

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 127/10
5152747

BETWEEN DAVID EAGLES
 Applicant

AND STATE SERVICES
 COMMISSIONER
 Respondent

Member of Authority: G J Wood

Representatives: Barbara Buckett for the Applicant
 Joanna Holden for the Respondent

Investigation Meeting: 8 December 2009; 28 and 29 April 2010; 21 May 2010
 at Wellington

Submissions Received: 18 June 2010

Determination: 23 July 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr David Eagles, claims that his dismissal by the respondent (the SSC/Commission), for failing to appear before a disciplinary panel in which he was the complainant, failing to attend a compulsory medical assessment, and failing to communicate professionally with SSC officers, was unjustified. He also claims personal grievances over failures to provide him with a safe and healthy workplace, and to properly support him in the pursuit of his complaint against a co-worker for assault, as well as unlawfully suspending him, improperly communicating with him, unlawfully attempting to make him redundant and unlawfully taking disciplinary action against him. He also seeks lost remuneration for an unpaid bonus. The SSC denies each and every one of Mr Eagles' claims.

Credibility

[2] There can be no certainty about what occurred during disputed events between the parties almost two years ago. The Authority is, however, required to make findings on such disputed events on the balance of probabilities, i.e. what is more likely to have occurred than not. In doing so, in this case, I have relied particularly on the documentary evidence generated at the time (of which there is plenty), together with an analysis of what was more likely to have occurred, given the different states of mind of the parties at the time and that their perceptions about the same events may be quite different.

[3] I have, in general, preferred the evidence of witnesses for the State Services Commissioner over Mr Eagles' own evidence where there is a contradiction. Mr Eagles was suffering at the time, and continues to suffer, at least in part, from a major injury affecting his brain. His continuing symptoms have been diagnosed (but not until well after his dismissal) as consistent with post-traumatic stress disorder, including paranoia. Some of the accusations he made at the time (many of which he continues to hold to in the sense that that is what he genuinely believed at the time), do indicate a sense of paranoia, rather than reflecting what actually occurred. By contrast, the witnesses for the State Services Commission were in general more balanced, particularly given that Mr Eagles had made such serious allegations against them as senior public servants with otherwise apparently unimpeachable records.

[4] The only exceptions to this analysis involve the meeting leading to Mr Eagles' suspension and a disciplinary meeting held with Mr Eagles, where I accept that the Commission's now chief legal adviser, Mr Gordon Davis, did make his incredulity about Mr Eagles' actions in the latter meeting apparent (where Mr Eagles had in effect tried to derail the meeting with claims for information, and had declined to continue with the Commission's own meeting). I therefore accept the evidence of Mr Eagles and his sister, who was there to support him, about that meeting. On the other hand, I acknowledge that Mr Davis had no idea just how ill Mr Eagles was at that time and that Mr Eagles' behaviour was unacceptable in the setting of a disciplinary meeting. I will deal with that matter in detail later.

The Facts

[5] Because this is such a facts dependent case, it is necessary to go into them in more detail than is usual. Mr Eagles is, amongst other things, a qualified, certified internal auditor. After stints with the Accident Compensation Corporation and the Department of Internal Affairs, he started work with the SSC in September 2006, as a project accountant. From 12 March 2007 he became the ICT Finance Manager within the corporate services and information communications technology branch. He reported to the Chief Financial Officer.

[6] Mr Eagles' employment had been operating well until August 2008. He had received good performance assessments in the past, but disputed some of the comments in his last performance review, together with the level of the bonus as set by Mr John Ombler, a Deputy State Services Commissioner responsible, amongst other things, for the finance area. Mr Eagles claims that he was entitled to a higher level of bonus, but has not provided any particular evidence to support that claim. Mr Eagles did not accept Mr Ombler's assessment of him or the bonus offered and asked for the bonus not to be added to his remuneration. Mr Eagles still claims for a higher bonus but I accept Mr Ombler's evidence that his remuneration was dealt with in the proper manner and therefore the claim is dismissed. I note that Mr Eagles' request not to receive any bonus rather than one he believed inadequate was one of the unfortunate sorts of comments Mr Eagles was to make during the course of his employment from August 2008 onwards, even allowing for his dyslexic-like natural writing style.

[7] Although employed in a finance position, Mr Eagles worked with the Government Technology Service (GTS), then part of the SSC, which was located in a separate area of the Commission's building from where the Chief Finance Officer worked. In March 2008, a decision had been made to transfer SSC's ICT operations to the Department of Internal Affairs and this included the GTS work, which Mr Eagles spent most of his time on because it was an important government initiative at the time.

[8] On 29 August 2008, a crucial event in Mr Eagles' life occurred at work. A Mr Brent Chalmers, then Acting Business Development Unit Manager, called Mr Eagles into a meeting room to discuss concerns a junior female staff member had raised about Mr Eagles' treatment of her (allegedly talking to her in a way which

caused her to break into tears). According to Mr Chalmers, when questioned about his behaviour, Mr Eagles denied bringing her to tears and said that he did not want to talk about it, but wanted instead to leave. According to Mr Chalmers, he put his foot and hand against the door as Mr Eagles approached to leave, and his other foot and hand came into contact with Mr Eagles' chest with a light touch. He then claimed that Mr Eagles told him to let him leave and that that was assault, and that he then did leave. Although Mr Chalmers admitted he had tried to stop Mr Eagles leaving, he disputed that he had pushed or shouldered him.

[9] According to Mr Eagles, Mr Chalmers asked him (using swear words) why he had made the other staff member cry and that he responded that he did not know what Mr Chalmers was talking about. He stated that as he went to leave, Mr Chalmers rushed towards the door and shouldered him against the wall, where he hit the side of his head hard. When he went to leave again, Mr Chalmers pushed the door, catching his hand and slightly crushing it, stating that he would leave when Mr Chalmers decided he could.

[10] Both parties accept that Mr Chalmers apologised the next day. In an email to Mr Chalmers' boss, Mr Stephen Crombie, the SSC's then general manager of GTS, Mr Eagles stated (word for word):

*I am at a lost to report Brent conduct yesterday – that Brent physically attacked me yesterday.
I have never dealt with conduct such as his.
He scream and yelled and he put is should into me when I went to leave the meeting room he blocked the door with his foot and pushed me back.
Please take urgent action to ensure this is a safe workplace.
I will be complaining to the NZ Police Service on the grounds of common assault.*

[11] Mr Eagles claims that Mr Crombie went to see him that day and told him that he wanted the matter to go away. I do not accept Mr Eagles' claim, for the reasons of credibility as set out above. It would seem unlikely that Mr Crombie would seek to stop such an inquiry before it had even begun, especially given the seriousness of the allegations and the involvement from that very day of Mr Eagles' boss, the SSC's Chief Legal Adviser and one of his legal staff, Mr Gary Forrester.

[12] Mr Eagles was then approached by his boss of less than a week (who was also new to the SSC), Ms Mandy Simpson, Chief Financial Officer. She tried to tell him about how the investigation into the Chalmers incident would be conducted,

information given later to Mr Eagles by Mr Forrester. This attempt was unsuccessful, I conclude, because Mr Eagles wanted Ms Simpson to hear instead from a witness to part of the Chalmers incident.

[13] Mr Eagles was upset about some parts of Ms Simpson's involvement. In an email written on 30 August, a Saturday morning, Mr Eagles complained about the SSC's behaviour over the process and in particular Ms Simpson, who was accused of *stunning* predetermination, a complete lack of personal integrity and a degree of bullying, stating that he was not prepared to meet Ms Simpson again, or the investigatory panel, before these issues were addressed. For reasons of credibility I do not accept Mr Eagle's complaints about Ms Simpson, who had only been an employee of the SSC and Mr Eagles' superior for less than a week, and accordingly had no reason to take such a strongly negative approach to him. As a result of Mr Eagles' attacks on Ms Simpson, she asked to be removed from the investigatory panel, a request later granted.

[14] Mr Eagles had been continuing to suffer from nosebleeds and a headache, and consulted a close relative (who is a doctor), who urged him to seek medical attention, as he had started having memory lapses as well. However he went in to work as usual on Monday.

[15] That week Mr Eagles had a number of discussions with Mr Forrester (with whom he got on well) about whether instead of attending the disciplinary meeting as proposed by SSC (which he felt was wrong, particularly as he believed that the panel was biased against him, and because he had been asked whether he wanted a representative he felt that he could face disciplinary proceedings himself), he could provide a written statement. While Mr Forrester agreed to consider that option, he later decided, after taking further advice, that it was not acceptable, because it would not provide the best evidence to the inquiry.

[16] Mr Eagles then complained that the SSC's Human Resources Manager, Ms Shelley Turner, had refused to accept an accident form from him, because it would affect any ACC discount that the SSC might otherwise be entitled to. I prefer Ms Turner's evidence that no such meeting took place, particularly as no such discounting arrangement applied to the SSC.

[17] The first meeting was set for Mr Eagles on 3 September. On 2 September he asked for approval for leave on that day (as a day in lieu) from other than his line manager, but when properly referred to her, Ms Simpson later gave him approval for a day's leave. I accept that Ms Simpson did not understand the concept of time in lieu at that point (having worked solely in the private sector) and therefore Mr Eagles was justifiably concerned that he had lost a day's leave. However, that is not a major issue, which I am sure the SSC will rectify, if it has not already done so. Mr Eagles had, however, already declined the meeting prior to going on leave. Mr Eagles also told Mr Forrester that he was not proceeding with the interview unless he was exonerated prior to the meeting.

[18] On his return, Mr Eagles again declined to attend a meeting, but would only provide a written statement to support his complaint, despite being given assurances as to his safety and being told that Ms Simpson was no longer on the panel. Mr Eagles left early that day in order to get a medical opinion about his ongoing medical issues. He was referred to Wellington Hospital because of ongoing nose bleeds.

[19] The next day, 4 September, Mr Eagles was directed to attend an interview on 9 September, and told that although he could have legal assistance, the Commission would not pay for it as requested by Mr Eagles, although it would reassess that decision at the end of the process.

[20] Mr Eagles replied that:

Just for you to be clear,

1. *I do feel safe and I'm not going.*
2. *I offered to have a statements taken and SSC refused.*
3. *The tone of your email adds no comfort to the situation and just further bullying.*

[21] The next day Mr Forrester became involved again and suggested a meeting at 11 o'clock that morning to discuss Mr Eagles' safety concerns and the process of the investigation. Mr Eagles' response was:

Not available regarding this full stop. Over it had too much.

[22] Mr Eagles was then advised by the Acting Branch Manager, Mr David Espie, (in the absence of Mr Ombler) that failure to attend would be considered a failure to

comply with a lawful and reasonable instruction and could result in a disciplinary investigation into him. Mr Eagles' response was:

*Its not lawful or reasonable.
I given Di back the letter and I had enough.*

[23] Mr Eagles was then informed in writing that disciplinary action was now being commenced against him.

[24] Mr Eagles responded by email stating that:

*I have a serious medical condition and this is the way you treat me,
see you and commission in court.*

You can have a war.

[25] Mr Espie then asked Mr Eagles to attend his office and discuss the serious medical condition, so that he could understand the nature of it and how it might be impacting on his employment. Mr Eagles' response was:

*See you in court, you gone too far now, I'm Had this, I can't be
stressed out or I could blood badly, just like yesterday at 3.3pm which
you made a number of very stupid assumptions about.*

from this point onward we be address my issue.

With you, Simpson et al.

[26] Mr Espie responded suggesting a meeting on Monday, unless it was more convenient to meet that day.

[27] The following Monday, Mr Eagles emailed Mr Espie telling him that he knew that he had sought medical treatment on Friday (which he did not), that the email was malicious in the extreme (given the injury that he had suffered) and questioned what kind of *weird bullying* was going on. Mr Espie noted that he was not involved in the disciplinary investigation into the Chalmers incident, but was only involved to ensure Mr Eagles attended the investigation meeting and to find out about his medical condition. Mr Eagles' response was short: *Tell OSH and Employment court.*

[28] Mr Eagles was away the next day, with continuing nosebleeds and a cold.

[29] On 9 September Mr Eagles was written to about his medical condition, which the SSC considered could affect his ability to give evidence to the disciplinary investigation and may be evidenced in part by nosebleeds. Mr Eagles was told that

the SSC leave policy was part of his employment agreement and provided that an employee can be directed to undergo a medical examination where *a manager has concerns about an employee's health and wellbeing*. Mr Eagles was then directed to see an outside doctor, whose report would be given to both him and the SSC.

[30] Mr Eagles responded to the medical issue on 10 September stating:

You need to come and see me, simple put, I find this unreasonable, I had one day off with a chill/cold. I offer medical evidence and was told it was not need.

The objections to your letter span arrange of issue. and this is getting silly.

[31] Mr Espie responded by stating that he needed to attend the appointment and that he was willing to discuss the matter with Mr Eagles, whose response was:

Well, there host of reason why I'm not going. But you did not avail yourself of the opportunity to discuss this and well its just more evidence of bad faith at this point. I think its very dis-ingenuous at this point.

I note medical evidence was offered and refused, that the injury was because of an unsafe work environment.

[32] The next day, Mr Eagles went to see Mr Forrester and, while declining to say what his reasons for not seeing the doctor were, suggested it had something to do with his previous role in ACC and that he already had provided medical information to the Commission. He indicated that Mr Espie would not come to his work station to see him and disputed that Mr Espie was his manager. In fact, as Mr Espie was Acting Branch Manager, he was, in effect, Mr Eagles' manager, whatever Mr Eagles might have thought. Clearly it was quite unreasonable of Mr Eagles to try and require a senior manager, even if acting in the role, to come to his work station to see him.

[33] Mr Eagles further complained on 11 September, stating that no medical report could be released without his consent and that he would under no circumstances see the doctor the SSC had engaged because of their *past conduct and record*. He was, however, unable to elucidate on that claim, even at the Authority's investigation meeting.

[34] That afternoon Mr Eagles had to go to the Emergency Department to see an ENT registrar. A few clots of blood were removed from his nose and he was sent home with advice on what to do in order to try and stop the bleeding recommencing.

[35] On 12 September, the panel concluded the investigation into Mr Chalmers without any input from Mr Eagles. Quite correctly in the circumstances, it was left to draw the conclusion that Mr Chalmers' statement had to be accepted, given the absence of any formal evidence to the contrary. Therefore he was not disciplined by way of any formal warning. It is not possible to say what the outcome may have been had Mr Eagles taken up the opportunity to be fully involved in the investigation, including providing medical information that may have supported his claim of assault. The sole responsibility for this, however, lay with Mr Eagles' failure to co-operate with the investigation into the complaint of assault that he himself had made.

[36] That same day Mr Eagles complained about the decision not to allow a witness statement by him, considering it would be a breach of health and safety legislation and that the SSC should be investigating *prejudicial conduct of Simpson Crombie and yourself*. Later on, Mr Eagles stated:

I never refused to take part, but I we not beat up twin, I have no alternative, but to seek relief and invoke the Whistle blower legislation and ask the Minister Park [Parker] to act directly.

[37] Later that same day, Mr Eagles emailed Mr Forrester stating:

As an example of Mr Crombie behaviour this morning "im sick of this shit if Laurence doesn't take him then I'll just get rid of him" I have 36 very similar statements please actually help.

[38] Clearly this was a gross exaggeration at the least, as Mr Eagles was unable to provide any statements from other people supporting his claim. Despite this lack of evidence Mr Eagles held on to this claim throughout the investigation, even when its illogicality was highlighted to him, revealing his lack of proper perspective.

[39] It soon became apparent that the SSC had had enough of Mr Eagles' bizarre behaviour by this point, and decided on immediate action. Mr Espie decided to engage the services of another of the SSC's solicitors, Mr Gordon Davis, who helped him initiate a disciplinary investigation into Mr Eagles' behaviour on three grounds - namely for failure to present at interview and/or to undergo a medical examination, as well as the tone and content of his recent communications. I note that although Mr Eagles claims he was never informed of the detail of these allegations, all the offending emails were provided to him at that time he was given the disciplinary investigation letter on 12 September, and he was failing to engage directly with Mr Espie, who could have provided him with a detailed explanation.

[40] Mr Espie approached Mr Eagles that Friday afternoon to ask him to talk with him and Mr Davis. Mr Eagles declined to meet Mr Espie without his own representative. The pair therefore had a meeting by themselves, whereby Mr Eagles was handed the letter of notice of an disciplinary investigation and suspension, which stated:

I advise that you are suspended with pay, with immediate effect. However, I am prepared to meet with you at 4pm on the 5th floor of the SSC premises ,if you wish to discuss with me any matters relevant to that decision. At this stage the term of the suspension of your employment will be until Monday 22 September 2008 by which time I anticipate that the investigation will be concluded ... Please arrange for your building access card to be retained by Graham Coupland during the period of your suspension.

[41] I am satisfied that any employee receiving such a letter would undoubtedly conclude that they had been suspended and that the offer to discuss any matters relevant to that decision were about ancillary matters, such as access to work materials etc during the suspension, rather than over the issue of suspension itself. If the SSC had meant the latter, it would have put that in the letter. I therefore do not accept Mr Davis' evidence that one of the principal purposes of the meeting was to discuss whether or not there was to be a suspension. The letter is quite clearly to the opposite effect.

[42] In any event, Mr Eagles declined to read the letter. Mr Espie therefore went to get Mr Davis and they later approached Mr Eagles together. Mr Eagles stated that he was too busy to meet and that the letter was factually incorrect; that he had put the letter *in the furnace*; that the Commission's processes were incorrect and that the Commission would be sorted out by his lawyer. He then sought personal details from Mr Davis and Mr Espie so he could serve proceedings on them. Mr Eagles was told he had to leave immediately. I do not accept, however, that either Mr Espie or Mr Davis acted in an overbearing way, given the difficult task they were undertaking.

[43] Mr Eagles provided copies of his medical records on 16 September and stated, regarding safety issues:

Given yours and Gordon's conduct on Friday, I will arrange suitable security for my protection.

[44] The investigatory meeting was held off site, with the SSC represented by Messrs Espie and Davis, and Mr Eagles supported by his sister. The meeting did not

go well. At its outset, Mr Eagles indicated that the allegations could not be put to him as they were not correct. When told that he would have a chance to respond once the allegations had been covered off, he said that the meeting should not proceed as a disciplinary meeting but rather a discussion between equals. No doubt Mr Davis was quite taken aback by these approaches by Mr Eagles, which run in the face of any normal running of a disciplinary investigation, in which the employer conducts the investigation and the employee's role is to contribute when asked.

[45] I conclude that from that point, Mr Davis would therefore have appeared disrespectful and antagonistic towards Mr Eagles because he could not contain his surprise at and/or disapproval of Mr Eagles' unorthodox and inappropriate approach to the disciplinary meeting. This meant that Mr Eagles and his sister did not believe that Mr Eagles got a fair hearing at the investigation meeting, although I do not accept that point. In fact, many of Mr Eagles' comments at the meeting were incorrect and/or bizarre, such as that his blood oxygen level was at a near fatal level and over the alleged criminal behaviour of the doctor he had been asked to see. Indeed, his sister stated in evidence that the SSC may have achieved what it sought to do, which was to get Mr Eagles to do something silly, describing his behaviour as apparently rude and bizarre - but not, as she stated, if you were suffering from a brain injury and almost autistic as a result.

[46] In essence, therefore, although the SSC received a number of explanations from Mr Eagles about his behaviour, such as his being under work pressure, being ill, and having concerns about the medical appointment, the meeting never properly covered all the points in issue, although Mr Eagles made it clear that he had suffered a brain injury, which Mr Davis apparently found hard to believe.

[47] As a result of feeling ill, Mr Eagles asked for a break. On his return he wanted all material relating to every communication over all matters that had arisen, because people in the SSC were *out to get* him. Mr Eagles declined to participate in the meeting any further unless he got this information. He then left the meeting.

[48] Subsequently, Mr Espie made preliminary findings on the issues in question, in the form of a draft report which he sent to Mr Eagles, together with a request to attend a meeting on 24 September, in order for Mr Eagles to make submissions before a final decision was made. In that report, Mr Espie concluded that Mr Eagles was at work during the relevant periods when an interview was sought, that he had declined

to be interviewed and that it was not incumbent on the SSC to continue to set meetings when he had made it clear that he would not attend. This was said to be a failure to follow a lawful and reasonable instruction and therefore misconduct. Mr Espie also concluded the same with respect to the instruction to attend a medical appointment, noting that there was no evidence of any criminal behaviour by the doctor whose services were engaged by the SSC.

[49] Mr Espie also concluded that the tone and content of Mr Eagles' communications to other staff members were unprofessional and unacceptable. In particular he found that Mr Eagles' accusations against Ms Simpson and Mr Crombie were wrong and unacceptable, as was his refusal to acknowledge Mr Espie's position as acting manager, and his claim that he and Mr Davis had bullied him.

[50] Under the heading *Proposed Employment Outcome*, Mr Espie noted that because there had been no acceptance by Mr Eagles of inappropriate or unacceptable behaviour, it meant that he was not communicating effectively with management. Dismissal was therefore considered the appropriate outcome.

[51] Mr Eagles then instructed Ms Buckett. Her response to SSC, dated 23 September, was to say that it was prejudicial for Mr Eagles to meet until he had been provided with all information, including information relating to the complaint against Mr Chalmers. The meeting was accordingly postponed by SSC. Much of the further information sought was provided, except that only limited information was provided in relation to the complaint against Mr Chalmers because of privacy issues for other people, in particular Mr Chalmers himself.

[52] In the meantime, Mr Eagles' suspension continued. Ms Buckett was unable to meet with SSC in the last week of September, but indicated a number of days that she was available in the first half of October. Mr Davis noted, on behalf of the SSC, that Ms Buckett had postponed two meetings, but suggested two further dates in October. Ms Buckett subsequently stated that it was too early to meet because there was too much documentation to go through and further information was required from the SSC (a response she was to repeat many times).

[53] During the course of this process, another major restructuring of the areas of work Mr Eagles was involved in was announced, in addition to the major restructuring already afoot. The further restructuring required was because of

budgetary issues in the SSC. I do not address these issues in much detail because although Mr Eagles denies that his position should ever have been affected, and that this was further evidence of the SSC's agenda to get rid of him, it was not disputed that the wider restructurings were genuine. Furthermore, there were grounds to consider that Mr Eagles' position may have been affected. He was invited to comment on the suggestion that his position would be affected and he declined to provide any such feedback, even though he claimed that the process should not have affected him at all. He could have provided such information to the SSC, or at least informed it that he was too ill to engage with it. I do not refer to this matter any more because of this fact and because Mr Eagles was not dismissed for redundancy, but for the misconduct allegations addressed in this determination. Furthermore, there is no evidence, other than Mr Eagles' speculation, that those people responsible for the restructuring were informed by Mr Eagles' managers that they should treat him in any particular way, other than one of many affected staff members.

[54] Mr Davis set a meeting for 14 October, which was one of the dates on which Ms Buckett said she was available, but declined to provide any more information about Mr Eagles' complaint about Mr Chalmers, although he did state that that position could be reconsidered.

[55] On 3 October Ms Buckett provided a medical certificate stating that Mr Eagles had been assaulted, that he was suffering from concussion and would be unfit for work until late November. Ms Buckett stated:

As well as for the reason that his health is a priority, it is inappropriate for there to be a meeting in the immediate future given that, as already referred to in our earlier communication, Mr Eagles has not yet been provided with all of the required information he needs to have before he can attend a meeting.

[56] ACC subsequently accepted the claim for a work-related injury and the SSC never challenged this with ACC.

[57] SSC took advice over the medical certificate and wrote to Ms Buckett stating that it was unusual to have 90 days off work for concussion and told her that Mr Eagles' suspension would end on 8 October. The Commission then stated that it would conclude its investigation when he returned to work. Mr Eagles was notified that he was required to contact Mr Ombler (who had since returned to work) as soon as he was cleared to come back to work.

[58] Mr Eagles correctly complained that this letter was sent to his home rather than his lawyer. However I do not consider that this constituted any disadvantage to Mr Eagles (let alone an unjustifiable one) in that it gave Mr Eagles information which he would not have to wait to receive from his lawyer. Neither was it a breach of good faith for which any penalty should be awarded. Rather SSC had made an understandable mistake.

[59] Throughout this period, Mr Eagles raised a number of personal grievances, which have remained unresolved and require determination.

[60] On 9 October Mr Davis wrote to Ms Buckett urging Mr Eagles to consult a concussion specialist at the Commission's expense, provided the Commission received a copy of the report. This was not made an instruction because of Mr Eagles' previous refusal to attend a medical examination.

[61] On 30 October, Ms Buckett responded to the letter of 9 October and gave a number of responses, including making further accusations against Mr Crombie, and also providing a written statement about the assault. Ms Buckett suggested mediation as the best way forward.

[62] On 11 November Mr Davis wrote on behalf of the Commission agreeing to mediation in relation to Mr Eagle's grievance over the alleged assault by Mr Chalmers, but not into Mr Eagles' subsequent alleged misconduct, because that investigation had not been concluded. Mr Eagles was asked to provide more details in relation to his complaint about Mr Chalmers. Ms Buckett was told that it was critical to the Commission for it to obtain a full and proper understanding of Mr Eagles' medical condition.

[63] On 20 November, Mr Eagles was declared fit to return to work. In breach of his obligation to contact Mr Ombler, he contacted another manager about his return. Mr Davis took exception to this and also again requested sufficient information whereby he could assess Mr Eagles' ability to return to his employment. On Mr Eagles' behalf, Ms Buckett responded stating that he could work part time and that the SSC:

... is not entitled to restrict Mr Eagles from liaising with Edwin Bruce, a colleague and a manager who Mr Eagles understood was looking for someone to do work which he was capable of and interested in doing. Nor is the SSC entitled to restrict Mr Eagles from

liaising with Laurence Miller in regard to return to work opportunities.

[64] I do not accept these assertions. The SSC was very much entitled to indicate the way in which Mr Eagles could return to work, such as by liaising with his branch manager.

[65] Ms Buckett then formally invited the SSC to attend mediation, but stated that before that could occur:

Mr Eagles requires undertakings from the SSC that:

All matters be put on hold until mediation;

All appropriate managers with decision-making authority will attend mediation.

[66] Ms Buckett also provided an ACC medical certificate, which stated that Mr Eagles would be seeing an occupational therapist and a psychologist.

[67] On 25 November Mr Davis wrote that with Mr Eagles being able to return to work, the Commission would now proceed to conclude its investigation. He was invited to attend a meeting prior to 5pm on 1 December.

[68] Ms Buckett replied on 28 November complaining again that not all the information had been received, particularly in relation to the assault, and that this be provided by midday 3 December. Ms Buckett said that she could not attend a meeting on 1 December and that it would be prejudicial for Mr Eagles to attend such a meeting without having all of the information to which he was entitled, as well as an adequate opportunity to review it.

[69] Mr Davis responded on that date stating again that he did not believe that the investigation into the assault was relevant to the proposed meeting, but that the Commission was prepared to extend its timeframe for the meeting to 5pm on 2 December, noting that the Commission had now been putting matters on hold for over three months and that it was not prepared to defer things indefinitely.

[70] On 2 December Ms Buckett wrote to say she was unavailable all day, that Mr Eagles could not meet with the SSC that day and that she would endeavour to respond to the SSC's letter *in due course*.

[71] Mr Ombler, who was responsible for completing the investigation, believed that enough time had been given to Mr Eagles to respond. He stated that:

While previous indications were that you were suffering health problems more recent communications confirm that you were recovered sufficiently to return to work, and yet you have still not accepted the invitation to respond.

I have considered carefully David Espie's draft report and have decided to adopt his recommendation and terminate your employment effective immediately.

[72] In a covering letter to Ms Buckett, Mr Davis stated:

It is regrettable that Mr Eagles did not take the opportunity to provide a response as he has repeatedly been invited to do, as the employment outcome might well have been different.

[73] These were prescient words. Mr Eagles simply declined, time after time, despite being legally represented, to meet with the Commission over its proposal to dismiss him. There was no need for further information on the assault allegation. The issues were about Mr Eagles' behaviour, not those of Mr Chalmers, which was and is a separate though related matter. Mr Eagles had had all the other relevant material from the outset. It is very unfortunate that Mr Eagles declined to attend such a meeting, because with appropriate assistance he may well have been able to convince SSC that he should not be dismissed. This was particularly because he was and is a very unwell man. This resulted in paranoia and other difficult behaviours because he was suffering from symptoms consistent with post-traumatic stress disorder, as the medical diagnosis Mr Eagles later obtained confirmed.

[74] Ironically, had Mr Eagles taken up the SSC's offers of assistance, including specialist medical assessments completed at its cost, these matters could all have come to the fore much earlier, instead of many of them not being done until well after Mr Eagles was dismissed.

[75] Incidentally, on the same date as the dismissal, but after SSC had made its decision, Ms Buckett wrote again, stating that Mr Eagles could not attend any meeting until he was provided with all the information he was entitled to, and therefore the appropriate next step was mediation. This confirms Mr Eagles' continuing refusal to meet with the Commission except on his terms, which I conclude were unreasonable.

[76] The next day, Ms Buckett wrote requiring the dismissal to be retracted immediately and for Mr Eagles to be reinstated. This was declined by the Commission, which noted that Mr Eagles had made his intentions known to lay charges against Mr Davis for his behaviour.

[77] It was not until several months later that Mr Eagles was assessed by a neuropsychologist, and the findings about his symptoms being consistent with post-traumatic stress disorder were made.

[78] Despite extensive subsequent efforts, including mediation and facilitation, the parties have been unable to resolve the matters between them and it therefore falls to the Authority to make a determination.

Determination

[79] I do not accept that Mr Eagles was not provided with a safe workplace. He made a complaint about being assaulted. This was investigated to the full extent SSC was able to, given Mr Eagles' own failure to co-operate with it. I do not accept his other complaints of bullying by managers at the Commission, as is clear from my findings of fact above.

[80] Furthermore, I accept that the SSC acted reasonably in investigating Mr Eagles' complaint. Given the seriousness of the complaint it was entitled to not make findings against Mr Chalmers (who did attend a disciplinary investigation meeting) in the absence of direct evidence from Mr Eagles, which could then be tested by the investigating panel. Furthermore, I do not accept that the panel was then investigating Mr Eagles with a view to disciplining him as well as Mr Chalmers. Its advise to him that he could obtain representation if he wished to was simply done out of an abundance of caution, and there were no other indicators of such an agenda.

[81] As noted in the section on the facts, I do not accept that Mr Eagles is now entitled to additional remuneration following his performance assessment.

[82] I accept that Mr Eagles' suspension was unjustified, because he did not have a proper opportunity to make submissions on whether he should be suspended at the time he was given the letter of suspension. Such an unlawful suspension clearly constitutes an unjustified disadvantage. This was not, taking place as it did, late on a Friday afternoon (with Mr Eagles having been at work pretty much full-time since the

Chalmers incident), the sort of situation where suspension was required so immediately that it was not fair and reasonable to give Mr Eagles some time to make submissions about its appropriateness.

[83] I accept that Mr Eagles was significantly affected by this action because it came to him out of the blue. He knows his employment rights and thus he knew at the time that the suspension was being improperly implemented. Mr Eagles takes such breaches of an employer's duty very seriously and it no doubt had an impact on him with regard to his future dealings with the Commission. It did therefore have an affect his dignity and other feelings. The SSC must take him as it knows him to be – a very sensitive person. I therefore consider that compensation of \$2,500 to be appropriate, particularly as the implementation of his suspension may well have impacted on the way he responded to the SSC from that point onwards, and will not have helped his feelings of paranoia and other post-traumatic stress disorder symptoms. Given his fragile state at the time, I conclude that there was no blameworthy behaviour by Mr Eagles to warrant a reduction for contribution

[84] I conclude that how the SSC acted and what it did when it dismissed Mr Eagles were what a fair and reasonable employer would have done in all the circumstances at the time. At the time, it was unaware of the seriousness of Mr Eagles' medical condition. While I accept that it knew that he had been suffering nose bleeds and (much later) was unfit for work due to concussion, I accept that it was unaware of his post-traumatic stress disorder-type condition. Even Mr Eagles was not given any such diagnosis until months later. The SSC was, however, prepared to try and find out what his medical problems were by asking for such information from Mr Eagles and trying to get an independent medical examination, which Mr Eagles refused to co-operate with. While the SSC might have been more astute in finding out the real cause of Mr Eagles' out of character behaviour, it was prepared to assist Mr Eagles in doing so for himself, but he declined to do so over the relevant period.

[85] I accept that Mr Ombler, who knew Mr Eagles well, genuinely addressed the recommendations in the Espie report before determining to dismiss Mr Eagles. Mr Eagles simply refused to participate in this process. He had more than ample opportunities to be involved in it, as it lasted for over three months once the recommendation to dismiss had been given. No employer is required to wait forever for such involvement and once Mr Eagles was fit to return to work it was entitled to

proceed. Furthermore, his failure to engage was consistent with his failure to attend an interview over the Chalmers complaint, or attend a medical examination, all of which he claims he never declined to do. In actual fact, while the SSC might have been more clear about the finality of its last deadline in its communications with Ms Buckett, it had made it clear that it would make a decision by 1 December - and even then it waited until 2 December before making that decision.

[86] I conclude that the SSC was entitled, at that point, to cry halt and not wait for more medical information, for instance, which Mr Eagles had previously either not provided or had promised but not delivered, particularly as Ms Buckett had made it clear that it was not possible for Mr Eagles to attend any meeting without all the details of the Chalmers complaint. I concur with the SSC that this complaint was essentially irrelevant to the employment issues it wished to address with Mr Eagles, even although it appears to have been the genesis for them. It is again worthy of note that had Mr Eagles, who was in receipt of professional advice, co-operated with the SSC's investigation, his resulting dismissal may very well have been avoided.

[87] While it may appear that Mr Ombler simply accepted Mr Espie's recommendations without fresh consideration, I accept his evidence that he did otherwise. In doing so, he had discussions with Mr Espie and with legal officers in the Commission. He noted in evidence that given his knowledge of Mr Eagles, Mr Eagles' odd email style was not new, but what was different was his continued refusal to co-operate with legitimate management requests. He accepted that Mr Eagles had refused to attend the interview, had refused to attend an independent medical assessment and that the tone and the content of his emails were unacceptable. While he was very saddened about the decision to dismiss, all the documentation provided to him gave clear evidence of serious misconduct, including a failure to co-operate with the SSC that continued right through to the dismissal. He therefore saw no alternative but to dismiss Mr Eagles.

[88] I accept that Mr Eagles' behaviour did constitute serious misconduct in his employment. A fair and reasonable employer is entitled to insist on employees attending meetings to discuss matters that occur at work, particularly where that employee has made a serious complaint against another worker. While the only loser to this approach was Mr Eagles, Mr Eagles was an employee of the SSC and as such had a duty to answer any questions (other perhaps than those that might incriminate

him) his employer had about things that had happened at work. Furthermore, Mr Eagles was the initiator of the complaint and while he certainly wanted it progressed, this appeared to be only on his terms, without him properly accepting that his employer was responsible for how it conducted its own investigation. The instruction to him was therefore not only fair and reasonable, but Mr Eagles had wilfully failed to follow the instruction without any reasonable grounds for refusing to do so.

[89] It is also fundamental to the parties' employment agreement that the SSC can require an independent medical assessment when it considers it appropriate to do so. Mr Eagles' behaviour and his complaint about suffering from a serious medical condition were sufficient to generate such a requirement of Mr Eagles. I conclude that, in all the circumstances, the SSC was justified in having Mr Eagles attend an independent medical examination. He was complaining about a serious medical condition, yet the only evidence the SSC had to date was over nosebleeds. His response over the medical assessment was quite extraordinary. Mr Eagles might claim that he did not refuse to attend the medical examination, but the facts belie that claim. This issue was to go on for some months, but he simply refused to do so without reasonable grounds, as the grounds he appeared to give were either difficult to understand, or unable to be supported by any evidence, or both. I conclude again that Mr Eagles was given a lawful and reasonable instruction pursuant to his employment agreement, and that he wilfully failed to follow that instruction without any reasonable grounds for doing so.

[90] Finally, I accept that Mr Eagles' behaviour, particularly through his emails, was completely unacceptable for a senior public servant. He made a number of serious allegations, over a very short period of time, without evidence to back them up (even at the investigation meeting), and did not pursue them through proper channels. He also required managers to come to him rather than, as would be expected, him to go to them. Furthermore, he refused to co-operate with managers and communicated with them in a particularly obnoxious style. Of course, with the benefit of hindsight, we know that Mr Eagles would not have behaved in this way if he was not suffering from symptoms consistent with post-traumatic stress disorder, but, as I have already indicated, the SSC did not know that, and its efforts to get an independent medical assessment of Mr Eagles were rebuffed.

[91] These are all matters involving serious misconduct by a senior public servant who the SSC rightly expected to know better. It therefore follows that in those circumstances, particularly without the benefit of Mr Eagles' own views (which was his own responsibility) dismissal was what a fair and reasonable employer would have done, even although that decision may well have been different if Mr Eagles had properly involved himself in the investigation.

[92] I do not accept that the SSC was required to attend mediation on the issues that were then before it, at least in the absence of a direction from the Authority. In particular, this is so when mediation has been suggested as an alternative to the disciplinary process, as opposed to being pursued on a parallel track to the disciplinary process during a similar time period. Failure to agree to mediation does not therefore, in the circumstances of this case, make an otherwise justified dismissal unjustified. That is because the issue was being used as a device to shield Mr Eagles from a disciplinary process that he was quite properly being required to participate in.

[93] I also accept that there were no possible alternatives to dismissal in the circumstances of Mr Eagles' ongoing failure to behave as one would expect of a senior public servant, and in particular to be responsive and communicative.

[94] I conclude by noting that Mr Eagles was (and could be again in the future) a dedicated and effective senior public servant. There was no evidence of any difficulties with his employment or his medical condition before his complaint about being assaulted. Subsequently, his behaviour declined; he has been suffering from symptoms consistent with post-traumatic stress disorder and has been dismissed. He must take responsibility for this latter action, principally because of his failure to cooperate with his employer over its investigations into his complaint of assault, and subsequently his own behaviour. This is a stark reminder to employees and their representatives of the need to be responsive and communicative in their employment, as the law requires.

Conclusion

[95] All of Mr Eagles' complaints, including his claim of unjustified dismissal, are dismissed, with the exception of his claim for unjustified suspension. The State Services Commissioner is ordered to pay Mr Eagles \$2,500 compensation under

s.123(1)(c)(i) of the Employment Relations Act 2000 for this breach of its obligations to him.

Costs

[96] Costs are reserved.

G J Wood
Member of the Employment Relations Authority