

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 141
3010692

BETWEEN FRASER MADDIGAN
Applicant

AND DIRECTOR-GENERAL OF CONSERVATION
Respondent

Member of Authority: Helen Doyle

Representatives: Anna Oberndorfer, Advocate for Applicant
Karen Radich, Counsel for Respondent

Investigation Meeting: 28 and 29 June 2018

Submissions received: 3 July 2018 from Applicant
6 July 2018 from Respondent

Determination: 4 October 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A Fraser Maddigan was unjustifiably dismissed.**
- B The Director General of Conservation is to pay to Fraser Maddigan the following, taking contribution into account:**
- (a) Reimbursement of lost wages in the sum of \$7,196 gross.**
 - (b) Compensation in the sum of \$7,500 without deduction.**

- C There is no order made for reinstatement.**
- D There is no award of a penalty for a breach of good faith.**
- E Costs are reserved and failing agreement a timetable is set.**

Employment Relationship Problem

[1] Fraser Maddigan was employed by the Director-General of Conservation at the Department of Conservation (the Department) as a Ranger from 1997 until November 2016 for a continuous period save for a period of two years when he worked at the Christchurch City Council.

[2] He was summarily dismissed for reasons set out in a letter dated 18 November 2016 from Andrew Roberts, Operations Director Eastern South Island. Mr Maddigan says that his dismissal was substantively and procedurally unjustified.

[3] In the alternative Mr Maddigan says that he was unjustifiably disadvantaged.

[4] He further says that the Department has breached its obligations of good faith and a penalty should be imposed.

[5] Mr Maddigan seeks to be reinstated to his position as a B Band Ranger for the Department. He also seeks compensation in the sum of \$18,000 and reimbursement of lost wages together with a penalty for a breach of good faith and reimbursement of costs.

[6] The Department says that Mr Maddigan was dismissed for actions that amounted to serious misconduct and significantly damaged the trust and confidence that it needed to have in him in his position as Ranger. It does not accept that there is a breach of a duty of good faith and further that that duty does not require that it maintain an employment relationship where Mr Maddigan's own actions caused a loss of trust and confidence.

Issues

[7] The Authority needs to determine the following issues in this matter.

- (a) What are the material provisions from Mr Maddigan's employment agreement and policies?
- (b) What were the allegations put to Mr Maddigan?
- (c) What were the reasons for the dismissal?
- (d) What led to the expanded reasons?
- (e) Did the Department undertake a full and fair investigation?
- (f) Could a fair and reasonable employer have concluded there was serious misconduct on the part of Mr Maddigan?
- (g) Was there disparity of treatment of Mr Maddigan?
- (h) Could a fair and reasonable employer have reached a decision to dismiss?
- (i) Can the claims about the alleged dismissal be viewed in the alternative as disadvantageous to Mr Maddigan's employment or conditions of employment?
- (j) If the dismissal was unjustified, what remedies should be awarded?
- (k) Are there issues of contribution and mitigation?
- (l) Is reinstatement practicable and reasonable?
- (m) Was there a breach of good faith?
- (n) If there was a breach of good faith then should a penalty be awarded?

What are the material provisions from Mr Maddigan's employment agreement and policies?

Collective Agreement

[8] The collective agreement that covered Mr Maddigan's work at the material time was the Department of Conservation and the Public Service Association Inc. Collective Agreement 6. It was effective from 1 November 2015 and is to expire 31 October 2018. Part 11 is headed discipline and refers to the disciplinary process being dealt with in accordance with the relevant policy. It set out the principles that the policy is to be based on.

Safe Driving Policy April 2014

[9] The Safe Driving Policy (the policy) recognises that the nature of the work of the Department requires a considerable amount of driving often over large distances and at night and that this activity represents a significant hazard for drivers, the Department and the public.

[10] The policy also refers to the code of conduct and states that certain actions in departmental vehicles will be viewed as serious breaches of conduct and may result in dismissal. These include driving while disqualified or not correctly licenced, acquiring demerit points leading to a suspension of licence, any actions that warrant the suspension of a licence and any other continued infringements of any nature.

[11] The policy provides that every driver of a departmental vehicle (or personal vehicle for the purposes of work) will:

- (a) Ensure they hold a current driver licence for the class of vehicle they are driving and this is carried when driving the vehicle.
- (b) Immediately notify the supervisor or manager if their driver's licence has been suspended or cancelled.
- (c) Be accountable for their actions when operating a departmental vehicle or driving for the purpose of work.
- (d) Display the highest level of professional conduct when driving a department vehicle.

- (e) Comply with all rules, regulations and legislation while using a motor vehicle.
- (f) Report infringements to a manager at the earliest opportunity.

Procedures for dealing with misconduct and unsatisfactory performance

[12] These procedures provide in particular for checklists for investigation and disciplinary processes including instant dismissal.

What was the allegation of serious misconduct?

[13] The allegation of serious misconduct is contained in a letter dated 19 October 2016 from Mr Roberts to Mr Maddigan. Mr Roberts was the decision maker.

[14] Under a heading “Allegation” in the letter of 19 October 2016 it provides the allegation of serious misconduct is that Mr Maddigan had failed to observe road traffic laws in a Department vehicle on two occasions and failed to immediately notify a manager of those infringements in accordance with the policy. It was stated to be a serious allegation on the basis that it was a breach of both road traffic laws and the Department’s policy.

[15] In addition Mr Roberts wrote that if it is correct that Mr Maddigan has gained enough demerit points to lose his licence for three months that would significantly undermine the Department’s ability to have trust and confidence in him as a Ranger. That is because of the driving requirements of that position which were set out later in the letter and because it means that Mr Maddigan had incurred a number of infringements in a relatively short period. It was further stated that this was not the first time that Mr Maddigan had lost his licence for driving offences compiling demerit points with an earlier occasion having occurred in late 2009 and that there had been a warning in April 2010.

[16] Mr Roberts invited Mr Maddigan in the letter to a meeting on 27 October 2016 at 1:30 pm so that he could provide his response. Mr Maddigan was advised that Mr Roberts would

be present at the meeting together with Ms McDonald from human resources. Mr Roberts wrote that the allegations were of serious misconduct and that Mr Maddigan was entitled to bring independent legal advice or a union representative to the meeting. The letter further advised the possible outcome may be dismissal.

What were the reasons for dismissal?

[17] Ms Oberndorfer refers to additional reasons for dismissal from Mr Roberts's oral evidence about returning Mr Maddigan to the work programme at Mahaanui. My notes record references to the short period in the programme before the suspension incident and that it was "hidden." I am not satisfied that those matters were the reasons for the dismissal. The reasons for dismissal I find are as follows:

- (a) Mr Maddigan was issued with speeding tickets twice while driving in the Department vehicles on 21 February 2015 and 7 January 2016.
- (b) Mr Maddigan did not advise his manager about either of the above incidents and did not report them to his supervisor.
- (c) Mr Maddigan accumulated enough demerit points to have his licence suspended.
- (d) He did not advise his supervisor/manager immediately that his licence was suspended which Mr Maddigan confirmed occurred on 1 September 2016.
- (e) Mr Maddigan advised his manager that his licence had been suspended six weeks later at the time he was going or had been to Court and was not granted a temporary work licence.
- (f) In the period between 1 September and 14 October 2016 whilst Mr Maddigan's licence was suspended he drove to/from work and was reimbursed for that mileage on a number of occasions.

- (g) Mr Maddigan drove to and from Duvauchelle for work purposes and during work time in the week of 26 September 2016. This was travel for which his time was paid and mileage was due to be reimbursed; and
- (h) Mr Maddigan has been caught by the police driving whilst his licence was suspended and is now facing Court action over this.

[18] It was concluded that this conduct had significantly damaged the trust and confidence Mr Roberts had in Mr Maddigan because he did not report matters that should have been reported and drove while his licence was suspended including in work time.

What led to the expanded reasons for dismissal?

Meeting 27 October 2016

[19] The expanded reasons for dismissal arose after the meeting on 27 October 2016. Mr Maddigan attended the meeting that day represented by a PSA Union delegate. Mr Roberts attended the meeting together with Mr Thompson and Ms McDonald. Notes were taken of the meeting by Ms McDonald. The purpose of the meeting was set out in the notes to seek a response from Mr Maddigan to the allegations of serious misconduct listed in the letter.

Mr Maddigan's explanations

[20] The notes taken at the meeting by Ms McDonald were provided to Mr Maddigan by Mr Roberts following the meeting. He added to them including additional statements to those made at the meeting on 27 October 2016. These were then provided to Mr Roberts by email dated 8 November 2016 and taken into account. I have referred to these expanded notes when setting out the explanations where appropriate to do so.

[21] Details relating to the five driving incidents for which demerit points had been incurred were provided by Mr Maddigan in an email dated 26 October 2016. The incidents were over a period from 30 July 2014 to 7 January 2016. There were three infringements

when Mr Maddigan was driving in his own vehicle. The last two in February 2015 and January 2016 occurred when Mr Maddigan was driving a Departmental vehicle and were for exceeding the speed limit. In that email which was treated as part of the explanation Mr Maddigan referred to his belief that he should not have lost his licence due to 35 demerit points for the last infringement being invalid and incorrect and that he was working to fix that.

[22] Mr Maddigan did not dispute that he had not advised his managers about the two speeding incidents in the Department vehicle. Mr Maddigan said that he thought he told his supervisors about the 21 February 2015 driving incident in the Department vehicle and he also thought that he might have told another employee K and expanded that to include R and O about the 7 January 2016 incident. He wrote that he thought that was adequate as he had not refreshed his memory on the exact wording of the policy in the years since 2009/2010 when he had signed the policy. He said that he would make sure he told management in the future.

[23] There was discussion at the meeting that this was not the first time Mr Maddigan had lost his licence because of driving offences compiling demerit points. In the expanded notes Mr Maddigan wrote that he thought what he did was enough and he was responsible for the payment of the fines. He explained that he thought those he reported the incidents to would tell him to report them to management or would do it themselves.

[24] Mr Maddigan confirmed that he was suspended from driving at the end of August 2016 and agreed to provide some documentation. When he expanded on the notes he wrote that this was based on the 35 points deemed incorrect and invalid by the Police. He wrote that they were incorrectly added and that the Police and the New Zealand Transport Authority (NZTA) made “the mistake of imposing a suspension erroneously.”

[25] He was asked at the meeting on 27 October 2016 if there was anything else before the Court or pending. He confirmed that he was pulled over by the Police and charged with driving while suspended and was attending Court on 31 October 2016. He said that he had sent a letter to the Court and believed the charge would be dropped. Mr Maddigan agreed to

provide documentation. He referred in expanded notes to the 35 invalid points and that he had not driven any of the Department vehicles in the whole period of his disputed suspension. Further that it was a personal matter and would not affect his ability to do his work.

[26] Mr Maddigan admitted to driving to and from work while suspended and driving to the nursery and to Duvauchelle which is about an hour or so from Christchurch. He referred in expanded notes about this that he had not driven a Department vehicle at any time during the suspension.

[27] In respect of the Court attendance on 13 October 2016, being the date that he advised the Department of the suspension, Mr Maddigan said that it was primarily to query the speeding infringement and the invalid 35 points. He wrote that he also tried to gain a limited work licence but the hearing was rushed and he never had time to explain effectively. He also in expanding on the notes wrote that the work licence application was called weak by the police as he only had his own affidavit.

[28] As to why he did not advise his licence had been suspended until 13 October 2016 he said that at that time the incorrect 35 points should have been removed but instead were altered. Mr Maddigan wrote that this all arose out of a mistake on behalf of the Police and NZTA and that there did not seem to be any urgent requirement to notify Mr Thompson. He wrote that he informed his manager and Mr Thompson on the day of his Court hearing which seemed appropriate but in future he would provide as much warning as he is able to.

[29] Mr Maddigan indicated that he was on leave most of the time between when he was suspended and 13 October 2016 and therefore was not required to drive for work purposes. He agreed that he had signed the vehicle policy in 2009/2010 and was advised that he should advise his manager should he have any vehicle infringements in the future. In expanding on the notes taken by the Department on 27 October 2016 Mr Maddigan wrote that he had forgotten the old vehicle policy stated to inform senior managers.

Two other emails

[30] By email dated 28 October 2016 Mr Roberts sent an email to Mr Maddigan attaching the meeting notes and setting out that it was agreed that Mr Maddigan would provide the Department with copies of all documentation relating to the traffic offences, the licence suspension and information in relation to the alleged driving whilst suspended. Mr Roberts wrote that he wanted the information by 2 November 2016 so he would be able to make a decision on a fully informed basis. Mr Roberts also asked for information and the outcome from the 31 October 2016 Court appearance in relation to driving whilst suspended.

[31] The Union delegate who had represented Mr Maddigan sent an email dated 31 October 2016 to Mr Roberts reiterating points from the meeting that the information being considered by the Department can only relate to the current loss of licence. He wrote that Mr Maddigan is still disputing the last demerit points and should they be wiped the loss of licence will not apply and the driving while suspended should be withdrawn. The Union delegate wrote that if that eventuates then the only issue should be Mr Maddigan not reporting the two incidents in the Department vehicles to a manager.

Email from Mr Maddigan to Mr Roberts with others copied in dated 1 November.

[32] Mr Maddigan indicated in his email that he was obtaining more information on the five infringements from the Police. He also noted that the 31 October court date had been changed to 21 November at the earliest and the appeal would be heard within the next two weeks.

Further investigation about whom Mr Maddigan told about the speeding infringements in the Department vehicles

[33] Andrew Thompson who is the Operations Manager, Mahaanui for the Department carried out further investigations into who Mr Maddigan told about the speeding

infringements in the Department vehicles. He reported back his findings to Mr Roberts in an email dated 3 November 2016.

Preliminary Conclusions and view as to Outcome Letter

[34] On 10 November 2016 Mr Roberts wrote to Mr Maddigan and provided a preliminary conclusion and a view as to outcome. He set out eight findings that became the reasons for dismissal.

[35] Mr Roberts set out in some detail the investigation undertaken by Mr Thompson of those individuals that Mr Maddigan said he had spoken to about being caught driving over the speed limit in the Department vehicles in February 2015 or January 2016. Mr Roberts set out that it was his view that Mr Maddigan did not report his driving infringements to his manager. Even if the policy had allowed for this he did not report the infringements to his supervisor. Rather he mentioned the January infringement to a science adviser who he temporarily worked with sometime after the infringement occurred.

[36] Mr Roberts referred to Mr Maddigan's written response where he had stated his driving history generally in the twenty years working for the Department and set out the key issues from his perspective being the failure to observe road traffic laws and failure to notify the Department in accordance with the policy of the infringements and suspension as well as driving to and from work while suspended. Mr Roberts concluded he did not need to closely examine every instance Mr Maddigan was issued with an infringement speeding ticket nor closely consider whether he was or was not a usually safe and alert driver.

[37] Mr Roberts set out in his letter the key points from the policy together with actions that would be viewed as serious breaches of conduct. In particular he wrote that Mr Maddigan had breached the requirements to display the highest level of professional conduct when driving a Department vehicle and comply with all rules and regulations as well as having failed to report infringements to a manager at the earliest opportunity. He stated that Mr Maddigan had accumulated demerit points to the extent that his licence was suspended

and failed to notify his supervisor or manager of that. Since the licence was suspended he had driven to and from work and to and from Duvauchelle during paid work time.

[38] Mr Roberts noted it was not the first time that Mr Maddigan had lost his licence because of driving offences compiling demerit points. He referred to a “Further Instructions” document” that Mr Maddigan had signed on 22 October 2010 which included an expectation that Mr Maddigan would comply with all Departmental policies and that he would use and drive vehicles in accordance with the Department’s policy for the use of motor vehicles at all times.

[39] Mr Roberts wrote that even if that context had not been apparent it was his view that the Department could no longer continue to have trust and confidence due to his recent conduct and that they are serious breaches and he believed they would justify dismissal. He wrote that he proposed to dismiss Mr Maddigan immediately but with one month’s pay in lieu of notice being appropriate in light of Mr Maddigan’s long service in the time of years. Mr Roberts said that he wanted to give Mr Maddigan one final opportunity to provide any further information by email to be received by 16 November 2016. This included documents referred to by Mr Maddigan in his 8 November response being written confirmation from the Christchurch Police Prosecutor that demerit points were added incorrectly and the assurance from the Police and NZTA that 35 points were deemed invalid and would be removed.

Ms Oberndorfer responds on behalf of Mr Maddigan

[40] Ms Oberndorfer had at that stage been instructed and responded to Mr Roberts’ letter of 10 November 2016 by letter dated 16 November 2016. She commenced her reply by setting out the allegations of serious misconduct in the letter of 19 October 2016 and addressing aspects of them. Ms Oberndorfer made submissions that the conduct was not

serious and dismissal not justified. She stated that it would appear prudent to allow the legal action about the demerit points to take place before reaching any further conclusions.

Advice to Mr Roberts on 16 November that suspension lifted

[41] Ms Oberndorfer also advised Mr Roberts on 16 November 2016 by email that the suspension had been lifted with immediate effect and that the Court needed to advise the NZTA in order for them to process the removal of the points and this may take a day or two. She wrote that “It was stated that the points were added in error and the additional 20 points were based on unproven evidence.” The Authority was provided with an oral judgement of Judge Strettell of the District Court dated 16 November 2016 allowing the appeal as to penalty by Mr Maddigan so that a specific finding could be made as to the level of speed enabling the appropriate demerit points to apply.

Decision to dismiss

[42] Mr Roberts proceeded to dismiss Mr Maddigan by way of the letter of 18 November 2016 on the basis of the findings in the letter of 16 November 2016. He said in his evidence that it was not material to him that the licence suspension had come to an end on 16 November 2016 because the issue was not “only” about him having had his licence suspended.

Did the Department undertake a full and fair investigation?

[43] Mr Maddigan says that there was procedural unfairness including bias, a failure to genuinely consider his explanations, a failure to take into account relevant information, incorrect weight placed on matters including a historical matter, a failure to comply with disciplinary policies and disparity of treatment.

[44] The Authority must consider the four procedural fairness factors set out in s 103A(3) of the Employment Relations Act 2000 (the Act) in determining whether the employer’s actions and how it acted were what a fair and reasonable employer could have done in all the

circumstances at the time of the dismissal. These are whether the allegations against Mr Maddigan were sufficiently investigated, whether the concerns were raised with him, whether he had a reasonable opportunity to respond to them and whether the explanations were considered genuinely by the Department before dismissal. The Authority may take into account other factors as it thinks appropriate and must not determine an action or dismissal to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[45] A fair and reasonable employer could be expected to comply with the good faith obligations set out in s 4 of the Act.

[46] I find that the investigation about whether Mr Maddigan had told a manager or supervisor about the driving infringements in Department vehicle undertaken by Mr Thompson was fair.

[47] It is unclear to the Authority what information Ms Oberndorfer alleged the Department failed to provide to Mr Maddigan.

[48] I am not satisfied that the policy is unclear. I accept that the Department could weigh because of the matter in late 2009/2010 the knowledge Mr Maddigan had about reporting suspension of a driving licence to his manager/supervisor under the policy. I am not satisfied that incorrect weight was placed on the 2009/2010 matter because of that.

Were the concerns the Department had clearly raised with Mr Maddigan?

[49] In his written evidence Mr Maddigan stated that “the allegations morphed and blurred to counter anything I was trying to put forward.”¹ He said that the suspension of the licence was not a factor for the final decision but he considered it “the catalyst for all of the events.”

[50] An employee is entitled to have the issues of concern clearly identified.² Mr Maddigan has some unique attributes and ways of thinking. I am satisfied that Mr Thompson and Mr Roberts recognise this and at times this has been a source of frustration and concern to them. This uniqueness is I find a circumstance in this matter against which to consider procedural fairness in this case. Particularly whether the material focus with the developing concerns was clear to Mr Maddigan.

[51] Mr Thompson’s evidence is that when he delivered the preliminary conclusion and outcome letter dated 10 November 2016 to Mr Maddigan he made a comment to Mr Maddigan to the effect that if he was focusing on the two speeding offences then he may be focusing on the wrong issue.³ Mr Thompson told Mr Maddigan to read the letter carefully. He reported that back in an email to Mr Roberts and Ms McDonald on the same day. A fair and reasonable employer could and should have recognised Mr Maddigan may not be clear about what the significant concerns were for the Department and taken in good faith some steps at that stage to clarify. That did not occur. Although represented at that stage Ms Oberndorfer in her letter dated 16 November 2016 set out and primarily focussed on the allegations of serious misconduct in the letter of 19 October 2016. There was no further meeting and Mr Maddigan was dismissed two days later.

[52] The main focus for Mr Maddigan as at 10 November 2016 was the Court process with his re-hearing and attempting to lift the suspension. Objectively assessed he did not appear to recognise a change in the nature of the concerns to the extent that may not make any difference in disciplinary outcome. Initially the requirements of Mr Maddigan’s Ranger position and the need to drive work vehicles on a daily basis assumed importance. It was

¹ Original written statement of evidence at [50].

² *Hoff v The Wood Lifecare (2007) Ltd* [2015] ERNZ 669 at [34]

³ See email dated 10 November 2016 reporting back to Mr Roberts after delivering letter – bundle 3 page 22.

stated in the 19 October 2016 letter “Without a driver’s licence, you are both unable to carry out your normal duties as well as not being able to transport yourself to your agreed worksites, which is also a matter that I need to take into account.” Although the ability to drive in the Ranger position was to be taken into account at the outset of the process that was not a focus at the time of the decision to dismiss when the suspension was lifted and Mr Maddigan would have been able to drive as usual. That is because it had been overtaken by more serious concerns with the driving whilst suspended and failure to report the suspension.

[53] Another example is the concern in the 19 October letter about whether Mr Maddigan can be trusted to continue in the position of a Ranger given the extent of driving required and the apparent breach of policy. Mr Maddigan responded by 8 November that he is an alert driver and had never had any accidents in 20 years of working for the Department and that there had been more serious incidents concerning other staff. Mr Roberts in his preliminary findings did not consider that relevant to key considerations. The focus had changed but that was not I find clear to Mr Maddigan.

[54] Ms Radich submits that Mr Maddigan’s various failings to comply with policies are set out in the letters of 10 and 18 November 2016. She submits that where there is a series of breaches and conduct issues there is no obligation on an employer to try to ‘categorise’ each action or instance into serious or less serious misconduct in order to make decisions on each action individually. Rather the requirement is to make a decision in all the circumstances at the time which enables a broader view. I accept for decision making all the circumstances can be considered.

[55] The process however commenced with a clear allegation of serious misconduct consistent with the language in the employment agreement and disciplinary procedures. That same language was not used with the new concerns about which findings were made on 10 November 2016. Ms Radich submits that while there were additional concerns there was nothing untoward in the initial concerns being extended where the conduct is admitted and

there is an opportunity to respond to the employer's "thoughts" before a decision is made. It was stated in *Booth v Big Kahuna Holdings Ltd*⁴

The fundamental point (from a natural justice perspective) is that the concerns the employer has must be adequately identified to enable an employee to understand what conduct is being impugned and what they are being asked to respond to.

[56] Preliminary findings were made about matters that had not been put to Mr Maddigan to explain/mitigate in the knowledge that they were considered serious misconduct. He attended the meeting on 27 October to answer the allegation of serious misconduct in the 19 October letter. I find it was too late in the circumstances of this case to fairly raise expanded concerns for the first time in a letter advising of preliminary conclusions and a proposed disciplinary outcome of dismissal. There was also a change in the focus of the concerns.

[57] A fair process could and should have involved a further step setting out the additional concerns following the 27 October 2016 meeting in the same way that the initial allegation of serious misconduct had been set out which was clear. That would have given Mr Maddigan an opportunity to be clearer about the concerns and more particularly the focus of them to appropriately direct any matters of explanation and mitigation. The Department is well resourced and could have easily accommodated that step.

[58] I do not find that the additional issues of concern were put in a way that enabled Mr Maddigan a reasonable opportunity to provide an explanation or factors in mitigation as required to satisfy procedural fairness in s 103A(3)(c) of the Act. The disciplinary process is based on principles in the collective agreement at clause 11.2. These include "The employee being informed of the issue in question in writing and be given a reasonable opportunity to provide an explanation."

⁴ *Booth v Big Kahuna Holdings Ltd* [2015] ERNZ 295 at [75]

[59] Had the additional issues of concern been put before the preliminary conclusions and preliminary decision to dismiss then the opportunity for a further meeting could have been expected as part of a fair and reasonable process. Any unfairness with the failure to hold a second meeting therefore needs to be assessed as part of the failure to put new allegations fairly. For completeness I am not satisfied as Ms Oberndorfer submits that there was a requirement to hold a second meeting in the disciplinary process and policy.

[60] At the time he was dismissed Mr Maddigan requested a further meeting with Mr Roberts however that was refused. He asked Mr Thompson if Mr Roberts was aware of the Court judgement. The decision however had been made by that stage.

[61] The Authority was directed to a number of emails that were exchanged particularly between Mr Roberts and Mr Thompson when an issue arose about Mr Maddigan undertaking an alternative work programme and some comments in emails at the time of the process.

[62] Ms Oberndorfer submits that it is clear from the earlier emails that Mr Thompson and Mr Roberts wished to be rid of Mr Maddigan as he was a source of frustration to them. Ms Radich in her submission submits that these earlier discussions about the alternative work programme are not relevant to the subsequent actions by Mr Maddigan.

[63] Some of the emails contain comments that could be taken to support Ms Oberndorfer's submission. Mr Thompson says that although Mr Maddigan was not the easiest person to manage he did not make any decisions about employment and that Mr Roberts had previously worked out ways for Mr Maddigan to continue his employment. I have weighed the emails taking into account that there was a level of frustration in circumstances where there was effort put into the new work programme by Mr Roberts and Mr Thompson. Mr Roberts did accommodate and was flexible about some of Mr Maddigan's concerns about travel and accommodation and other matters. I will set out some of the specific emails Ms Oberndorfer refers to.

[64] There is an email on 10 August 2016 responding to a concern from Mr Thompson that there had been issues involving Mr Maddigan a day and a half into the new work program. Mr Robert in an email to Mr Thompson and Ms McDonald wrote amongst other matters:

If you have a copy of the agreement you could read it to see if it looks like he has breached it that might be a short cut into a formal process.

...

[65] Mr Roberts said that he was trying to get an understanding as to how serious the agreement is and whether the process was holding and that the matter did not go any further.

[66] When Mr Thompson reported the initial concerns to Mr Roberts and Ms McDonald about infringements in the Department vehicles he wrote amongst other matters in his email of 14 October 2016:

In addition to these two issues⁵, since his induction back into Mahaanui, Fraser has been causing a high level of frustration here by changing work arrangements at the last minute, self-assigning work (declined by me) and not starting work on time. There have been many other small incidents that all documented in emails.

I have a really good team here with a great culture and Fraser is not only disruptive, he soaks up a huge amount of time and effort.

Is he a fit and proper person who can remain in DOC's employment?

[67] Mr Thompson in his evidence said there was a "little bit of frustration and he questioned whether Mr Maddigan should remain in employment with his licence suspended."

[68] Ms Oberndorfer referred to other emails that were sent during the disciplinary process. One is dated 3 November 2016 from Mr Roberts to Ms McDonald and Mr Thompson in which he expresses a reluctance to wait further for information from Mr Maddigan. He does then however allow further time.

[69] There is also an email from Mr Thompson to another operations manager on 18 November 2017 which was the day of dismissal. Mr Thompson advised the operations manager that he had dismissed someone that day. The operations manager responses

⁵ Difficulty for a Ranger who cannot drive and breach of confidentiality

“Bugger! Can I ask who?” Mr Thompson responded “No it’s all good actually – Fraser Maddigan.”

[70] Mr Thompson said that he was expressing relief at the end of the process leading to dismissal and not about the dismissal itself.

[71] I accept Ms Oberndorfer’s submission that Mr Thompson although not the decision maker did take part in discussions with Mr Roberts during the process and could be seen to be more influential in those circumstances than someone who simply carried out some investigation and delivered letters. Mr Thompson from the outset of the disciplinary process had questioned Mr Maddigan’s fitness and propriety as an employee of the Department.

[72] As Ms Radich submits the Authority must objectively assess whether Mr Roberts closed his mind to a genuine consideration of the issues before him. Mr Roberts in his evidence says that he kept an open mind.

[73] There is some evidence that the Department moved quite swiftly to the start of the process on 19 October 2016 with allegations that were not as serious as other subsequent concerns. There was limited investigation before the letter was sent. Some communication does support the Department anticipating responses and countering them. This is less suggestive of an open mind and a genuine consideration of explanations. An example is when a concern is raised about Mr Maddigan in his Ranger’s position not being able to drive in the 19 October letter. The letter then goes on to state that the Department would need to consider carefully whether to support an application for a work licence seemingly because of the number of driving offences. The letter then states that “in case” Mr Maddigan is granted an exemption then the over-riding issue is in light of the alleged conduct is whether Mr Maddigan can be trusted to continue in his position given the extent of driving required and the apparent breach of the policy.

[74] Objectively assessed the significant evidence of a closed mind to a genuine consideration of the issues following the response from Ms Oberndorfer two days before

dismissal that the suspension was lifted. The evidence however does not satisfy me sufficiently that there is a link between that and the earlier views and issues at the time of the changed work programme.

[75] A fair and reasonable employer approaching the matter with an open mind could have been expected to have wanted to consider, understand and weigh the circumstances when considering whether to dismiss an employee who had worked for the Department for 20 years. This would be in order to assess what that would mean for the seriousness of the conduct about the delay in advising of the suspension, the driving whilst suspended and the charge of driving whilst suspended. That there had been a mistake with the demerit points was the context advanced by Mr Maddigan for his actions/omissions after 1 September 2016. Objectively assessed the judgment of Judge Strettell was very important to him and he felt vindicated by it in his view of a mistake.

[76] Mr Roberts moved quickly to dismissal without considering that where there was no apparent need for urgency. I do record there had been a significant earthquake event which created much additional work for Mr Roberts but Mr Maddigan had not been suspended and was either having leave or continuing to perform work during the disciplinary process. On the morning that Mr Maddigan was dismissed he had advised Mr Thompson and his supervisor by email that his licence suspension had been cancelled and he would be back to normal with his work rather than being restricted to work activities that he could bike and be transported to.

[77] I have also taken into account that Mr Roberts had asked specifically in his letter of 10 November 2016 for information from Mr Maddigan about the assurance from the Police and NZTA that the 35 points were deemed invalid and would be removed as well as written confirmation for the Police that demerit point were added incorrectly. Further I was not satisfied that Mr Maddigan although asked had provided all information as requested including the notice of suspension and there was no information provided about the driving

whilst suspended. However when there was some more current information that was not considered relevant.

[78] I find that was suggestive of a closed mind and a pre-determined view. District Court Judge Strettell's judgment on the appeal sets out the background and clarifies matters.

[79] Subsequently I accept that the manner of the attempted delivery of the dismissal letter to Mr Maddigan at work caused him upset. I agree with Ms Radich's submission that is not a matter that goes toward the justification for the dismissal.

[80] I find for reasons set out above that the Department investigation into the concerns was not carried out in a fair and reasonable manner. I accept Ms Oberndorfer's submission about good faith that there was a blurring about the concerns and a lack of clarity about what Mr Maddigan was required to respond to and the focus of the Department. That was not a minor defect in the circumstances of this matter and I find that it did result in unfairness. Further the failure to consider the circumstances and information about the licence suspension being cancelled advised on 16 November 2016 was suggestive of a closed mind to Mr Maddigan's explanation and an element of pre-determination.

Substantive Justification

[81] In the letter of termination dated 18 November 2016 Mr Roberts concluded that the Department could no longer have trust and confidence in Mr Maddigan for reasons set out including in the 10 November letter. The Department concluded he had not reported matters he should have reported and then drove while his licence was suspended including in work time for work purposes.

Speeding infringements

[82] Mr Maddigan did not report his two speeding infringements in the Department vehicles to a manager at the earliest opportunity. A fair and reasonable employer could conclude after the investigation carried out by Mr Thompson that he also did not report the infringements to a supervisor. I accept that a supervisor role in the Department now carries a position title and is not simply a term used to describe a more senior person and that Mr Maddigan could be expected to know that as a long serving employee.

[83] I accept Ms Oberndorfer's submission that the failure to report infringements at the earliest opportunity to a manager is not an action viewed in the policy as a serious breach of conduct that may result in dismissal. A fair and reasonable employer could also be expected to weigh the passage of time between the first speeding infringement in February 2015 and subsequent investigation undertaken over a year later by Mr Thompson as to who Mr Maddigan advised and the fact that there is no formal log in the Department for recording such infringements.

[84] I agree that on their own these failures to report could be considered by a fair and reasonable employer as less serious than those that followed. Clear reporting at that early stage though would have prevented escalation of the concerns about a lack of knowledge particularly after the final infringement in the Departmental car.

[85] The incident on 7 January 2016 involved Mr Maddigan being ticketed for speeding at 121 km per hour in a Department vehicle. At that stage he disputed that he was travelling at that speed and the matter came before Justices of the Peace at the District Court in August 2016. A transcribed discussion between the Justices of the Peace at that time supports Mr Maddigan pleaded guilty to travelling at 110 to 115 km per hour.

Accumulation of demerit points

[86] A fair and reasonable employer could also find that Mr Maddigan accumulated enough demerit points to have his licence suspended although weighed that not all were accumulated in the Department vehicles.

Failure to report licence suspension in terms of the policy for six weeks and driving whilst suspended for work purposes and in work time.

[87] Ms Oberndorfer submits that the Department could not conclude that driving whilst suspended amount to serious misconduct because:

- (a) There was a genuine error about suspension and a genuine belief that it would be sorted quickly.
- (b) Mr Maddigan never drove a department vehicle.
- (c) There was a failure by the NZTA to remove the expired points at the time of expiry which would have prevented the suspension occurring.
- (d) The suspension was removed from Mr Maddigan's record prior to his dismissal.
- (e) The charge of driving whilst suspended was dropped following the reinstatement of his licence.
- (f) That Mr Roberts accepted under cross examination that it is understandable that the applicant would consider the situation where a mistake had occurred different to one where there was no mistake.

[88] On 1 September 2016 a fair and reasonable employer could conclude Mr Maddigan's licence was suspended on the basis of excess demerit points.

[89] I have considered whether the belief that there had been an error with the demerit points and in turn the suspension that followed could have impacted on the seriousness of the

failure of Mr Maddigan to advise the Department of the suspension for six weeks and the driving whilst suspended for work purposes and in work time during that period.

[90] Ms Oberndorfer in her submissions stated that Mr Roberts accepted under cross examination that it is understandable Mr Maddigan would consider the situation where a mistake had occurred different to one where there was no mistake. Further that this could influence the behaviour of the person in dealing with it. Ms Radich accepted that Mr Roberts had said that a situation where a mistake had occurred “could impact” on the behaviour of the person dealing with it but not that it was understandable.

[91] Ms Radich copied her typewritten notes of this answer in her submissions and they largely accord with my own notes about Mr Roberts’ response. I have not recorded an answer that it was understandable from Mr Roberts but he did agree a mistake could impact on the behaviour of the person dealing with it. The full response included Mr Roberts saying to the effect that would not always hold and that he felt Mr Maddigan was reluctant to admit that he had done anything wrong and that it was someone else’s fault. The Authority notes record that Mr Roberts responded by not telling the Department and hoping it would all go away the hole got dug deeper each day. Therefore Mr Roberts agreed in his answer that a mistake could have an impact but he felt Mr Maddigan was reluctant to admit any wrong doing and hoped it would all go away but each day the Department was not told in effect things got worse.

[92] I find that a fair and reasonable employer could conclude as Mr Roberts did that Mr Maddigan knew he should have advised a manager of the suspension of his licence from the earlier incident in 2009/2010. In a letter written to a manager about that incident Mr Maddigan records with hindsight knew he should have informed his manager and got a limited licence at the outset. In his evidence Mr Maddigan said that the current matter is distinguishable from the earlier matter because of the mistake with the demerit points. There were also similarities. I do not accept Ms Oberndorfer’s submission that the interpretation of what Mr Maddigan wrote at that time by Mr Roberts went beyond its natural meaning.

[93] A fair and reasonable employer could have concluded that six week delay was not an immediate notification of the suspension of the licence as required under the policy. Further that the length of time to notify of suspension was not consistent with an ongoing belief that the situation would be sorted out quickly. I accept Ms Radich's submission that this obligation to notify was there whether or not the suspension was subsequently to be appealed or the number of demerit points was disputed. Had notification taken place at an early stage then Mr Maddigan's work programme could have been modified to reflect his inability to drive and prevent unlawful driving.

[94] The work programme that Mr Maddigan was undertaking at the time of his 2016 suspension required travel from Christchurch to Motukarara and Duvauchelle. It was agreed that Mr Maddigan's mileage would be covered to the nursery over winter and Duvauchelle over spring and autumn. The fact his licence was suspended for a period impacted on his ability to drive and carry out his work duties and should have been notified if not immediately as soon as possible after 1 September 2016. Notification would not have prevented Mr Maddigan explaining that he considered suspension was a mistake.

[95] The policy refers to actions in Departmental vehicles including driving whilst not correctly licensed being viewed as a serious breach. Mr Maddigan did not drive a Departmental vehicle whilst suspended. A fair and reasonable employer could still conclude that Mr Maddigan drove his own vehicle whilst suspended for work purposes in work time and had a responsibility under the policy to ensure in doing so he held a current driver licence as well as a legal responsibility under the Land Transport Act 1989. He drove unlawfully. I accept Ms Radich's submission that statements Mr Maddigan made during the process confirm that he knew his licence was suspended whilst maintaining that it was a mistake. That he was suspended was further confirmed by the Police charging him for driving whilst suspended within the six week period before notification.

[96] I accept a fair and reasonable employer could have weighed that there had been a failure of NZTA to remove expired points at the time they expired as that was referred to in

Ms Oberndorfer's letter of 16 November 2016 before dismissal. Whilst it did not appear to have been considered a fair and reasonable employer could find that matter does not answer the concerns the Department had about a failure to notify about suspension and driving whilst suspended.

[97] Whilst Mr Maddigan's licence was suspended between 1 September and 14 October 2016 he did on occasions drive to and from work and was reimbursed for mileage.

[98] He also drove to and from Duvauchelle for work purposes and during work time in the week of 26 September 2016. He was paid for the travel and mileage was due to be reimbursed.

[99] Mr Maddigan was caught by the Police during that six week period for driving whilst suspended. It was not known at the time of dismissal what the situation was with the charge of driving whilst suspended however the evidence supports that subsequently this charge was dropped.

[100] Before I reach conclusions about substantive justification I want to set out from the Court and NZTA records the situation with the demerit points and suspension at the time of dismissal. I have already found there was procedural unfairness when there was a failure to give this matter further consideration.

[101] There is some clarity about the situation from the 16 November 2016 decision of Judge Strettell two days before dismissal. Judge Strettell recorded the admission Mr Maddigan made to the Justices on 16 August 2016 that his speed was between 110 and 115 kilometres. The Judge sets out that it was suggested that Mr Maddigan would receive demerit points of 20 but there was at that time incorrect advice given that Mr Maddigan had been convicted of exceeding 100 kilometres per hour by 21 kilometres and he received 35 demerit points. Judge Strettell stated in his judgment that did not make a significant difference in the sense of whether he received 20 or 35 points because disqualification would still follow and

initially he had considered it did not matter. Mr Maddigan's existing demerit points before taking the January infringement into account totalled 80.

[102] What was then set out in the decision was that there was a difference on the basis of the concession made by Mr Maddigan that means it is necessary to have determined by what speed Mr Maddigan was over the limit. This was because there was a different impact for Mr Maddigan if he was speeding by 10 kilometres per hour or more than 10 kilometres in terms of demerit points. If Mr Maddigan was only speeding at 110 then he would only receive 10 demerit points and would not be suspended. If he was travelling at more than 110 then he would receive 20 demerit points.

[103] The appeal was allowed therefore in regard to penalty and a rehearing was directed to enable a finding of fact as to speed. The matter was referred to the Justices of the Peace for rehearing as to penalty for a finding of fact to the level of speed on 19 January 2017.

[104] It seems that the effect of the successful appeal as to penalty was to cancel the demerit point suspension and Mr Maddigan's driver licence had a current status and he was able to drive. This is confirmed in a letter from the NZTA dated 30 November 2016.⁶

[105] At the 19 January 2017 re-hearing it was found that Mr Maddigan's speed was 115 kilometres and 20 demerit points were imposed. I note that the Police wanted to proceed on the basis that the speed was 121 kilometres per hour however while it was stated the prosecution may have proved that there was an earlier amendment to the charge and agreement to 115 kilometres per hour.

[106] When the notes of evidence of the re-hearing on 19 January were transcribed it appeared the demerit points had already been changed from 35 to 20 demerit points in all likelihood from October 2016 in a Chambers hearing. That would be consistent with the information provided by Mr Maddigan at the start of the disciplinary process that the demerit points imposed for the 7 January 2016 speeding incident were 20.

⁶ Bundle 2 at page 108

[107] I accept that the Demerit Points and Suspension History Report dated 18 May 2018 shows 100 demerit points incurred by Mr Maddigan between 30 July 2014 and 7 January 2016.

Conclusions about serious misconduct

[108] There were a series of breaches by Mr Maddigan of the policy. Some were more serious than others.

[109] Mr Maddigan was aware from January 2016 that he may lose his licence because of excess demerit points from the infringement in the Department car at that time. He did not report in accordance with the policy that infringement to a manager. When he was suspended from driving on 1 September 2016 he did not advise Mr Thompson or his supervisor for a further six weeks of that in circumstances where the inability to drive directly impacted on his performance of duties. He then drove whilst suspended in his own vehicle on occasions to and from work and during work and claimed mileage. Driving whilst suspended was unlawful. It showed poor judgement on his part. During that time Mr Maddigan was charged with driving whilst suspended.

[110] A fair and reasonable employer could conclude in all the above circumstances Mr Maddigan's failure to notify his suspension immediately or as soon as possible to his supervisor or manager when he was required to drive for work purposes and then driving whilst suspended was serious misconduct that destroyed the confidence and trust the Department was entitled to have in Mr Maddigan.

Could a fair and reasonable employer have reached the decision to dismiss?

Disparity of treatment

[111] The Employment Court⁷ recently considered why an allegation of disparity treatment may be relevant to a dismissal by reference to the rationale in another Employment Court judgment.⁸ Summarised the rationale is that an important aspect of treating an employee fairly and reasonably requires consistency in treatment in cases where the conduct and circumstances are sufficiently similar

[112] Judge Corkill stated in *Nel v ASB Bank Limited*⁹:

In short, when making a disparity assessment, it will be necessary to consider whether the comparative conduct is sufficiently similar. Consideration should be given to all relevant circumstances including context. The assessment will be case-specific. The analysis is for the purpose of determining whether the dismissal or other step taken meets the statutory test of justification under s 103A of the Act.

[113] Mr Maddigan refers to some examples in his written evidence where he says the policy and breaches were not dealt with in an even handed manner. He refers to examples of employees undertaking breaches and not being disciplined. There is mention of texting, talking on the phone whilst driving, supposed drink driving in Department vehicle being kept quiet, Mr Maddigan being run over on his bike by another employee, other staff not informing managers of speeding and ticket infringements and a vehicle being written off.

[114] The main and relevant circumstance in this case was a failure to report a suspension of licence where there was a requirement to drive for work and driving for work purposes whilst suspended. Texting and talking on the telephone whilst unacceptable is not sufficiently similar to that conduct. Whilst Mr Maddigan says that other staff have not advised of infringements in Department cars the Department is unaware of that and say that they are

⁷ *Nel v ASB Bank* [2017] NZEmpC 97

⁸ *Rapana v Northland Co-Operative Dairy Company Ltd* [1998] 2 ERNZ 528 at 537

⁹ Above n 7 at [52]

notified of such infringements. In any event that is not comparable conduct with not reporting suspension and driving whilst suspended for work purposes. The vehicle being written off is not comparable. It was an accident. Whilst very unfortunate the incident where Mr Maddigan was hit on his bike by a car driven by another employee is not sufficiently similar. There was insufficient information about the incident being kept quiet about drink driving to conclude that it was sufficiently similar.

[115] Ms Radich in a memorandum set out the four instances since January 2016 where human resources were aware an employee's drivers licence was suspended since January 2016. Two were for reasons out of work time and did not involve Department vehicles. Both employees notified the Department at the time the licence was suspended. One did not drive as part of their employment and the other obtained a limited licence.

[116] Another employee who did not drive for work purposes advised that their licence had been suspended for demerit points in a meeting about other matters and the employee then resigned.

[117] The fourth employee was involved in an accident and had their licence suspended. The manager was advised immediately and kept informed. Adjustments to the work programme were made and a limited licence obtained.

[118] There was no failure in the above instances to report a suspension in circumstances where the employee was required to drive for work purposes and no conduct of driving whilst disqualified.

[119] Mr Maddigan felt that he had been dismissed when others who he considered had breached the policy in more serious ways had kept their jobs. The conduct to be compared has to be sufficiently similar in a disparity assessment. I am not satisfied for the reasons set out above that Mr Maddigan was treated in a disparate manner.

Conclusion on whether the decision to dismiss was one that a fair and reasonable employer could have undertaken

[120] I have found serious misconduct occurred. I have not been satisfied that Mr Maddigan was treated in a disparate manner. Notwithstanding I find that the procedural unfairness in that there was not a reasonable opportunity to provide an explanation to the concerns including because the focus had changed. Further Mr Maddigan who had worked for the Department for 20 years was not provided a fair opportunity of establishing dismissal was not an appropriate outcome because his explanation about a mistake with the demerit points and suspension was not properly considered by the Department in respect of the allegations before dismissal.

[121] Mr Maddigan has made out his personal grievance of unjustified dismissal and is entitled to consideration of remedies. I am not required to separately assess the alternative grievance that Mr Maddigan was unjustifiably disadvantaged.

Remedies

Reinstatement

[122] The primary remedy that Mr Maddigan seeks is reinstatement to the position of a Band B Ranger. Reinstatement is strongly opposed by the Department.

[123] Section 125(2) of the Act provides that the Authority may, whether or not it provides for any of the other remedies specified in section 123, provide for reinstatement if it is practicable and reasonable to do so.

[124] Ms Oberndorfer submits that it is reasonable for Mr Maddigan to be reinstated. She referred as does Ms Radich to the full Court of the Employment Court and the statement that the requirement for reasonableness:¹⁰

¹⁰ *Angus v Ports of Auckland No. 2* [2011] NZEmpC 160

...invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.

[125] The Court of Appeal endorsed its view in an earlier decision about the test for practicability in *Lewis v Howick College Board of Trustees*¹¹:

Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully.

[126] Ms Oberndorfer set out in submissions that Mr Maddigan has built a career working for the Department over 20 years. She referred to evidence that Mr Maddigan is very hard working and passionate about his work. The Authority was provided with a wide range of character and work references that speak highly of his passion, dedication and hard work in New Zealand conservation.

[127] Ms Oberndorfer submits that it would be practicable for Mr Maddigan to be reinstated to a position that was no less advantageous to him. She refers to a budget announcement about additional funding for pest control which is an area that Mr Maddigan is most skilled in. She submits that this supports an increased need for pest-control experts. She submits that the Department is a large workforce and it would be practicable to reinstate Mr Maddigan to a position where he had little to no contact with Mr Thompson.

[128] Ms Oberndorfer suggested that the Authority could give consideration to how to rebuild the relationship through a return to work plan, mediation or counselling

[129] Ms Oberndorfer submits that a loss of trust and confidence is based on conclusions that have not been justifiably reached.

[130] Mr Maddigan was competent in his work at the Department and there is no doubt that he could carry his work out if reinstated. His dismissal was found to be unjustified on procedural grounds. In terms of trust and confidence Mr Maddigan drove for work purposes

¹¹ *Lewis v Howick College Board of Trustees* [2010] NZCA 329

when his licence was suspended which was unlawful and he did not tell either his supervisor or Mr Thompson for six weeks from the date of that suspension whilst he was doing so.

[131] This was not the first time that his licence had been suspended and he had not told his manager. On the earlier occasion he acknowledged that he knew he should have told his manager. Ms Oberndorfer submits that situation was different from the present matter because of the mistake about demerit points. The circumstances however also involved a suspension of licence and a failure to tell a manager or supervisor at the Department. There did not appear to be any learning from the earlier matter or a basis for the Department to have confidence as it needs to do that Mr Maddigan will comply with the rules and report issues as they arise in the future.

[132] The evidence from Mr Maddigan supported that he wanted to try to fix things himself before he told the Department. That does not recognise obligations to advise under the policy to report and obligations to be communicative and responsive with his employer.

[133] Reasonableness requires a broad enquiry into the equities of both parties' cases. Ms Radich submits that it is not reasonable to place Mr Maddigan's supervisor and manager in a position of potentially breaching their own health and safety duties because Mr Maddigan cannot be trusted to report and raise issues with them.

[134] I weigh when considering that submission that Mr Maddigan does not have insight into why his conduct concerned the Department and there is no real acceptance of responsibility. Instead he says that others such as the Police and NZTA made mistakes and if they had not then he would have reported his suspension sooner and the situation would not have arisen. Mr Maddigan focusses on others making mistakes rather than his speeding and the need to report matters. The lack of insight is not encouraging for confidence that there will be reporting of issues in the future. It was Mr Maddigan's decision to drive while suspended for work purposes and not tell his supervisor or manager of his suspension for six weeks.

[135] The earlier failure to report a suspension of licence in late 2009 means that this matter is distinguishable from *De Bruin v Canterbury District Health Board*.¹² It cannot be said with any degree of certainty to be a one-off event which is extremely unlikely to occur again.¹³

[136] Ms Oberndorfer recognises that there may be a strained relationship between Mr Thompson and Mr Maddigan but submits that could be resolved with assistance. Mr Maddigan has lost a measure of trust and confidence in Mr Thompson which trust and confidence would be necessary in a resumed relationship and needs to be considered and weighed in term of the reasonableness of any reinstatement.

[137] I accept that Mr Maddigan is passionate and enthusiastic about working for the Department and has worked for them for a very long period. Even when weighing those matters I find that because of the factors above reinstatement is not practicable and reasonable.

Reimbursement of lost wages

[138] Ms Oberndorfer seeks 13 weeks of lost wages in final submissions. She records that the applicant has not sought full-time work for a variety of reasons but has taken on some temporary work and voluntary work. Ms Radich submits that Mr Maddigan has failed to show any mitigation of loss and aside from working in his pest management business from which he obtained a small income he has not applied for another job. Further she submits that Mr Maddigan has been unclear about income he has received despite repeated requests. She refers to the evidence of Mr Roberts that other employment would be available for Mr Maddigan in related fields and that his career is not over. She also relies on the large amount of references to indicate that he has plenty of support for seeking other employment.

[139] There was limited evidence of mitigation but Mr Maddigan wanted to be reinstated and that should be reflected and weighed in any assessment. It did not appear from the very

¹² *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110, [2012] ERNZ 431

¹³ *De Bruin* above n 12 at [75]

limited information received about business income that Mr Maddigan increased his work in his business from the level of activity he had already been undertaking whilst an employee of the Department. I am reassured that is in all likelihood correct by the fact that Mr Maddigan received a benefit from late January 2017 for which he would no doubt have been required to disclose all sources of income. Given the limited evidence of mitigation I find any award should be limited to the statutory period of three months in s 128 (2) of the Act.

[140] During the period between 1 April 2016 and 1 November 2016, which is seven months, Mr Maddigan received gross earnings in the sum of \$30980 which divided by 7 is an average of \$4426 per month.

[141] I have divided \$4426 by four to ascertain a weekly figure of \$1107 and have then multiplied that by 13 weeks to arrive at a figure for lost income of \$14,391 gross.

[142] Subject to any issue of contribution Mr Maddigan is entitled to reimbursement of lost wages in the sum of \$14,391 gross.

Compensation

[143] Mr Maddigan seeks the sum of \$18,000 for compensation. Ms Radich in submissions says that Mr Maddigan was unable to articulate the basis for the claim referring firstly to lost wages and then to damage done to him, his career and future.

[144] I find that there was a basis for an award from the evidence. There was evidence about the humiliation Mr Maddigan felt when Mr Thompson came to where he was working at Godley Head to hand him the letter of dismissal. His questioning of Mr Thompson if he could meet with Mr Roberts and whether Mr Thompson had received the information from the Court support his view he had not been heard and he was distressed about that. In his written evidence Mr Maddigan referred to not being able to say good bye to people in the workplace and that his dismissal is the worst thing in his life and that he has given his life to the Department.

[145] Subject to issue of contribution I find that an appropriate award under this head is \$15,000.

Contribution

[146] The Authority is required to consider the extent under s 124 of the Act where it has found an employee has a personal grievance to which the actions of an employee contributed towards the situation that gave rise to the personal grievance.

[147] Ms Radich refers to Mr Maddigan's actions in driving whilst suspended for work purposes and not telling the Department of that suspension as particularly blameworthy conduct. I accept that submission. Mr Maddigan says that suspension was a mistake. I do not find on the balance of probabilities that Mr Maddigan was mistaken that his licence had been suspended from 1 September 2016.

[148] There was a mistake with the 35 demerit points. Mr Maddigan had admitted in August 2016 that his speed was between 110 – 115 kilometres per hour. To fall below 20 demerit points which would also have resulted in a suspension of his licence there would have had to have been a finding that his speed was 110 kilometres. The finding after a re-hearing was a speed of 115 kilometres.

[149] To achieve justice between the parties I weigh the actions of Mr Maddigan in driving whilst suspended for work purposes and not telling his employer with the procedural unfairness I have found. I conclude an appropriate reduction to the remedies is 50%.

Penalty for a breach of good faith

[150] The claim for a breach of good faith was that the Department was not active and communicative in maintaining the employment relationship and embarked on a course of action motivated to terminate rather than maintain the relationship.

[151] A penalty is sought under s 4A of the Act. This is on the basis that the breach was deliberate, serious and sustained or alternatively that it was intended to undermine the employment relationship.

[152] Ms Oberndorfer submitted that there is evidence that the Department was motivated to terminate the relationship due to bias and feelings of frustration towards the applicant. That there was a work programme pushed through that underutilised the skills and experience of Mr Maddigan. Further that the transition was not accommodated in a supportive way and the applicant felt bullied and his confidence was undermined and he became fearful of his interactions with Mr Thompson.

[153] Ms Oberndorfer says that the issue of the suspended licence was seized on with a motivation to end the relationship rather than proactively maintaining it.

[154] I accept that there were emails at the time of the workplace transaction that supported a level of frustration with Mr Maddigan and even the possibility of some disciplinary action. There were issues raised with him on his first day of work in the new work programme by Mr Thompson. I accept that raising those issues could have waited however to do so at the time they arose could have also been of assistance. Mr Roberts did agree to accommodate daily travel costs to the nursery and travel and accommodation to Duvauchelle in good faith and there was some other flexibility shown about other issues that concerned Mr Maddigan.

[155] I have found there was serious misconduct on the part of Mr Maddigan and therefore some basis on which to conclude damage to the level of trust and confidence the Department could have in him. It was not therefore a situation as Ms Oberndorfer submits where Mr Maddigan was dismissed through little fault of his own.

[156] The Authority has already considered aspects of the alleged breaches of good faith in determining the personal grievance of unjustified dismissal.

[157] I do not find that a penalty for a breach of good faith should be awarded in all the circumstances.

Costs

[158] I reserve the issue of costs. Failing agreement Ms Oberndorfer is to lodge and serve submissions as to costs by 19 October 2018 and Ms Radich is to lodge and serve submissions in reply by 2 November 2018.

Orders

[159] Taking contribution into account the Director-General of Conservation is to pay to Fraser Maddigan for reimbursement of lost wages under s 123(1)(b) of the Act the sum of \$7196 gross.

[160] Taking contribution into account the Director-General of Conservation is to pay Fraser Maddigan compensation under s 123(c)(i) of the Act the sum of \$7,500 without deduction.

[161] Costs are reserved and failing agreement a timetable has been set.

Helen Doyle
Member of the Employment Relations Authority