

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2015] NZERA Auckland 116
5466956**

BETWEEN TERE LAWSON
Applicant

AND NEW ZEALAND TRANSPORT
AGENCY
Respondent

Member of Authority: Eleanor Robinson

Representatives: Paul Barrowclough, Counsel for Applicant, on
8-10 October 2014
Applicant in person on 17-18 March 2015
Rachel Burt, Counsel for Respondent

Investigation Meeting: 8 – 10 October 2014 and 17 – 18 March 2015 at Auckland

Determination: 21 April 2015

DETERMINATION OF THE AUTHORITY

Employment Relationship problem

[1] The Applicant, Mr Tere Lawson, claims that he was unjustifiably dismissed for serious misconduct on 15 May 2014 by the Respondent, the New Zealand Transport Agency (NZTA).

[2] Mr Lawson further claims that he was unjustifiably disadvantaged by NZTA breaching the duty of good faith it owed to him pursuant to s 4(1)(a) & (b) (i) & (ii) of the Employment Relations Act 2000 (the Act) by failing to provide him with information which was important to him.

[3] NZTA denies that it unjustifiably dismissed or unjustifiably disadvantaged Mr Lawson and claims he was justifiably dismissed for serious misconduct.

The Issues

[4] The issues for determination are whether or not Mr Lawson was:

- Unjustifiably dismissed by NZTA

- Unjustifiably disadvantaged by NZTA breaching the duty of good faith it owed to him by failing to provide information, specifically the transcript of the Disputes Tribunal hearing and Mr van Heiningen's statement.

Note

[5] I have considered all of the evidence given, information provided and submissions made during the preparation of this determination, however as permitted by s 174 of the Employment Relations Act 2000 (the Act) I have not set out a full record of these matters. I have however stated findings of fact and law and expressed my conclusions on those matters and/or issues that require determination in order to dispose of the matter; and have specified the orders made as a result.

Background Facts

[6] NZTA is a Crown entity established to contribute to an affordable, integrated, safe, responsive and sustainable land transport system for New Zealand as set out in the Land Transport Management Act 2003.

[7] Mr Lawson, a former sworn police officer, commenced employment with NZTA in 2007, and was initially employed as a Senior Taxi Enforcement Officer until the position was disestablished in 2009. Thereafter, pursuant to an individual employment agreement dated 10 November 2009 (the Employment Agreement), Mr Lawson was employed in the position of Principal Transport Officer (PTO).

[8] As the result of a restructure in 2011, Mr Lawson was appointed as Manager Transport Officers (MTO). In this role he was responsible for managing compliance with the legislative requirements of the Land Transport Act 1998 of approved Taxi Organisations and taxi operators which involved ensuring the taxi organisations and operators worked within the rules set out in the Land Transport Act 1998 and operational policy.

[9] In the position of MTO Mr Lawson managed for a team of seven personnel including four Transport Officers and was responsible for co-ordinating the delivery of regulatory services in the region, specifically in relation to passenger services including taxi services.

[10] The team managed by Mr Lawson included Mr Michael Collie, Transport Officer. Mr Collie said that he had, during the time he had worked for Mr Lawson, received positive performance appraisals from Mr Lawson, and at Mr Lawson's request carried out on an informal basis the duties of a Senior Transport Officer (STO) who had resigned. On or about

August 2013 he had applied for the vacant position of STO, however his application had been unsuccessful.

[11] Mr Lawson said that he believed Mr Collie had been resentful following his unsuccessful application for the STO position, and had formed the view that Mr Collie held him responsible.

[12] Mr Collie denied that he had held Mr Lawson responsible for his unsuccessful application, stating that it had not been Mr Lawson's decision, and he had always found Mr Lawson to have been supportive and encouraging in his aspirations for progression.

[13] Mr Lawson was employed pursuant to the Employment Agreement in which it was stated: "*NZTA policies. You are bound by the NZTA Code of Conduct and policies*" (the NZTA Code of Conduct). This is amplified further in clause 9 of the *Individual Agreement for Managers*, a schedule attached to the Employment Agreement.

[14] The NZTA Code of Conduct contains a section on misconduct which states: "*Serious misconduct is behaviour that is considered unacceptable to the Transport Agency and may result in a final warning or termination of employment. This may be summary dismissal ie dismissal without notice*". Included as examples of serious misconduct are:

- *Acting in a way that brings the Transport Agency into disrepute.*
- ...
- *Failing to declare a conflict of interest that affects performance or judgment*
- *Giving false or misleading information to stakeholders or customers deliberately.*

24 March 2013: Complaint from Mr Hendry

[15] On 24 March 2013 a disaffected ex-taxi driver, Mr Hendry, complained to Mr Collie about unlicensed passenger services within the Auckland Maxi Taxi Company and Alert Taxis Limited (Alert Taxis), both owned by Mr Robert van Heiningen. Mr Hendry's complaints were that he had (i) been dismissed by Alert Taxis, (ii) operating as an unlicensed taxi service operator during his employment with Alert Taxis, and (iii) that he had been driving an unsafe taxi vehicle. The nature and resolution of these complaints is not relevant to this determination.

[16] Mr Collie said he had advised Mr Hendry to complete a complaint form, and had emailed a complaint form and zip file to him. After he had received the complaint form and zip file from Mr Hendry, he had spoken to Mr Lawson of the complaint, but had not forwarded the complaint form and zip file to him at that stage.

[17] Mr Lawson stated that upon Mr Collie informing him of the complaint from Mr Hendry, he had carried out an assessment, and advised that NZTA should not become involved in what appeared to him to be an historic civil matter and that Mr Collie should advise Mr Hendry that he should instead seek legal advice. However he said he had not advised Mr Collie not to proceed with the matter.

[18] Mr Collie said that Mr Lawson had advised him to refer the part of the complaint relating to the condition of vehicles operated by Mr van Heiningen to Mr David Mabey, Manager Transport Officers, and he had done so.

[19] Mr Collie received an email from Mr Hendry dated 24 March 2013 returning the completed complaint form, making comments in reference to an unnamed person and followed by the statement: *“I don’t expect you to act on this information but as you say store it away”*.

[20] A few months later Mr Collie said that Mr Hendry had contacted him again to seek his attendance as a support person and also the support of NZTA Transport Officers at his subsequent Disputes Tribunal hearing against Alert Taxis. Mr Collie said he had not considered it appropriate that he attend, so he had pleaded other commitments and suggested Mr Hendry contact Mr Mabey.

[21] Mr Collie said that Mr Mabey subsequently told him that he had spoken to Mr Hendry and he had also declined to attend the Disputes Tribunal hearing.

[22] Mr Lawson confirmed that he had advised both Mr Collie and Mr Mabey that it was a civil matter and they did not have to attend unless they had been summoned to do so.

Summonses in relation to the Disputes Tribunal hearing

[23] Mr Lawson said that on or about late June 2013 Mr van Heiningen had telephoned him and asked him to attend the Disputes Tribunal hearing involving Mr Hendry’s complaints as a witness on his behalf. Mr Lawson said he had advised Mr van Heiningen that he would not do so unless he was summonsed to appear.

[24] Mr van Heiningen explained that he had wanted Mr Lawson to attend in order to explain who he was, what he did, and the operating requirements for the taxi industry. At the Investigation Meeting Mr Lawson said he had not at that time consider the inferences that Mr Hendry might make of his attendance at the Disputes Tribunal hearing, and felt that he had no choice but to attend if summonsed.

[25] Mr van Heiningen said he had acted with the advice of the Alert Taxis solicitor in seeking Mr Lawson's attendance at the Disputes Tribunal hearing, which he explained was for the purpose of Mr Lawson confirming his (Mr van Heiningen's) obligations as the holder of an Approved Taxi Organisation (ATO) approval.

[26] When Mr Lawson said he would not attend the Disputes Tribunal hearing without being summonsed, Mr van Heiningen explained that he had not consulted with the Alert Taxis solicitor about the format of a summons, but had: "*jumped on a computer and typed it out*".

[27] The resulting document had consisted of a single page which he had signed. Mr van Heiningen said he had not retained a copy of the summons which he had given to Mr Lawson on or about Monday 1 July 2013 when he had met Mr Lawson outside the NZTA building..

[28] Mr Lawson said that the summons had been served on him in the hallway outside his office inside the NZTA building. It had been on A4 paper, contained his name, the names of the two parties, the date and venue he was to attend, and it was not written on the Alert Taxis letterhead. He had accepted it at its face value and had considered it to be legitimate. He had not kept a copy, nor had he given a copy to Mr Collie for the file relating to Mr Hendry's complaint.

[29] I note that under the Disputes Tribunals Act 1988, rule 14 sets out the procedures in relation to the issuing and serving of *Summons to witness*

(1) Subject to subclause (2), a Tribunal may at any time during any proceedings, by a summons in [form 5](#), summon any person

Form 5 requires the signature of the Registrar, and rule 15 sets out the procedure for service and includes;

(2) There shall be paid or tendered to the witness at the time of service of the summons, or at any other reasonable time before the time at which the witness's attendance is required, the sum that the Registrar estimates to be payable to the witness under [rule 17](#) for allowances and travelling expenses (but not for fees).

In addition, a willing person may attend and give evidence as a witness without the need for a summons.

Disputes Tribunal Hearing 3 July 2013

[30] On the morning of the Disputes Tribunal hearing, Mr Lawson said he had told the other employees in his team that he was attending a Disputes Tribunal hearing involving Alert Taxis that day.

[31] Mr Lawson said that at the Disputes Tribunal hearing he had not allowed Mr van Heiningen to introduce him as a significant senior manager in the NZTA or state that he was an advisor to the Minister of Transport, and that if the statements were made, he had not been in the room at the time..

[32] Upon his return to the office he said that the other members of his team had not enquired about the Disputes Tribunal hearing and he had not spoken to them about it. Nor had he made a file note about what had occurred at it.

February 2014: further complaint from Mr Hendry

[33] On 26 February 2014 Mr Hendry submitted a further formal complaint to Ms Celia Patrick, NZTA Group Manager Access and Use, alleging that his first complaint had not been properly investigated and that Mr Lawson, and possibly other NZTA staff, had acted corruptly and were engaged in an inappropriate relationship with Mr van Heiningen and the Alert Taxis.

[34] In response to this complaint from Mr Hendry, NZTA appointed Mr Andrew Thompson, Managing Counsel (Regulatory and Commercial) to follow up the complaint with Mr Hendry, and Mr John Henderson, Chief Risk Assurance, to conduct a process review.

[35] On 6 March 2014 Mr Rick Barber, Regional Manager Northern, had been contacted by Mr Henderson by email and asked to retrieve all documents and correspondence related to the issue. The email further advised that Mr Henderson wished to talk to Mr Lawson's MTO team, specifically Mr Lawson, Mr Mabey, and Mr Collie, and requested that Mr Barber inform them of this.

Mr Henderson's process review

[36] Mr Henderson said that he had been asked to conduct a process review in relation to Mr Hendry's complaint and the process followed by NZTA. He had not been undertaking an employment investigation into Mr Lawson's conduct

[37] Mr Henderson explained that in his position with NZTA, he had experience of conducting reviews and audits. He had not been based in Auckland and although he was aware of who Mr Lawson was, he had not previously known him prior to the review.

[38] He met with Mr Mabey, Mr Collie and Mr Lawson on 11 March 2014. Mr Henderson stated that he had followed a basic question format with the three employees, including discussion about what had happened in regard to Mr Hendry's complaint.

(a) *Mr Collie 11 March 2014*

[39] Mr Collie had informed him that:

- no file had been created in relation to Mr Hendry's complaint and Mr Hendry had not been advised of the outcome;
- he had been asked by Mr Hendry to, but did not, attend the Disputes Tribunal hearing as Mr Lawson had advised him it was a civil matter;
- he had been informed by Mr Hendry during a telephone call in early 2014 that Mr Lawson had attended a Disputes Tribunal hearing in July 2013 which was in fact the same hearing he had declined to attend on Mr Lawson's instruction; and
- Mr Hendry had made a number of allegations about Mr Lawson's appearance at the Disputes Tribunal hearing being detrimental to his case.

2. *Mr Lawson 11 March 2014*

[40] Mr Henderson said that although at the beginning of their meeting Mr Lawson had been open and willing to discuss the regulatory environment in which his team operated and the work his team undertook, he had the impression that Mr Lawson did not want to answer his questions when asked about Mr Hendry's complaint.

[41] Mr Lawson initially said that he had been unable to recall anything about Mr Hendry, however upon further questioning; he admitted that he did recall telling Mr Collie that it was a civil matter and he had instructed him not to take any action but to ask Mr Mabey of the status of the vehicle involved.

[42] When asked if he recalled anything further, Mr Lawson had replied: "No", however upon further questioning about the Disputes Tribunal hearing he agreed he had attended it.

[43] Mr Henderson said Mr Lawson told him he had been summoned to attend the Disputes Tribunal hearing by Alert Taxis. He had not kept a copy of the summons, had not made any file notes, and had not talked to Mr Van Heiningen prior to the Disputes Tribunal

hearing although he amended this statement to say that there had been one call from Mr van Heiningen just prior to the Disputes Tribunal hearing.

[44] Mr Lawson said he had not told anyone at NZTA that he was attending the Disputes Tribunal hearing. Mr Henderson said he had asked Mr Lawson twice if he had informed anyone he had been summonsed, and on both occasions he had answered that he had not told anyone he had been summonsed, and that he would not normally do so.

[45] At the conclusion of the meeting with Mr Lawson, Mr Henderson noted his perceptions of him under the heading: “*My thoughts*” which were that Mr Lawson was being evasive and unforthcoming. Rather than being co-operative with the review, he had not wanted to answer the questions raised.

[46] He stated that Mr Lawson had lead him to believe that he had been served with an official summons, but this was a fabrication as the Disputes Tribunal Registrar had confirmed that no official summons had been issued to Mr Lawson. He also had considered it strange that Mr Lawson had kept no copy of the summons and appeared to be evasive about answering questions concerning it. Mr Henderson noted his view that: “*Summons is a total fabrication and not well prepared for*”, and made a note that further questions were required.

Mr Hendry’s Official Information Act 1982 (OIA) Request

[47] On 18 March 2014 Mr Hendry telephoned Mr Lawson and challenged him in relation to his actions in attending the Disputes Tribunal hearing, this call being recorded in accordance with NZTA’s standard practice. In that call Mr Lawson was recorded as stating a number of times that he had been: “*legally summoned*” and that he did not have a copy of the summons as the matter was over.

[48] On 21 March 2014 Mr Hendry submitted an OIA request to NZTA for information in connection with his previous complaint and Mr Lawson’s appearance at the Disputes Tribunal hearing. In particular Mr Hendry requested a copy of Mr Lawson’s summons.

[49] Also on 21 March 2014 Mr Henderson sent an email with further questions to Mr Lawson.

Events 24 March 2014

[50] On 24 March 2014 Mr Collie arrived at work and received Mr Hendry's OIA request which he had forwarded it to Mr Barber and Mr Henderson to be actioned. At Mr Barber's request he forwarded a copy of the OIA request to Mr Lawson that same morning, receiving a response at approximately 11.00 a.m. from Mr Lawson (who was at that time on sick leave) asking him to come to his home with his work laptop and diary and to bring a printed copy of the OIA request with him.

[51] Mr Lawson said that as he was at home on sick leave, he had been unable to respond in writing to NZTA matters because he was without computer access, however he had reviewed all his incoming e-mails, including work emails on his mobile telephone whilst at home.

[52] He had read Mr Henderson's email detailing the questions to which a response was requested, and had noted this was for his urgent attention. However he said he was unable to respond in writing as he had no computer access, and could only write limited emails using his mobile telephone. Therefore he had emailed Mr Henderson and asked that he telephone him that afternoon.

[53] Mr Collie had arrived at Mr Lawson's home on or about mid-day and gave Mr Lawson his work laptop and diary. They had discussed work issues including Mr Hendry's OIA request, Mr Lawson writing some comments on the printed OIA request form.

(a) Telephone Call to Mr van Heiningen

[54] Question 1 on the OIA request form stated: "*The summons that Tere Lawson says he received in his official capacity at Land Transport to appear alongside Robert van Heiningen in the District Court on 3rd July 2013.*" Beside the question Mr Collie said that Mr Lawson had written what appeared to him to be: "*Neva had*". Mr Collie said he had questioned Mr Lawson about that, and he answered that he had not been summoned.

[55] Mr Lawson said that what he had written was: "*None held*" meaning that he did not hold the summons.

[56] Mr Collie said that Mr Lawson had then telephoned Mr van Heiningen and had put the telephone on speaker phone so he (Mr Collie) could hear what was said. Mr Collie said Mr Lawson had told Mr van Heiningen about Mr Hendry's OIA summons, said that he was intending to say that it was not something he would keep, and Mr van Heiningen was to say when questioned that he no longer had it, and it was not something he would keep.

[57] As Mr van Heiningen appeared to be confused, Mr Collie said he had asked Mr Lawson to repeat what he had said and after he had done so, Mr van Heiningen said he understood. The tone of the conversation between Mr Lawson and Mr van Heiningen had been jovial and ended by Mr van Heiningen commenting about having a coffee next time.

[58] Mr Collie said he had been shocked by what he had heard and after he had left Mr Lawson's home, immediately made notes whilst seated in his car which was parked in the street bordering Mr Lawson's home.

[59] Mr Lawson denies that he told Mr Collie he had not been summonsed, and he said that the telephone call to Mr van Heiningen had been in relation to a complaint from Mr van Heiningen about an unlicensed taxi operator at Whangarei.

[60] He said that at the conclusion of the telephone conversation with Mr Van Heiningen, he had requested a copy of the alleged summons Mr van Heiningen had served on him; however Mr van Heiningen had said that he did not have one. He said that he had then advised Mr van Heiningen that he may need to be spoken to about the summons, and if that occurred, he was to tell the truth, following which Mr van Heiningen had commented: "*yes no problem, let's meet up for coffee sometime*".

2. *Telephone Call with Mr Henderson*

[61] Mr Henderson telephoned Mr Lawson later that afternoon. At the commencement of the call Mr Lawson had told him that he was unable to provide written responses to the questions which had been emailed to him as he had no computer access, however Mr Henderson thought he had heard the sound of a computer Windows start-up.

[62] Mr Lawson denied having seen the OIA request from Mr Hendry although he agreed he was aware that it had been made, however Mr Henderson said he believed Mr Lawson had in fact seen the OIA request as a result of the comments he made about it.

[63] At the time of his telephone call with Mr Lawson, Mr Henderson said he had been unaware that Mr Collie had earlier delivered a laptop to Mr Lawson and had given him a copy of Mr Hendry's OIA request.

[64] At the Investigation Meeting, Mr Lawson agreed he had the laptop following Mr Collie's visit; however said he did not have computer access due to the NZTA network being inaccessible at that time.

[65] Mr Henderson said that Mr Lawson now told him that he had informed his team he had been summonsed. He had asked Mr Lawson how he had been introduced at the Disputes Tribunal hearing, and he replied that he had been called by his name.

[66] Mr Henderson said that as a result of this conversation, he had begun to have doubts about Mr Lawson's credibility.

25 March 2014

[67] Mr Henderson said that he had a telephone conversation with Mr Collie on 25 March 2014 during the course of which Mr Collie told him about the meeting he had with Mr Lawson the previous day. Mr Collie also discussed the telephone conversation he had overheard between Mr Lawson and Mr van Heiningen.

[68] Mr Collie told him that Mr Lawson had advised Mr van Heiningen what to say if he was questioned about a summons in relation to his (Mr Lawson's) attendance at the Disputes Tribunal hearing, and that he should say, if asked, that he had thrown away his service copy of the summons because it was no longer needed. This response had been repeated. Mr Collie had noted that Mr Lawson appeared to be very jovial with Mr van Heiningen and they discussed meeting for a coffee in the near future. Mr Collie told him he had been shocked and had made notes of the events immediately after returning to his car.

[69] Mr Henderson said that he had concerns about Mr Lawson's explanations. He noted several departures from the usual process in respect to the handling of Mr Hendry's 2013 complaint against Alert Taxis. He had also been concerned that no official summons had been recorded and that Mr Lawson had not retained a copy of the summons he claimed to have received.

[70] Taking into consideration Mr Collie's information, he had decided that further investigation was required as it appeared to him there were doubts about Mr Lawson's real motivations in attending the Disputes Tribunal hearing, the real nature of his relationship with Mr van Heiningen and the genuine nature of his answers to the process review. His view was that an employment process should be undertaken enquiring further into Mr Lawson's actions and conduct.

[71] On 27 March 2014 Mr Henderson met with Ms Patrick and Mr Thompson and outlined his review findings and recommendations. As a result it was decided that an employment investigation should be undertaken.

[72] On 31 March 2014 Mr Henderson met with Mr Collie and took a formal statement from him in regard to what he had seen and heard at Mr Lawson's house on 24 March 2014.

They had also discussed whether or not there had been other occasions when Mr Collie had had reason to doubt Mr Lawson's integrity and he had spoken about a disclosure issue regarding Green Cabs when he had been asked by Mr Lawson to lie to stakeholders. The formal statement was provided to Ms Patrick on 1 April 2014.

The Employment Investigation April and May 2014

[73] Ms Patrick briefed Mr David Pearks, Regional Manager Midlands, and appointed him to manage the employment investigation and to be the decision-maker.

[74] Mr Pearks said he had not worked in the Auckland NZTA office, and although he knew of Mr Lawson, he had not worked with him. Prior to the briefing by Ms Patrick he had not known of the complaint by Mr Hendry or that it involved Mr Lawson.

[75] Mr Pearks wrote to Mr Lawson in a letter dated 9 April 2014 which alleged that Mr Lawson:

... deliberately misled the review in relation to your attendance as a witness for Alert Taxis and its director Robert van Heiningen at a disputes tribunal hearing. Specifically it is alleged that you have repeatedly stated that you were summonsed to attend the hearing and that was the sole reason you attended. You told the independent review that the summons arrived the day before the hearing.

The independent review concluded no summons was in existence. Subsequently, a statement has been received from Michael Collie that you admitted to him that no summons was ever issued. He also states he was witness to a phone conversation that took place at your home between you and Mr van Heiningen where you arrange that Mr van Heiningen will say should he be questioned by anyone.

You informed the independent review that you had no personal relationship with Mr van Heiningen and had not spoken to him prior to the hearing. You later recalled that a single phone call took place, some days beforehand, where you were informed that you would be summonsed. Your subsequent appearance at the hearing without summons and the actions alleged in trying to have Mr van Heiningen to support your story implies a relationship exists in some form that may constitute a conflict of interest.

Further it is alleged that you allowed yourself to be introduced at the hearing without correction as an advisor to the then Minister of transport and a significant senior manager at the NZ Transport Agency and in doing so you placed the Transport Agency in a position of risk of disrepute.

[76] The letter also set out that possible consequences if the allegations were substantiated would be disciplinary action up to and including summary dismissal, invited Mr Lawson to have a support person present at the proposed meeting to take place on 14 April 2014, and suggested that Mr Lawson take paid leave rather than a suspension taking place. Mr Lawson agreed to take paid leave rather than undergo a suspension process.

[77] On 13 April 2014 Mr Lawson sent a written OIA request to Mr Pearks for full disclosure of the review file, and requested a delay in the scheduled investigation meeting until he had had time to read and review the OIA request disclosure pack.

[78] The meeting was accordingly re-scheduled to 2 May 2014 at Mr Lawson's request due to his representative's availability and in order to supply the requested information.

[79] Mr Lawson said he had received the disclosure pack and had been concerned that the interviews with him, Mr Collie and Mr Mabey had been recorded in a short and selective notation format. He was further concerned that opinion introduced by Mr Henderson under the heading: "*My Thoughts*" were in his opinion extremely defamatory in nature, and that these opinionated comments permeated the reports and interview notes contained in the disclosure pack. He had been particularly concerned that Mr van Heiningen had not been contacted in order to obtain his version of events.

2 May 2014 meeting

[80] The meeting with Mr Lawson took place on 2 May 2014. Mr Lawson had been accompanied by Mr Colin Jessop, a work colleague, and Mr Pearks had been assisted by Mr Henderson and Ms Brown.

[81] Mr Pearks said that prior to the meeting with Mr Lawson he had prepared the areas of enquiry that he had wanted to ask about at the meeting. He had been particularly interested in:

- a. whether or not Mr Lawson had a personal relationship with Mr van Heiningen;

- b. why there was no copy of the summons and why the Disputes Tribunal Registrar had no copy of it; and
- c. why Mr Lawson had instructed Mr Collie that he did not need to attend the Disputes Tribunal since it was a civil matter, but had attended himself.

He had also been concerned that it appeared from the written information that Mr Lawson had not been open and forthcoming but defensive and vague in his answers.

[82] Mr Pearks said that at the commencement of the meeting he had advised that it was an opportunity for Mr Lawson to respond and present his explanation, and that no decision would be taken at the meeting.

[83] During the meeting Mr Pearks said that Mr Lawson had not wanted to set out a general response, but to answer direct questions, and that he had answered: "*I can't recall*" to many of the questions.

[84] Mr Lawson disputed this was the case and said that he had provided detailed answers to the questions he had been asked during the meeting.

[85] In relation to the summons issue, Mr Lawson responded that he had not kept a copy and in response to a question about there having been no official summons recorded, Mr Pearks said Mr Lawson for the first time during the meeting explained that Mr van Heiningen had personally served him with the summons as opposed to any Tribunal official.

[86] Mr Lawson said Mr van Heiningen had served the summons in the NZTA reception area and the summons had been typed on a blank piece of paper with just a scrawl for a signature. He had taken it at face value as being an official document.

[87] Mr Henderson had prepared a list of phone records which had been provided to Mr Lawson who was asked about the calls and text messages between him and Mr van Heiningen around the time of the Disputes Tribunal hearing; however he had been unable to recall most of the calls and could only show some of the text messages involved.

[88] Mr Lawson said Mr Pearks and Mr Henderson had not read the text messages he had shown to them or asked for copies of them. He had been unable to recall accurate details on the other calls and text messages because these had occurred in 2013.

[89] Mr Pearks said he recalled Mr Lawson reading aloud some of the texts messages, and showing them to Mr Henderson. He said he had been interested in the fact that Mr Lawson had retained texts between himself and Mr van Heiningen from 24 March 2014, but did not

have other texts between them, nor could he recall the reason why he had called Mr van Heiningen on the evening after the Disputes Tribunal.

[90] The meeting concluded with an agreement that Mr Lawson could provide further written submissions, and that Mr Henderson would interview Mr van Heiningen.

After the 2 May 2014 meeting

[91] Mr Pearks said he considered Mr Lawson's attitude and the explanations provided over the weekend following the meeting on Friday 2 May 2014, writing a summary of his reflections. He had several concerns about Mr Lawson's explanations, in particular that:

- i. Mr Lawson was a former police officer, used to keeping careful records, used to receiving in his words: "*hundreds of summons*" and therefore he should have been well aware of what an official summons would look like. He considered that it did not make sense that Mr Lawson would not have checked the summons validity and retained a file copy;
- ii. The initial stance taken by Mr Lawson at the process review meeting where he had said he could not recall anything was concerning considering he had been informed in advance of the issues to be explored. This did not accord with Mr Lawson's police background in which he would have been used to giving briefings and keeping comprehensive records;
- iii. Mr Lawson appeared not to know why Mr van Heiningen had wanted him at the Disputes Tribunal hearing, and had just turned up to it; and
- iv. Mr Lawson's recollection of events appeared to be variable.

[92] Mr Pearks noted at this stage in his investigation that he had considered on the balance of probabilities that Mr Lawson was not telling the truth about his involvement in the matter.

[93] He said that although he had read Mr Henderson's review notes and spoken with him, he had been careful to form his own views about what had occurred, in particular based on Mr Lawson's answers during the meeting held on 2 May 2014.

Interview of Mr van Heiningen on 8 May 2014

[94] Mr Henderson interviewed Mr Van Heiningen on 8 May 2014 and afterwards telephoned Mr Pearks and reported the interview to him. He said Mr van Heiningen had essentially supported what Mr Lawson had said; however there were some critical differences

in relation to the serving of the summons. In particular Mr van Heiningen had said the summons had been served outside the NZTA building, it had been served on Alert Taxis distinctive yellow and red letterhead, and it had been served some days prior to the Dispute Tribunal hearing.

[95] Mr van Heiningen had also said that it was his lawyer's idea for Mr Lawson to attend the Disputes Tribunal hearing.

[96] In addition, without prompting in any way, and without any question on the nature of their relationship having been put to him, Mr van Heiningen had emphasised that he and Mr Lawson were not friends.

[97] Mr Pearks said the interview with Mr van Heiningen had not changed his thinking in any way, but rather tended to confirm his original thinking which was that Mr Lawson was not telling the truth about the summons, which was emphasised by the disparities in detail between them.

[98] As he believed Mr Lawson was not being truthful about the summons, he had also preferred Mr Collie's statement about what he had overheard of the telephone conversation between Mr Lawson and Mr van Heiningen.

[99] He had considered it strange that Mr van Heiningen's lawyer had not arranged for Mr Lawson's appearance or arrange for and draft the summons. He further considered it strange that Mr van Heiningen had not kept a copy of the summons, and there was no electronic copy of it even though he had drafted it.

[100] Mr Pearks said he formed the view that, despite what Mr Lawson had said, the actions of him and Mr van Heiningen suggested a closer relationship between them, the nature of which compromised Mr Lawson as a regulator and constituted a conflict of interest.

[101] Mr Pearks said he also tended to believe Mr Hendry's allegation that Mr Lawson had allowed himself to be introduced incorrectly at the Disputes Tribunal hearing.

14 May 2014 meeting

[102] Mr Lawson was invited to attend a further meeting on 14 May 2014 by letter dated 9 May 2014. The letter set out the allegations against Mr Lawson as being:

- *Acting in a way that brings NZ Transport Agency into dispute*

- *Giving false or misleading information to stakeholders or customers directly*
- *Failing to declare a conflict of interest that affects performance or judgment*

[103] The letter stated that if the behaviour was substantiated, it had the potential to: “*fundamentally undermine the trust and confidence we have in you as an employee*”. The letter advised that the purpose of the meeting was to advise Mr Lawson of the outcome of the investigation, and that he was encouraged to bring a support person or representative to the meeting.

[104] The meeting held on 14 May 2014 was attended by Mr Pearks, Ms Brown, and Mr Lawson who was represented by Mr Jessop. During the first part of the meeting held on 14 May 2014, Mr Pearks and Ms Brown set out their preliminary finding that serious misconduct had been committed and Mr Pearks presented his reasons for reaching that decision.

[105] Ms Brown explained that Mr van Heiningen had been interviewed and he had said that the summons was on Alert Taxi letterhead and served outside the NZTA building. Mr Lawson responded that his only fault had been in mistakenly accepting a summons as a valid one when it was not.

[106] Mr Pearks announced his preliminary decision which was that the allegations against Mr Lawson had been substantiated. Mr Pearks said Ms Brown told Mr Lawson that Mr van Heiningen had been interviewed and supported his version of events on the substantive facts, although there had been some differences, referencing Mr van Heiningen having said that the summons was on the Alert Taxis letterhead.

[107] Mr Lawson provided an email from Mr Collie dated 15 August 2013 which set out Mr Collie’s concerns that there was no career progression for him. Mr Pearks said he presumed that Mr Lawson was showing him the email in order to suggest that Mr Collie had motivation to discredit him and provide an opportunity for him to take over Mr Lawson’s job. However he had considered that the email did not suggest that Mr Collie was dishonest or impacted upon Mr Collie’s credibility.

[108] Mr Pearks then invited Mr Lawson to make any comments prior to him reaching a final decision, and granted an adjournment for Mr Lawson to consult with Mr Jessop.

[109] When the meeting was resumed, Mr Pearks said Mr Lawson had nothing further of substance to add and he had finalised his decision, which was that Mr Lawson had committed serious misconduct and was summarily dismissed.

[110] Mr Pearks said that on the balance of probabilities he did not believe that a summons had been issued but that Mr Lawson had attended the Disputes tribunal hearing because of his relationship with Mr van Heiningen. As a result he could not rely on Mr Lawson's version of events and had lost trust and confidence in him.

[111] He had considered whether or not a final written warning was more appropriate than dismissal, but he considered that Mr Lawson had been untruthful and had undermined NZTA's ability to act as a regulator. Mr Lawson had not appeared to recognise any wrongdoing or adequately explain why he had acted in the way he had.

[112] Mr Pearks confirmed his final decision in a letter dated 15 May 2014 which stated:

... It was alleged that you deliberately mislead the review in relation to your attendance as a witness for Alert Taxis and its director Robert van Heiningen at a disputes tribunal hearing.

Your subsequent appearance at the hearing without a summons and the actions alleged in trying to have Mr van Heiningen to support your story implied a relationship exists in some form that constitutes a conflict of interest.

Further it was alleged that you allowed yourself to be introduced without correction as an advisor to the then Minister of Transport and a significant senior manager at the NZ Transport Agency and in so doing you placed the Transport Agency in a position of disrepute.

Such behaviour represents serious misconduct outlined within the guide to the NZ Transport Agency Code of Conduct including:

- *Acting in a way that brings the NZ Transport Agency into disrepute*
- *Giving false or misleading information to stakeholders or customers directly*
- *Failing to declare a conflict of interest that affects performance or judgment ...*

On 14 May 2014 we met again so I could verbally advise you that the allegations were substantiated and my preliminary decision was to

dismiss you. At this time I gave you another opportunity to provide me with and further information ...

Having considered my decision overnight I am writing to confirm ... I have concluded that you have acted in a manner that seriously breaches the NZTA's Code of Conduct. Given your role and responsibilities within the agency as a regulatory manager your breach of the Code of Conduct mean I no longer have trust and confidence in you as an employee. Therefore I have to inform you that summary dismissal is my only option, effective today.

[113] Mr Lawson filed a Statement of Problem in the Authority on 26 June 2014 and mediation took place thereafter, but did not resolve the matter.

DETERMINATION

Was Mr Lawson unjustifiably dismissed by NZTA?

[114] The decision to dismiss Mr Lawson on the basis of serious misconduct must be a justifiable decision in accordance with the Test of Justification as set out in s 103A of the Employment Relations Act 2000 (the Act) which states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[115] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. NZTA must therefore establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[116] NZTA must show that it carried out a full and fair investigation into the issue of whether Mr Lawson's actions constituted serious misconduct, taking into consideration the

factors in s 103A(3), statutory good faith requirements and natural justice. NZTA must also establish that dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

Substantive Justification

[117] The finding by NZTA that Mr Lawson was guilty of committing serious misconduct was founded upon the definition of serious misconduct as set out on page 23 of the NZTA Code of Conduct. Specifically;

Acting in a way that brings the Transport Agency into dispute;

Failing to declare a conflict of interest that affects performance or judgement;

Giving false or misleading information to stake holders or customers deliberately.

[118] The three allegations set out in Mr Pearks letter dated 9 April 2014 were that Mr Lawson:

- a. provided false or misleading information during the process review, to an external shareholder, and in response to an OIA request, in particular in respect to his (Mr Lawson's) appearance at the Disputes Tribunal and the assertion that he was summonsed to do so;
- b. had a personal relationship to Mr van Heiningen which was inappropriate for a regulator thus creating a conflict of interest; and
- c. had allowed himself to be introduced without correction at the Disputes Tribunal hearing as an advisor to the then Minister of Transport and a significant senior manager at the NZTA.

(i) First allegation

[119] Mr Pearks had reached his decision that Mr Lawson had provided false and misleading information based on findings including the following:

- Mr Lawson repeatedly stated that he was legally summonsed to attend the Disputes Tribunal hearing and that was the sole reason for his attendance.
- Mr Lawson could not produce a copy of the summons. Whilst Mr Lawson stated that he did not keep copies of summons documents, this seemed

implausible given his role and standard practices in relation to such documents, and the fact that as a Police prosecutor he would have been aware of the need to retain such significant documents;

- There was no official summons issued by the Disputes Tribunal Registrar;
- It was implausible that Mr Lawson would have taken the summons at face value without checking it to see if it was a valid summons given his extensive experience in both serving and receiving summons both as a Police Prosecutor and with NZTA;
- The summons had been served on him by one of the parties to the Disputes Tribunal hearing whereas he referred to other summons he had received previously which had been served by police officers or bailiffs;
- When interviewed by Mr Henderson, he had apparently not bothered to review the information provided to him despite having been advised about the review;
- He did not openly disclose that he had attended the Disputes Tribunal hearing, saying he could not recall anything further until directly asked by Mr Henderson if he had done so; claiming that he did not think it was relevant;
- He was not able to provide a consistent account but changed his version of events over time;
- Mr Pearks preferred Mr Collie's account of what happened on 24 March 2014 as being more credible as there was no motivation for Mr Collie to give a false account; and
- Mr van Heiningen's version of events, whilst supporting that of Mr Lawson was suspect given Mr Collie's evidence of prior collusion and the difference in details.

(ii) Second Allegation

[120] Mr Pearks concluded that there was an inappropriate relationship with Mr van Heiningen which constituted a conflict of interest for a regulator and an external shareholder based on findings including the following:

- That as Mr Lawson had not been believed concerning the issue of a legal summons, he had therefore attended a civil matter as a witness on behalf of Mr van Heiningen because he had been asked to attend, which was contrary to the advice he had given his team members and contrary to his role as a regulator to remain impartial;
- He had attended the Disputes Tribunal hearing; despite being aware that Mr Hendry had raised a complaint about one of Mr van Heiningen's companies and asked for Mr Lawson's NZTA team members to support him in that;
- As Mr Collie's version of the telephone call between Mr Lawson and Mr van Heiningen on 24 March 2014 had been preferred, this meant that Mr Lawson and Mr van Heiningen had colluded on the reason why Mr Lawson had attended the Disputes Tribunal hearing and
- It appeared Mr van Heiningen had been prepared to lie on Mr Lawson's behalf, which underpinned the conclusion that they had an inappropriate relationship.

(iii) Third Allegation

[121] Mr Pearks had not been in a position, due to NZTA being unable to obtain a copy of the Disputes Tribunal hearing transcript prior to the employment investigation and Mr Lawson's dismissal, to focus on this third allegation, and therefore focussed on the first two allegations, basing his conclusion that there had been serious misconduct on those.

[122] Having completed the employment investigation, Mr Pearks had given the matter full consideration and concluded that Mr Lawson's actions constituted serious misconduct as defined in the Code of Conduct.

[123] NZTA's Code of Conduct defines serious misconduct as: "... *behaviour that is considered unacceptable to the Transport Agency ...*" a finding of which: "... *may result in a final written warning or termination of employment*" which may be summary dismissal.

[124] In *Northern Distribution Union v BP Oil New Zealand Ltd*¹ the Court of Appeal stated that whilst it is not possible to define serious misconduct warranting summary dismissal as it is always a matter of degree, :² "Usually what is needed is conduct that deeply

¹ [1992] 3 ERNZ 483

² Ibid at page 487

impairs or is destructive of that basis confidence or trust that is an essential of the employment relationship”.

[125] Mr Pearks concluded that Mr Lawson’s serious conduct which breached the Code of Conduct: “... *behaviour that is considered unacceptable to the Transport Agency ...*” had destroyed the trust and confidence that NZTA could have in him both as an MTO managing a team of employees and representing NZTA as an impartial regulator. On that basis, summary dismissal was the only option.

[126] I find Mr Pearks’ conclusion to have been one that a fair and reasonable employer could have reached in all the circumstances at the time the dismissal occurred.

Procedural justification

[127] In accordance with s 103A (3) of the Act, NZTA was required to carry out a fair investigation and follow a fair procedure.

[128] *Ministry of Maori Development v Travers-Jones*³ the then Chief Judge Goddard stated in regards to a fair procedure:⁴

What amounts to a fair procedure has been described often enough. It is generally accepted that the minimum elementary components must be clear notice to the employee of the misconduct alleged, a fair opportunity to answer or explain, including adequate time for preparation, followed by consideration by a mind at least receptive to the need to evaluate the answers and explanations and generally open to the possibility that there may be an innocent explanation for suspicious circumstances.

[129] The duty of good faith as contained in s 4 of the Act is also relevant to this case, in particular s 4(1A)(b) and (c) which state:

(1A) *The duty of good faith in subsection (1) –*

(b) *Requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*

(c) *Without limiting paragraph (b), requires an employer who is proposing to make a decision that*

³ [2003] 1 ERNZ 174

⁴ Ibid at para [30]

will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected –

- (i) Access to information, relevant to the continuation of the employees' employment, about the decision; and*
- (ii) An opportunity to comment on the information to their employer before the decision is made.*

[130] The steps to be undertaken in a disciplinary process as set out in NZTA policy: “*Resolving Performance and Misconduct Issues*” follow the steps required to be taken in s 4(1A) (c) of the Act.

[131] I consider it relevant that neither Mr Henderson nor Mr Pearks had any personal knowledge of Mr Lawson prior to the process review or employment investigation, and that they had both had prior experience in conducting the type of investigations they were each charged with undertaking.

[132] I find that Mr Lawson was advised of the allegations against him which were set out fully in the letter dated 9 April 2014, the letter advised of the possible outcomes, and invited him to have a support person or representative with him at the proposed meeting on 14 April 2014.

[133] At the meeting which in fact took place on 2 May 2014 to accommodate the availability of Mr Lawson’s representative and to provide the information requested by Mr Lawson, Mr Lawson had the opportunity to present an explanation in response to each of the allegations.

[134] Following the meeting on 2 May 2014, Mr van Heiningen had been interviewed, and Mr Pearks had given the matter consideration.

[135] At the meeting on 14 May 2014 Mr Pearks set out the reasons for his preliminary decision, and Mr Lawson was invited to provide further explanations or submissions. It was only after this that Mr Pearks announced his final decision.

[136] I find that NZTA undertook a fair investigation and followed a fair procedure.

[137] I determine that Mr Lawson was justifiably dismissed by NZTA.

Was Mr Lawson unjustifiably disadvantaged by NZTA not providing him with all relevant information?

[138] Mr Lawson was provided with all the information NZTA had on its file prior to the meeting held on 2 May 2014, but was not provided with a copy of the Disputes Tribunal transcript prior to the meeting on 2 May 2014. Mr Henderson and Mr Pearks both stated at the investigation Meeting that they had not read the Disputes Tribunal transcript prior to the first Investigation Meeting in October 2014.

[139] Mr Henderson said that he had been advised by Mr Thompson that NZTA would not be able to obtain a Disputes Tribunal transcript, and that he had reasonable relied on that information, especially as Mr Thompson had formerly been a Referee dealing with dispute resolution.

[140] In addition I observe that Mr Pearks said that he had not focused on the third allegation, being information regarding Mr Lawson's introduction and evidence at the Disputes Tribunal since a Disputes Tribunal transcript was not available at that time.

[141] Apart from the Disputes Tribunal transcript, NZTA said that Mr Lawson had been provided with all relevant information prior to the meeting on 2 May 2014.

[142] Mr Lawson claimed that he had been disadvantaged by not being provided with a copy of Mr van Heiningen's statement. All relevant information should be provided to an employee during an investigation process, which may include any witness statements provided.

[143] Mr Henderson verbally conveyed the details of his meeting to Mr Pearks and Ms Brown and these details were verbally conveyed to Mr Lawson by Ms Brown during the meeting on 14 May 2014, with Mr Lawson being given an opportunity to respond at that time.

[144] NZTA chose not to have Mr van Heiningen make a formal statement, nor did Mr Henderson make any written notes of the interview, as a result none were available at the meeting held on 14 May 2014.

[145] Whilst it might have been preferable for there to have been a formal statement from Mr van Heiningen, I note that there was no legal requirement in relation to this. Equally written notes of the interview made by Mr Henderson recording the interview with Mr van Heiningen might have been desirable, however I find that as Mr Lawson was provided, albeit verbally, with the details of the interview with Mr van Heiningen, and given an opportunity to respond, he suffered no disadvantage as a result.

[146] I determine that Mr Lawson was not unjustifiably disadvantaged by NZTA not providing him with all relevant information.

Costs

[147] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority