed about APN's role in the approach from the police, but not to conclude that the company was out to get him. Unfortunately as matters progressed Mr Cook became increasingly wedded to that conclusion and still holds it.

[20] Similarly Rick Neville, to whom Mr Currie reported at the time, referred to the unacceptability of an employee's refusal to tell his editor what he was working on. If that was the view being taken of Mr Cook's responses, matters had not reached that point. Mr Cook and Mr Comeskey were being careful about what was said because of concerns about Mr Cook's possible role as a witness in a criminal trial, but were otherwise attempting to explain Mr Cook's activities. However the suspicion created by early perceptions of Mr Cook's responses also persisted, and increased with Mr Cook's subsequent behaviour.

[21] Mr Neville went on to say APN sought an assurance that Mr Cook was not engaged in any activity of a criminal nature that compromised the company or himself. Mr Gibbs added that the company also sought an undertaking that Mr Cook would be forthcoming with any further information or developments with the story or any involvement as a witness or otherwise in any criminal proceedings.

[22] Mr Comeskey summarised the written undertaking to be given. It concerned Mr Cook's lack of involvement in criminal activity, lack of any action jeopardising his obligations to the company, and awareness of the need to avoid bringing the company into disrepute. It did not mention the handing over of Mr Cook's story

notes or any terms of the kind Mr Gibbs had just indicated, although the omission was not pointed out. A brief company file note taken at or about the time records Mr Comeskey as agreeing to an undertaking which included the provision of the notes, as well as Mr Gibbs' terms. That was not an accurate record of Mr Comeskey's response regarding the contents of the undertaking.

[23] The meeting ended with Mr Gibbs saying matters would either rest where they were on receipt of the undertakings, or there may be further questions and the process may continue. For his part Mr Cook sought further information about the approach from the police.

[24] At that point there was no reason to anticipate difficulties, and it was common ground that after the meeting Mr Currie sought to reassure Mr Cook.

[25] By letter also dated 18 September, Mr Cook gave undertakings in the terms Mr Comeskey had summarised.

[26] It was again common ground that Mr Currie spoke to Mr Cook that evening and stressed Mr Cook's value to the paper.

#### 4. The suspension

[27] Unfortunately from that point on the relationship began a downward spiral. Mr Currie had reservations about the content of the undertakings because of what he considered their broad brush nature. In that they did not address some of the points discussed in the 18 September meeting, there were reasonable grounds for the reservations. Mr Currie sought advice from Mr Gibbs about what to do.

[28] Mr Cook was not aware of the reservations and the reasons for them, and asserted in any event that the undertakings were adequate. He believes there was a change in APN's view of him because he believes another journalist, on Mr Currie's instructions, was able to source police evidence obtained through the use of intercept warrants. He did not comment on the content of the material, but believes the journalist concerned is trying to smear his good name.

[29] Mr Currie denied instigating any investigation of the kind Mr Cook alleged, and any involvement in the journalist's activities. The journalist was not an employee of the Herald on Sunday at the time. He did not give evidence. He was one of a number of people Mr Cook sought to have summoned, but the summonses were not obtained or served. In that respect, two teleconference calls which the Authority convened in an attempt to discuss the relevance of the evidence of the summoned witnesses, and the possibility of obtaining briefs of evidence from them, did not advance matters because Mr Comeskey was not available to participate in the calls.

[30] In a letter to Mr Comeskey dated 23 September 2008 Mr Currie acknowledged these undertakings, but said additional undertakings were required. I accept that his action was the result of advice he obtained from Mr Gibbs. The additional undertakings amounted to an expansion of the items discussed at the 18 September meeting and not mentioned in Mr Comeskey's summary. In that sense they are not the 'fresh undertakings' Mr Cook alleges.

[31] The requested undertakings were that Mr Cook would provide a status report regarding his research and the story on which he was working, inform Mr Currie should he have further contact with the particular individuals of interest to the police, inform APN should he be involved in a criminal investigation as a witness or interviewee, and inform APN if he were the subject of a criminal or other investigation or charged with an offence.

[32] Unfortunately Mr Comeskey was unavailable and the additional undertakings were not provided. This created a delay which aggravated APN's concerns. On the afternoon of 1 October APN was advised there would be a further delay in that Mr Comeskey would be out of Auckland until 6 October.

[33] It was not clear whether that message had been received when, by letter to Mr Comeskey dated 2 October 2008, Mr Currie expressed concern about the failure to provide the undertakings and advised of a decision to suspend Mr Cook. The suspension was stated to be in place until Mr Cook provided the assurances and status report that were promised, and while further investigations were carried out.

[34] Mr Cook said 'that was the day my career was stolen from me.' The suspension provoked extremely harmful speculation about why he was not at work. Mr Cook said there was gossip to the effect that he was a drug dealer and involved in a P ring. These matters have had a profound effect on him and caused him considerable distress.

[35] Again, very unfortunately, Mr Cook attributed blame for the gossip to Mr Currie and APN in circumstances that were not warranted. In doing so he viewed APN's attempt to pursue its legitimate employment-related questions as something more sinister, and reacted in a way that was least likely to assist in allaying its concerns.

[36] For his part Mr Currie denied being the source of the gossip, and said that, when asked by a number of journalists and colleagues about the reasons for the suspension, he declined to discuss the matter. However he also said the gossip was a cause for concern for him, and he became even more concerned to obtain the information being sought from Mr Cook.

## 5. The warning

[37] By letter to Mr Comeskey dated 7 October 2008 Mr Currie sought a further meeting with Mr Cook on Friday 10 October. The letter said the meeting was to discuss ongoing concerns regarding its trust and confidence in Mr Cook. It referred to the failure to deliver the assurances it said were promised at the 18 September meeting, and requested in the 23 September letter and subsequently.

[38] It is always unfortunate when the availability of counsel creates delays which inhibit the resolution of employment relationship problems. Mr Comeskey was not available on 10 October and sought a delay to the end of the following week. Early on the evening of Wednesday 8 October Mr Currie sought a meeting 'this week', suggesting that alternative representation be arranged if necessary. This was a reasonable request in the light of the delays in obtaining a response to the 23 September letter.

[39] On 9 October APN was advised Mr Cook was unwell and would be seeking medical attention. A medical certificate asserting that Mr Cook was medically unfit for work for three weeks from 10 October was provided on 10 October. No other details were provided. To the extent that unfitness was the result of stress, and Mr Cook's stress was connected with the gossip about his circumstances, it would have assisted matters if Mr Cook had said so to APN. Instead, APN perceived that he was avoiding providing an answer to its requests.

[40] A series of exchanges failed to culminate in an agreed alternative meeting date, so APN sent a further letter dated 14 October to Mr Comeskey.

[41] The letter repeated and expanded on the requests for assurances. This time it referred to the requests and assurances it had sought on 18 September concerning the details of Mr Cook's story, and added several further questions concerning what, if any, interest the police were taking in Mr Cook. In what was a reference to the gossip, it asked whether Mr Cook had been talking to other journalists about the matter and why he had been logging in to his work email while suspended.

[42] The letter ended with a warning that, if acceptable and full assurances and answers were not provided by 3 pm on Friday 17 October, APN would review the suspension and consider disciplinary options including dismissal. The same day, Mr Cook was advised of the suspension of his cell phone access and fuel cards and asked to return his vehicle.

[43] By letter dated 17 October 2008 Mr Comeskey answered the questions as they related to involvement with the police, but said he was not in a position to answer the critical questions about Mr Cook's story and his notes as those were matters for Mr Cook.

[44] Regarding the possibility of discussions with other journalists, the letter said Mr Cook was aware from journalists who had contacted him that the matter was being discussed. He went even further at the end of the letter and said: "You have allowed rumour to effectively destroy the career [Mr Cook] has built up over 20 years and he will seek to hold you personally responsible." Mr Currie responded to Mr Comeskey by denying that he had anything to do with any rumours.

[45] By letter dated 21 October Mr Currie also pointed out that it was over a month since the requests for Mr Cook's notes and other documents relating to his story had been made. He then articulated formally the suspicions APN had. He said:

“The arrival in the Herald on Sunday newsroom on September 5 of two undercover drugs squad detectives, and their comments to me suggested that Mr Cook, at the very least, has been aware of nefarious activities and Mr Cook maintained his role as a journalist with Herald on Sunday was connected to these activities (sic). APN, however, is not aware of any work assignments for which any inference could be made that his involvement in these activities is work related, and has serious doubts that there is a work-related aspect to these activities and/or police inquiry.”

[46] The 21 October letter went on to say that, in the absence of the information it sought from Mr Cook, APN had reached the conclusion that Mr Cook had not been honest when he said his activities were work-related. It emphasised the extent to which the company's trust and confidence in him was being lost, and warned him in the following terms:

“In light of Mr Cook not providing the written assurances sought and information required in a timely fashion and before the deadlines set by the company, APN is now issuing him with a first and final written warning, which will be added to his employment file.”

[47] Later, the letter instructed Mr Cook to provide the notes of the story on which he said he was working. It warned that if he did not provide the documents no later than midday on 24 October further disciplinary action up to and including dismissal may follow.

## 6. The demotion

[48] Mr Cook's claim that he was unjustifiably demoted arises out of the following paragraph also contained in the 21 October letter:

“This letter is also to advise that Mr Cook's title as assistant editor has now been removed and he will assume the title of senior reporter, until such time as the company's confidence in Mr Cook is restored. All other terms and conditions of his employment will remain the same.”

[49] The letter went on to advise that Mr Cook's suspension was lifted, although Mr Cook remained on sick leave until 31 October in any event.

## 7. The response

[50] Mr Comeskey replied by letter dated 23 October. On the critical matter of the material regarding Mr Cook's story, he said he would discuss the matter with Mr Cook when he recovered and asserted that while Mr Cook was too sick to work it followed that he was too ill to properly respond to work-related issues.

[51] I do not accept that logic. The mere fact Mr Cook was unable to work did not mean he was unable to turn his mind to providing the material that by then had urgently and repeatedly been sought. There was certainly no evidence that Mr Cook was so ill (or stressed) that he was prevented from attending to the matter. A copy of a medical certificate asserting that Mr Cook was unfit for work was far from adequate in that respect.

[52] Mr Currie replied on 24 October, asking that Mr Cook post the notes to him.

[53] Mr Cook provided a further medical certificate dated 30 October 2008, asserting he was medically unfit to work and should be fit to resume on 9 November.

[54] By letter dated 11 November 2008 - attached to the first statement of problem and included in the parties' joint bundle of documents - Mr Comeskey raised personal grievances and sought an exit package on behalf of Mr Cook. APN's counter-offer was also produced in the parties' joint bundle of documents. Accordingly the 'without prejudice' privilege has been waived in respect of both documents. The only comment I would make about the exchanges is that the magnitude of the amount Mr Cook sought by way of settlement suggests he was factoring in his concerns about damage to his reputation associated with the gossip and rumours. I am not persuaded that APN was responsible for those matters, and in any event the amount sought was well in excess of awards made by the Employment Court and Employment Relations Authority.

[55] The 11 November letter also asserted that, for Mr Cook, a return to any employment with the Herald on Sunday was untenable. Mr Cook was concerned about the demotion and the warnings, while:

“the mere fact of this whole suspension saga has in reputational terms served to diminish his standing in the profession because of widespread gossip and rumour among his colleagues.

It is our position that his employer has acted unreasonably, unfairly and unjustly harshly in pre judging him on the strength of a visit from the police and the attendant ‘notes’ issue. It is the questionable decision to suspend that has fuelled speculative gossip among many members of the media industry. A twenty year career has been irreparably damaged on spurious grounds.”

## 7. Events leading to the dismissal

[56] By letter dated 12 November 2008 APN repeated the requirements that the story notes be provided and the company vehicle be returned. If these matters were not attended to by 12 noon on 14 November, further disciplinary action may result.

[57] Mr Comeskey replied to the 12 November letter saying Mr Cook had not reacted well to this latest turn of events and was seeing his doctor. Unfortunately Mr Cook saw the references to the possibility of the termination of employment in this and earlier correspondence as threats, and did not appear to appreciate that an employer is obliged to draw such a possibility to the attention of an employee as part of any disciplinary process.

[58] Two days later Mr Cook presented a further medical certificate asserting his unfitness for work until 14 December.

[59] By letter dated 15 November APN sought a further meeting on 18 November to discuss Mr Cook’s failure to return to work on 11 November, the provision of the story notes, and the return of the company vehicle. Since the return of the company vehicle and the failure to return to work were not themselves grounds for dismissal I do not address them any further in that context.

[60] On 17 November 2008 Mr Cook filed a statement of problem in the Authority in respect of the disadvantage grievances.

[61] Mr Cook also prepared a letter dated 18 November 2008 saying he would not be bullied and harangued. As for his story notes, he asserted that he had not been asked for them on 18 September. Even if the assertion was correct, it was not a complete answer because there had been repeated requests subsequently and the notes had still not been provided.

[62] A meeting went ahead on 19 November. Mr Comeskey represented Mr Cook, who did not attend in person. Mr Comeskey had with him Mr Cook's 18 November letter, but used it as a basis for his responses rather than tabling it. Mr Comeskey also advised Mr Cook's view on the provision of his notes was that he was not willing to provide them as he did not trust Mr Currie, and believed Mr Currie would give them to the police.

[63] By letter dated 20 November Mr Currie advised APN was considering dismissing Mr Cook on the ground that it had lost trust and confidence in him. The loss of trust and confidence arose from APN's view that Mr Cook had not been honest or open in his responses, and subsequently breached a final warning in relation to the return of its intellectual property in the form of the story notes.

[64] Further, Mr Currie found unacceptable Mr Cook's explanation regarding loss of trust in Mr Currie, and the fear Mr Currie would hand over the notes to the police. Regarding the latter, he pointed out that well-established ethics and principles applied. He also said an editor has every right to view the notes and accompanying documents on any particular assignment being carried out by an employee for the employer's newspaper.

[65] Mr Cook provided a folder of documents on 21 November. They included his notes and some court documents. The notes were very brief, being 1.5 handwritten pages. A transcript Mr Cook provided after the investigation meeting indicated they comprised a series of even briefer notes of interviews with the family member and another person involved in the assault.

[66] Mr Currie responded by letter dated 21 November 2008. He commented on the brevity and content of the notes and expressed perplexity at Mr Cook's resistance to providing them. He believed there was no legitimate basis for refusing to provide

them as required in terms of the warning. APN did not resile from the preliminary decision to dismiss.

[67] By then as Mr Currie saw it, Mr Cook's initial reluctance to discuss the story – a story of which Mr Currie was not aware - followed by his refusal to hand over the notes, had led to a complete breakdown in Mr Currie's trust and confidence in Mr Cook. Such trust was important to Mr Currie, as editor, because of the extent to which reporters were obliged to be out of the office and working with sources who may or may not have hidden agendas. The editor had ultimate responsibility over what could or should be published in association with that activity. Mr Currie said there was an expectation that the initial concerns about Mr Cook would be allayed. Instead Mr Cook's behaviour in response caused a gradual breakdown in trust and confidence and the behaviour itself became the issue.

[68] Mediation went ahead on 4 December 2008. The parties were not able to resolve the problem. The matter was referred to Chris Jagusch, the new general manager of the New Zealand Herald and Herald on Sunday, to review events to date. A draft of Mr Jagusch's report was provided to Mr Cook for comment. The draft report concluded that APN should confirm its preliminary decision to dismiss. Mr Cook elected not to make any further comment.

[69] Accordingly the decision to dismiss on the ground of loss of trust and confidence was confirmed in a letter dated 16 December 2008. The dismissal was effective on that date, and Mr Cook was paid two months' salary in lieu of notice.

### **Breach of privacy**

[70] The allegation of breach of privacy arises out of Mr Currie's providing the police officers with Mr Cook's home address.

[71] If the matter is being pursued as a disadvantage grievance in its own right, Mr Currie's action must be considered in the light of the definition in s 103(1)(b) of the Employment Relations Act. Among other things the employer's action must affect a condition of employment to the employee's disadvantage. Beyond broad allegations of lack of justification Mr Cook's disadvantage grievances were not approached in

terms of whether they met s 103(1)(b), and as further developed in the case law. In the absence of argument on the point as it relates to privacy I find Mr Currie's action did not affect Mr Cook's employment or a condition of it, as distinguished from some other right of Mr Cook's. Accordingly I do not accept there is a personal grievance on this ground.

[72] Otherwise the Employment Relations Authority has no jurisdiction in respect of breach of privacy as a cause of action in its own right. Depending on how it is framed, the matter is either one for the civil courts or for the Privacy Commissioner under the Privacy Act 1993.

### **Whether the suspension was justified**

[73] It is usually accepted that disciplinary suspensions fall within the definition in s 103(1)(b) of the Employment Relations Act in that they affect employment or a condition of it to an employee's disadvantage. The issue arising is usually one of justification for the action, as is the case here. Section 103A of the Act sets out the test of justification. While it underlies my assessment here, I detail the test later in this determination.

[74] The parties' employment agreement provided for suspension as follows:

“Termination

...

The company may terminate your employment without giving any notice in the event of serious misconduct. If you are suspected of this, the company may also suspend you on pay until the matter is resolved.”

[75] There was a suspicion of misconduct, but the suspected misconduct did not concern an association with drugs. Any rumour-monger who linked the suspension with such an association did so without possessing or understanding correctly the relevant facts. If Mr Cook believed the suspension reflected a suspicion that he was involved in drugs then he should have raised that matter squarely with Mr Currie at the time, and given APN an opportunity to address it or correct any wrong impressions, rather than making generalised accusations in the correspondence.

[76] Further, while it was not appropriate for Mr Currie to discuss details of the suspension with anyone else who might have been attempting to do so, it would have been appropriate for Mr Currie to discuss it with Mr Cook. Instead Mr Cook reached an unwarranted conclusion which has caused him considerable harm both in a personal emotional sense and because of the way it affected his own behaviour.

[77] The suspected misconduct went only as far as a concern about what Mr Cook was doing at the address being observed by the police and whether his activities were work related. APN was attempting to investigate those matters, and it imposed the suspension because the difficulties it was encountering were causing its suspicions to deepen.

[78] I apply the following approach to determining whether the suspension was justified:

“[104] Each case about the justification for suspension of employment must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise. There is no immutable rule requiring that an employee must be told of an employer’s proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so. The passage from **Tawhiwhirangi** ... confirms the case by case, flexible and sensible approach to these infinitely variable cases. Imminent danger to the employee or others and an inability to perform safety-sensitive work are two examples of circumstances in which it might be held to be inappropriate to delay an intended suspension to give the employee an opportunity to be heard about that intention. Ultimately the test in each case must be the fairness and reasonableness of the employer’s conduct. In many cases that will call for advice and discussion before determining whether to suspend; in others, it may not.”<sup>1</sup>

[79] Here APN was being prevented from exercising the oversight of Mr Cook’s activities which it was entitled to exercise, and was unable to progress an investigation it was entitled to pursue. Its suspicions could have been allayed by fuller and earlier responses, but instead were being aggravated because the responses it received did not answer some important questions.

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<sup>1</sup> **Graham v Airways Corporation of New Zealand** [2005] ERNZ 587, 613

[80] The justification for the resulting decision to suspend must be assessed with reference to the circumstances at the time. APN's trust and confidence in Mr Cook were being weakened as a result of Mr Cook's responses to its requests, to the point where it was entitled to suspend Mr Cook pending the resolution of those matters and restoration of trust.

[81] For these reasons I find the suspension was justified.

### **Whether the warning and demotion were justified**

#### 1. The warning

[82] There was a warning in respect of the production of the required information in the letter dated 14 October, but the failure to meet the associated requirement did not lead directly to further disciplinary action. Accordingly I take it no further.

[83] The 21 October warning also concerned the failure to provide the material APN had been seeking. It further required the production of the material by midday on 24 October, but the material was not produced by that deadline.

[84] There was no explanation for the failure to meet the deadline in the 14 October letter, while the explanation for the failure to meet the 24 October deadline was that Mr Cook was too ill to address the matter and would address it when he recovered. I have not accepted on the evidence that Mr Cook was too ill to address the matter, and no such evidence was available to APN at the time. Further, the open-ended nature of the indication as to when Mr Cook would address the matter was reasonably capable of exacerbating APN's concerns.

[85] For these reasons I consider the warning was justified.

#### 2. The demotion

[86] The demotion concerned a change in title and the loss of ability to participate in strategy sessions. Mr Cook's conditions of employment were not otherwise affected.

[87] Arguably the demotion was not necessary in that Mr Cook was absent on sick leave so could be expected not to attend strategy sessions in any event. Overall, however, on the information available to APN Mr Cook's conduct was not consistent with the conduct reasonably to be expected of someone whose role included participating at that level of management. APN's actions were justified.

### **Whether the dismissal was justified**

[88] Section 103A of the Employment Relations Act reads:

“... the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.”

[89] While Mr Cook appeared to have little to show for the activity he had apparently undertaken in association with his story, depending on what he had to say a prompt, more responsive and co-operative approach from him might have avoided the dismissal. On the material I have, his was a dismissal that need not have occurred.

[90] That is not a finding that the dismissal was unjustified. The focus must be on the employer's actions at the time.

[91] The reason given to Mr Cook for the dismissal was a loss of trust and confidence as a result of the view that he had not been honest or open in his responses, and had breached the final warning. The circumstances of the latter influenced the conclusion concerning the former.

[92] Regarding the production of the story notes in particular, there was an initial misunderstanding about the scope of the undertakings Mr Comeskey was offering on 18 September, but that was soon corrected in the repeated requests for the notes and other material beginning on 23 September.

[93] The responses to the requests were unhelpful. Mr Cook should have provided the notes and assurances promptly when asked rather than delaying, then invoking illness in circumstances not supported by sufficient information, then refusing on the

ground that he did not trust Mr Currie. As I have indicated, none of these responses was satisfactory.

[94] To the extent that Mr Cook's approach was dictated by his reaction to rumour and gossip, the approach was unwise.

[95] The difficulty escalated to the point that the warnings were issued. I regard the warnings as analogous to the formal issuing of instructions that the material in question be provided. I find those instructions were lawful and reasonable.

[96] In failing to provide the material in the way he did, Mr Cook fed the suspicion that he was not being open and honest about his activities. For that reason I find it was reasonably open to APN to reach the conclusion it did. Faced with conduct of that kind, its action was action an employer acting fairly and reasonably would have taken.

[97] Finally it was open to Mr Cook to attempt to correct the impression APN had gained, by commenting on Mr Jagusch's report. The report was a useful overall summary of APN's position at that point, and the reasons for it. Mr Cook did not take that opportunity. He should have resisted any temptation to repeat the broad accusations he had made to that point, and provided a considered response.

[98] Nothing in this determination should be construed as a finding that Mr Cook was being dishonest or had something to hide, rather I find that his reaction was reasonably capable of suggesting to his employer that he did.

[99] For these reasons, I find the dismissal was justified.

### **Remedies**

[100] My finding that Mr Cook's dismissal was justified means he is not entitled to any of the remedies set out in s 123 of the Employment Relations Act.

[101] That includes reinstatement. Reinstatement was sought for the first time after I referred to s 123 of the Employment Relations Act. An address on behalf of Mr

Cook on the remedies sought did not appear to be founded on that provision, or those following it. Further, Mr Cook should be aware that the nature and extent of the adverse views of his employer which he sought to express, and his avowed lack of trust and confidence in his employer, would have raised a serious question over the practicability of reinstatement.

### **Costs**

[102] Costs are reserved.

[103] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority