

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Jonathan Marshall (Applicant)  
**AND** Livingstone Productions Limited (Respondent)  
**REPRESENTATIVES** Richard Harrison, Counsel for Applicant  
John Rooney, Counsel for Respondent  
**MEMBER OF AUTHORITY** R A Monaghan  
**INVESTIGATION MEETING** 4 December 2003  
**SUPPLEMENTARY  
EVIDENCE PROVIDED** 17 and 26 March and 14 April 2004  
**SUBMISSIONS RECEIVED** 23 January, 9 and 11 February 2004  
**DATE OF DETERMINATION** 27 April 2004

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

Jonathan Marshall says he was unjustifiably dismissed by his former employer, Livingstone Productions Limited (“LPL”).

A claim for reinstatement was withdrawn.

LPL counterclaimed regarding certain items of clothing provided to Mr Marshall. That matter has also been withdrawn.

**Background**

LPL employed Mr Marshall as a trainee reporter and researcher for a television programme called Queer Nation. Queer Nation was made pursuant to a contract between LPL and Television New Zealand (“TVNZ”) which broadcast the programme on TV2. One of the clauses of the contract between LPL and TVNZ read in part:

- “6.3 (i) The Producer shall, .... enter into an agreement (“Contractor Agreement”) with any presenter, frontperson or host (“contractor”) provided by the Producer to provide services to TVNZ in accordance with the terms of this agreement, such Contractor Agreement to provide that the Producer’s employment of the contractor may be terminated without notice in the event of serious misconduct by the contractor.  
(ii) in the event of serious misconduct by the contractor TVNZ may at its option:  
a. Require the Producer to replace the contractor with another contractor acceptable to TVNZ.  
b. Require the Producer to withdraw the services of the contractor for a period of time ...  
(iii) For the purpose of this clause ‘serious misconduct’ shall mean:

- a. ...
- b. ...
- f. any other conduct which could seriously damage the reputation of TVNZ.”

Mr Marshall’s and LPL’s employment relationship began on 3 February 2003. According to the parties’ written employment agreement it was to end on 5 December 2003, in association with the end of the Queer Nation series. I was not told whether the term ‘contractor’ as it appeared in the contract with TVNZ extended to employees, but in any event the copy of Mr Marshall’s employment agreement I was given did not include a reference to ‘serious misconduct’ in the terms set out in the LPL/TVNZ agreement. The employment agreement did, however, provide:

“Notice of termination

The notice period for termination of this agreement is one week by either party in writing. ...

The employer may terminate the agreement without notice during its term if serious misconduct leads to dismissal.”

According to the job description included in the agreement, Mr Marshall’s duties were to:

- . become part of the production team by participating in activities such as work-related meetings, developing internal working relationships, answering telephone calls and responding to correspondence;
- . discover and develop talents as a researcher by maintaining and developing personal contacts in the ‘queer’ community, as well as maintaining and managing library and research material; and
- . develop skills as a television reporter and director by assisting with and developing story ideas and maintaining story files, assisting reporters, and training in the skill of location filming and post-production.

At the time the employment relationship began Mr Marshall had some prior relevant broadcasting experience in that he had been engaged in a work experience programme with Radio New Zealand, and presented two documentaries about Hero Parades in Auckland for the regional broadcaster Triangle TV. He had also worked briefly for LPL as a general assistant when it covered the Gay Games in Sydney in October 2002.

Mr Marshall was to report directly to the producer of Queer Nation, Andrew Whiteside. However in practice he was also given the opportunity to be one of a team of people providing the programme with stories. When he was engaged on particular stories he came under the immediate supervision of the director responsible for the relevant story. In the period February – April 2003 the director concerned was David Herkt, although Mr Herkt was contracted to LPL and was not an employee himself. Mr Herkt also had a personal relationship with Mr Marshall.

The events which led directly to Mr Marshall’s dismissal began with the publication of an item in the 4 May 2003 issue of the Sunday Star-Times describing an incident in which Mike Hosking, a TVNZ presenter, had been followed by someone in a car as he went about his business. The item did not say who was in the car, but the occupants were Messrs Marshall and Herkt. Indeed on Monday 5 May 2003 Mr Marshall was openly displaying around his desk photographs he had taken of Mr Hosking on other occasions, including the preceding weekend. He made no secret of his interest in photographing Mr Hosking.

On 5 May Mr Marshall was displaying at his desk a number of photographs of Mr Hosking, some or all of which had been taken the previous day. They showed Mr Hosking in the street. Mr Marshall was also open about the fact that he was the person referred to in the newspaper item. John Givins, the managing director of LPL, saw the photographs there and told Mr Marshall he thought

they were 'fabulous'. He said in evidence that, at the time, he did not really contemplate the consequences of the photographs. He also said that, while he was aware of Mr Marshall's freelance photography, he understood Mr Marshall took his photographs at various social and gala events. I accept Mr Givins was unaware of any paparazzi-style photography of fellow presenters.

On Tuesday 6 May Michelle Camilleri, the TVNZ public relations spokesperson, telephoned Mr Givins. His oral evidence about his conversations with her differed from his written statement, but in a manner that called into question accuracy rather than honesty. According to Mr Givins' oral evidence, the approach was to draw to his attention a rumour that the person named in the previous weekend's 'Hosking stalking story' was a Queer Nation presenter. Ms Camilleri's concern was to ascertain the facts, but she also raised the possibility of a conflict of interest if the 'stalker' was a Queer Nation presenter. Mr Givins suspected the person involved was Mr Marshall, and undertook to ascertain the facts. To that end he and Mr Whiteside met with Mr Marshall later that day.

Mr Marshall admitted following and photographing Mr Hosking but denied stalking or harassing him. He did not consider there was anything wrong with his actions. Nor did he see that his actions had implications for LPL's contract with TVNZ. It was explained to him that his behaviour amounted to a conflict of interest in that he, as a presenter of a programme being broadcast by TVNZ, was being seen to be 'stalking' a presenter of other programmes also broadcast by TVNZ. Mr Givins told Mr Marshall to leave Mr Hosking alone. Mr Marshall agreed to withdraw the photographs from sale. When asked if there was anything else of relevance that LPL should know, he replied 'no'.

In a letter to TVNZ dated 6 May Mr Marshall confirmed that the photographs taken the preceding weekend had not been sold, and guaranteed there would be no sale. By letter dated 7 May 2003 he wrote to Mr Hosking apologising for taking 'paparazzi' photos with the intention of selling them for publication, and accepting there was a conflict of interest in his doing so. He assured Mr Hosking of his intention to discontinue taking photos.

By a letter also dated 7 May Mr Givins wrote to Mr Marshall warning that his role on Queer Nation had been compromised by his activities as a freelance photographer. His actions in following a TVNZ presenter for the purpose of obtaining a compromising photograph to sell were incompatible with his role on Queer Nation. Mr Givins went on to explain that Mr Marshall's actions could be interpreted by TVNZ as serious misconduct under LPL's contract with TVNZ in that they could seriously damage the reputation of TVNZ, or amount to serious harassment of any person. He said that if TVNZ insisted on following that course of action - or viewing Mr Marshall's actions in that way - "I would have no choice but to seriously reconsider your employment with the company."

Mr Givins recorded further:

"It is my understanding you have recognised the detrimental effect of your actions and that you will not be pursuing this style of work in the future. ... I also note your assurances that you have not sold any images taken during these events, that no illegal activity was undertaken and that the "story" will remain confidential. Should subsequent events change these assurances and understandings we will be forced to readdress this issue."

Finally, in the interests of avoiding a repetition, the letter included an instruction to Mr Marshall to obtain Mr Givins' approval before undertaking any paid or unpaid activity that might adversely affect the performance of his duties at Queer Nation. Failure to do so might place Mr Marshall's employment in jeopardy.

Mr Givins spoke again to Ms Camilleri and told her that Mr Marshall was the person involved in the Hosking story. She expressed a concern about the public relations implications for TVNZ and for Queer Nation. Mr Givins advised he had issued a warning, and said in evidence Ms

Camilleri's response was to thank him for letting her know of this. His evidence was that a warning was sufficient for LPL's purposes, although the contractual arrangement with TVNZ meant he would have to consider the matter again if TVNZ insisted on dismissal.

Almost immediately after the meeting with Messrs Givins and Whiteside on 6 May, Mr Marshall was approached by a reporter from the Sunday News newspaper. The reporter had heard Mr Marshall had taken some photographs of Mr Hosking on 4 May and that they were for sale. Mr Marshall said he could not sell them. When the reporter asked why, Mr Marshall's evidence was that he told the reporter 'off the record' that Mr Hosking had complained to TVNZ and Mr Marshall had given an assurance the photographs would not be sold.

At the investigation meeting he said it 'occurred' to him that he should tell Messrs Givins and Whiteside of the approach. In his statement of evidence he said he did tell Mr Givins of the approach on 7 May, but received an unhelpful response. The evidence about the discussions during the subsequent disciplinary process was that Mr Givins questioned Mr Marshall about why he had not been advised of the pending item, but there was no indication that Mr Marshall responded by referring to his advice of 7 May. I am therefore not persuaded that on 7 May Mr Marshall informed Mr Givins of the approach.

Both Sunday newspapers contacted Mr Marshall later in the week, and Mr Marshall told them he could not comment. He understood that much of what Mr Givins had told him.

Then on Saturday 12 May 2003 a Sunday News photographer waited for Mr Marshall outside a residence where Mr Marshall was thought to be staying. Mr Marshall said at the investigation meeting that he stopped and posed for the photographer because the alternative was to be followed until the photographer was satisfied, which he did not want. He also said he understood that a photograph was being sought because stories about his activities were being prepared. I do not believe his allowing the photograph to be taken was the action of someone who, according to Mr Marshall's brief of evidence, did not know what to do. It was the action of someone in a situation he recognised, having instigated that sort of situation himself on more than one occasion, and reacting without taking into account what his employer had told him.

On Sunday 11 May the Sunday News carried a front-page item with an inside follow-up about Mr Marshall's following Mr Hosking and photographing him. It also recorded Mr Marshall's information that he would be apologising to Mr Hosking, the likely content of the apology, and Mr Marshall's intention not to pursue the sale of the photographs. The item included a relatively extensive series of quotes of Mr Marshall's comments about these matters. It was apparent from the content of the quotes that the relevant comments had been made after the meeting of 6 May. I infer that the quoted comments were the ones which Mr Marshall subsequently explained were given 'off the record'.

Mr Givins saw the Sunday News item. The same day TVNZ's TV2 programmer drew to Mr Givins' attention an item from the Sunday Star-Times' gossip section, "Forum", reporting on events during a workshop for TV2 presenters which covered dealing with the media. Mr Marshall was not named in the item but he had attended the workshop.

The programmer also drew to Mr Givins' attention an item which Mr Herkt had posted on the internet. The item diarised in detail the incident during which Mr Hosking had been followed by people in a car, and not only identified Messrs Herkt and Marshall as the followers but identified the car as Mr Marshall's. It also referred to Mr Marshall's having a camera in the car, and discussed estimated market values of various kinds of photographs of Mr Hosking.

The printed record of internet discussion of the item contained feedback critical of the item, although the criticism tended to be directed at Mr Herkt. However one identity expressed the hope that no NZ On Air funding was expended on the incident, one asked whether Mr Marshall was the presenter on Queer Nation and commented that the item made him less inclined to watch Queer Nation, and another said that if he watched Queer Nation he would boycott it until Queer Nation 'got rid' of Messrs Marshall and Herkt.

Mr Givins telephoned Mr Marshall to find out what had happened. Mr Marshall admitted he had spoken to the Sunday News reporter, but said he had done so off the record. He denied posing for the photograph of him, and denied being the source of the "Forum" item. Mr Givins was very concerned that Mr Marshall had apparently spoken to the Sunday News reporter in the face of an instruction not to, and had not advised Mr Givins he had done so.

On the afternoon of Wednesday 14 May Messrs Givins and Whiteside met again with Mr Marshall. During the meeting Mr Givins expressed concern that Mr Marshall had not advised of the Sunday News item, that the contents and issues raised in association with the item could be a breach of confidentiality with LPL, and also raised a concern about Mr Herkt's internet item. Mr Givins believed the item brought LPL into disrepute. He then asked Mr Marshall whether there was any reason why he should not be suspended pending a further investigation.

Mr Marshall responded by offering an apology and claiming Mr Givins himself had admired the photographs of Mr Hosking. He said he had been open about his photography and it had not been a problem before, there had been no problem with the Hosking photographs and it was not fair to suspend him. He said Mr Herkt's internet item was nothing to do with him, and he did not contribute to it. Finally he argued that his position was important to him, he was important to Queer Nation, and since he had apologised no more detriment would follow.

Mr Givins did not agree with what Mr Marshall said. He concluded a suspension on pay was in order and suggested a further meeting the next day. Mr Marshall could attend with a representative, and was told that summary dismissal was an option for LPL. Mr Givins followed up with a letter also dated 14 May confirming the imposition of a suspension on pay, and the scheduling of a meeting for 15 May. It set out the threat to LPL's trust and confidence in him arising out of his failure to advise of the newspaper interview, the view that the content of the story may breach a confidentiality agreement and the possibility of Mr Herkt's internet item bringing the company into disrepute.

After the meeting Messrs Givins and Whiteside went through LPL's files and found other material which was of concern to them. It included:

- correspondence between Mr Herkt and the Auckland Central Police Station in April 2003 concerning a complaint that Mr Marshall and a cameraman had shot a piece to camera on Auckland Central Police Station property, without seeking permission. The complaint had not been brought to the attention of Mr Givins or Mr Whiteside. Instead Mr Herkt apparently sent a letter of apology 'on behalf of Queer Nation', which went as far as to say: "From now on Mr Marshall must provide evidence of consent before any filming at any outside location. He has also been warned that any repetition (sic) of such behaviour will result in termination of his contract." Mr Herkt sent an email version of the letter to Mr Marshall on 7 April, and Mr Marshall replied thanking Mr Herkt 'for doing that, baby'.

Aside from this incident being a concern of itself, on 22 March 2003 LPL had received a complaint from a school about Messrs Marshall and Herkt approaching students to conduct interviews with them at school without seeking or obtaining consent from the school's

administration. Mr Whiteside spoke to Mr Marshall about the unacceptability of the action, and Mr Marshall replied that he did not see anything wrong in what had been done. Mr Whiteside wrote to the school on 24 March 2003 apologising for the breach of LPL policy on interviews with people under 16 – being to require written consent to such interviews from a parent or guardian.

- . an email message dated 5 May from Mr Herkt to Mr Marshall setting out the text of the internet item diarising their escapades when following Mr Hosking by car. The subject line of the message read: “Is this part OK?”
- . an email message dated 12 May from a Mike Puru to Mr Marshall saying: “Dude ... I think TV2 are upset by the Forum piece ... just overheard a convo ... they don’t know its you but they are on the rampage ... be careful man”. Mr Marshall’s reply read: “OK, keep it very low ... don’t need that to add to the pile.” Mr Givins was concerned because he read the message as suggesting Mr Marshall was the source of the “Forum” piece, despite Mr Marshall having denied it.

Mr Marshall and his solicitor, who was not acting as counsel at the investigation meeting, met with Messrs Givins and Whiteside and LPL’s solicitor on 15 May 2003.

Mr Givins asked Mr Marshall why he had not notified LPL of the upcoming article in the Sunday News. Mr Marshall’s solicitor answered on behalf of Mr Marshall. The response was to allege that LPL knew Mr Marshall had a separate business as a paparazzi photographer, and explain that Mr Marshall had spoken off the record to the Sunday News. Mr Marshall admitted having posed for the Sunday News photographer and acknowledged a lack of judgment. He referred to his apologies, his not having mentioned LPL, his belief that in essence no harm had been done to LPL and his wish to keep his job. He denied giving an ‘interview’ to the Sunday News.

Mr Givins then referred to the email message of 5 May relating to Mr Herkt’s internet item, saying Mr Marshall had denied any knowledge of the item. That was not quite accurate. Mr Marshall had said it was nothing to do with him – a statement which does not exclude the possibility he knew about it. Mr Marshall answered for himself saying he was aware Mr Herkt’s internet diary existed, but denying even reading the email message.

Mr Givins suggested Mr Marshall’s actions had brought LPL into disrepute. The reply from Mr Marshall’s solicitor was that Mr Marshall had apologised, and in any event the company’s name had not been mentioned. The solicitor referred to Mr Marshall’s remorse and said his youth and exuberance got in the way. He also alleged that what Mr Marshall had done was not illegal, LPL knew he was a paparazzi photographer, Mr Marshall himself probably was ‘not thinking’, and Mr Herkt should have been ‘aware’. He said Mr Marshall would not behave in this way again.

Mr Givins raised the importance of staff and the Queer Nation team being open and truthful. He said he could not trust Mr Marshall because he had found things that were not true. Questions had been asked and answers had been lies. Mr Marshall argued that he had been fully open and honest, before Mr Givins went on to refer to the complaint from Auckland Central Police Station. He believed the response was concocted by Messrs Marshall and Herkt. Mr Marshall referred to the fact that Mr Herkt was training him, and said the matter had been resolved. He was asked why he had thanked Mr Herkt and whether he believed Mr Herkt should tell someone about the complaint. Mr Marshall’s response was that he wouldn’t know. When questioned about the significance of the message saying ‘thank you for doing this, baby’, his response was a bare statement that he was thanking Mr Herkt for doing the letter.

At the end of this exchange Mr Marshall sought an adjournment.

When the meeting resumed there was an exchange about the fact that the company had accessed Mr Marshall's email messages, before Mr Givins raised the concern about the "Forum" item. Mr Marshall repeated his denial of having passed on information, although he admitted mentioning to the "Forum's" editor that he attended the presenters' workshop. When asked to explain why he seemed to be keeping quiet about the matter he said 'they' may be concerned he was there. However there was no suggestion his attendance at the workshop was unauthorised.

Mr Givins expressed a concern that Mr Marshall had not been open and truthful. The meeting was adjourned while Messrs Givins and Whiteside considered their decision. LPL's solicitor said if there was any more comment he could be contacted, and the meeting ended.

Overall Mr Givins concluded Mr Marshall had not been open and honest and had brought the company into disrepute. The company no longer had any trust or confidence in him. Summary dismissal was therefore appropriate.

The company's solicitors advised Mr Marshall's solicitor of the decision and confirmed it in writing by letter dated 16 May 2003. The letter gave the reason for dismissal as serious misconduct. It listed the instances of lack of openness and honesty with particular reference to the 'interview' with the Sunday News reporter, Mr Marshall's posing for the associated photograph, a lack of openness in respect of Mr Herkt's internet item, a lack of openness about the piece in the "Forum", and a lack of openness in the disciplinary process as a whole. It also said Mr Marshall had damaged the company's reputation and brought it into disrepute. In addition it was said the company did not accept Mr Marshall's explanation of the April exchanges with the Auckland Central Police. Overall, Mr Marshall's actions had destroyed the company's trust and confidence in him.

## **Determination**

One of the strands of argument raised on behalf of Mr Marshall was that LPL unfairly took into account the views of TVNZ when deciding to dismiss him.

However there was no allegation that any particular individual at TVNZ issued any threat or instruction, or expressed any view as to how the matter should be handled. In addition there was no suggestion of anything wrong in principle with LPL attempting to observe its obligations under its agreement with TVNZ, and ensuring it did not give TVNZ grounds to terminate the agreement. Further there was little to assist me to determine whether LPL stepped over any line in this respect when it came to its obligations to Mr Marshall. Finally, there are cases in which employees' services have been dispensed with at the insistence of a customer of the employer because of activities unsatisfactory to that customer. Even if the facts supported an allegation of that kind here, that would not necessarily be fatal to the justification for the dismissal.

Returning to the evidence about TVNZ's 'views', Mr Marshall's allegations relied firstly on a paragraph in the letter of warning of 7 May, in which Mr Givins referred to the agreement with TVNZ and said he would be forced to reconsider Mr Marshall's employment if TVNZ insisted on treating as serious misconduct Mr Marshall's actions in respect of Mr Hosking. Indeed Mr Givins acknowledged that prospect in his evidence. However there was no evidence of any such insistence.

Mr Marshall's allegations relied also on a letter from a senior manager in TVNZ dated 16 May 2003, in which the writer 'concurred' with the view that Mr Marshall's 'harassment of a TVNZ staff member' constituted serious misconduct and confirmed that the 'proposed strategy' to deal with Mr Marshall was acceptable. That passage was the nearest thing to evidence that Mr Marshall was dismissed on the ground he followed and photographed Mr Hosking, and in the absence of

evidence from its writer it does not carry weight. In any event the totality of the evidence persuades me the reasons for dismissal were as stated by LPL.

As for the other comments in the letter, for his part Mr Givins admitted keeping TVNZ ‘informed’ of the way he was dealing with Mr Marshall. He also said he made his own decisions about what should be done and that TVNZ acknowledged it was for him to deal with the matter. While approval of his decisions might have been expressed by TVNZ representatives, and might even have been sought and welcomed, there was no evidence to indicate the decisions themselves were made by anyone other than Mr Givins.

None of this means the agreement with TVNZ gave LPL carte blanche to ignore its obligations to Mr Marshall. Indeed it has sought to justify the decision to dismiss by saying there were substantive grounds for its actions, and it acted fairly.

The following principles underlie the approach to be taken in determining the justification for dismissals imposed on the ground of serious misconduct:

“Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential in an employment relationship. ... In the end the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances.” **Northern Distribution Union v BP Oil NZ Limited** [1992] 3 ERNZ 483, 487.

“The burden on the employer is not that of proving to the court the employee’s serious misconduct, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct. The distinction is highlighted in cases involving alleged dishonesty by employees. An employer can justify dismissal without having to prove the dishonesty by showing that, after a full and fair investigation, it was at the time of the dismissal justified in believing that serious misconduct had occurred ....” **W & H Newspapers Limited v Oram** [2000] 2 ERNZ 448, 487.

On its evidence the employer’s perception of Mr Marshall’s obligations of openness and honesty, and his failure to meet those obligations, was a significant reason for the dismissal. Some additional and relevant legal principles are as follows:

“Mr Sherriff submitted ... that in an employment situation the telling of a lie, or even prevarication short of a lie, strikes at the fundamental requirement of honesty and good faith, so that its true relevance is as part of the total factual context in which the justification for the dismissal is to be considered. As a general proposition, this must be correct. A proved lie, told in denial or explanation of an allegation of misconduct, may not necessarily assist in the proof of the misconduct, but may be misconduct in itself.” **Honda NZ Limited v New Zealand (with exceptions) Shipwrights etc Union** [1990] Sel Cas 855, 860.

Often-cited comments of Chief Judge Goddard in **Macadam v Port Nelson Limited (No 1)** [1993] 1 ERNZ 279 emphasise the need to properly investigate and put to an employee the allegation of lying, if lying is relied on as misconduct giving a ground for dismissal. Here, it was put to Mr Marshall that he was not being open and honest.

Turning to the grounds for dismissal, as I have said Mr Marshall was not dismissed for following and photographing Mr Hosking. Rather in the first instance the unsatisfactory aspects of that behaviour in the context of his employment were explained to him on 6 May and he received instructions on how to avoid any repetition of the problem. He also gave assurances about his own actions and behaviour. Thus while Mr Marshall’s behaviour was considered unacceptable, in addition to making this clear to him the aim was to limit any damage it might cause LPL by ensuring it was not further publicised.

Since there was no evidence to suggest otherwise it may be matters would have ended there if Mr Marshall had observed the terms of the parties’ discussions and the letter of 7 May. Instead within

days there was precisely the publicity LPL sought to avoid. It was submitted on behalf of Mr Marshall that, among other things, a 'witch hunt' ensued in respect of Mr Marshall's activities but I do not agree. The nature and content of the subsequent publicity appeared to be in such direct contravention of the parties' recent discussions that LPL decided to investigate whether Mr Marshall was guilty of any other behaviour which might give cause for concern. That is not an unusual response on the part of an employer once circumstances cause it to question whether a particular employee has been involved in other conduct likely to be of concern but of which it is not aware.

Regarding the detail of the allegations of lack of openness and honesty Mr Givins was not justified in concluding Mr Marshall had lied when, at the 6 May meeting, Mr Marshall said there was nothing else of relevance to tell the company. I understood Mr Givins to be referring to the approach from the Sunday News reporter, but that approach was made after the meeting. I am not persuaded that Mr Marshall lied at the meeting when he said he had nothing more of relevance to tell the company.

However Mr Givins was also concerned about Mr Marshall's speaking to the press when he had been told his activities were to remain confidential and why. When asked whether he gave weight to Mr Marshall's explanation that his conversation with the Sunday News reporter was conducted 'off the record' Mr Givins said it was the fact Mr Marshall spoke to the reporter that caused concern, although he later said the content of the relevant item meant he did not believe the conversation was 'off the record'. He was also concerned because the discussion had not been brought to his attention and he felt it was deliberately kept from him. For his part Mr Marshall said at the investigation meeting he gave the reporter the information he did because he wanted to explain why the photographs were not for sale. However that merely underlines the extent to which he had failed to take proper account of the concerns his employer had put to him.

At the time Mr Marshall had no explanation for his failure to advise LPL he had spoken to a reporter. This was also a concern of Mr Givins'. He was justified in concluding Mr Marshall had not been open and honest in that respect.

Mr Marshall admitted to lying about posing for the Sunday News photographer. Inevitably he had no explanation for failing to speak to Mr Givins before posing. Obviously Mr Givins was entitled to draw the conclusion about lack of openness and honesty he did from that admission.

Mr Givins did not accept that Mr Marshall had no involvement in Mr Herkt's internet item. He also seemed to have been proceeding on an assumption that Mr Marshall lied about his state of knowledge of the item at the meeting of 14 May 2003. Overall Mr Givins believed Mr Marshall co-operated in the item's release and approved its content, relying in support on the email message from Mr Herkt. For present purposes I would accept Mr Herkt sought Mr Marshall's approval. However there was no evidence that Mr Marshall had any hand in the drafting of the item and no evidence he had any general involvement in Mr Herkt's internet diary (other than to the extent he was mentioned in it). At the meeting of 14 May he said the item had nothing to do with him. As I have said, that does not necessarily mean he knew nothing about it, although it is an indicator he was distancing himself from it. Mr Marshall said at the investigation meeting that he ignored the email message and did not recall replying to it. There was no evidence he did reply or make any statement at all – approving or otherwise – about the content or the intention to post it on the internet.

I therefore conclude that the information Mr Givins had about the level of Mr Marshall's involvement was too limited to justify a conclusion that Mr Marshall lied about it, or that he was less than open about it.

Mr Givins did not accept Mr Marshall's denial of being the source for the "Forum" item. One of the criticisms of his investigation into that matter was that he did not ask the editor who the source was, but the criticism is not strong because there could be no realistic expectation that the editor would disclose this information. Indeed Mr Givins did not expect her to.

The information available to Mr Givins was that Mr Marshall attended the workshop referred to in the item, admitted having spoken to the "Forum" editor about the fact of his attendance, and against that background Mr Marshall had a weak explanation of the meaning of the email message from Mr Puru. On its own the information is limited, although at least it establishes there was a conversation of some kind between Mr Marshall and the editor about the workshop. The question is whether there was enough to justify Mr Givins' belief that the conversation went as far as conveying the information eventually reported in the newspaper piece. The only information in that respect was the email message and the weak explanation of its meaning.

While I accept that the evidence overall raised serious questions about Mr Marshall's credibility, and consider it likely that was an important factor in Mr Givins' conclusion regarding the "Forum" item, there was too little evidence available to Mr Givins to warrant a conclusion that Mr Marshall had lied about his involvement in the item. The best that can be said is that Mr Marshall's explanation and overall behaviour provided reason to doubt his openness about what he had said to the editor of the "Forum". On its own this would not provide a sustainable ground for dismissal, although it is a factor capable of weakening LPL's trust and confidence in Mr Marshall.

Mr Givins also had a concern about Mr Marshall's lack of openness in respect of the Auckland Central Police exchanges, believing that Mr Marshall tried to cover the matter up to avoid disciplinary action. Mr Marshall's position, in effect, was that Mr Herkt had dealt with the matter and the method was nothing to do with him. This time his effort to distance himself from Mr Herkt's activities was less than convincing. When asked at the investigation meeting whether he knew it would be a serious matter if Mr Givins or Mr Whiteside found out about the incident, his reply was 'not for me'. I found that disingenuous.

On the material available to Mr Givins, Mr Herkt had asked for Mr Marshall's comment on the letter before sending it, and Mr Marshall conveyed his response in affectionate terms. A mere fortnight before that incident he had been taken to task over the school incident just as Mr Herkt had been. There were no reasonable grounds for him to believe that, this time, the responsibility would be treated as Mr Herkt's alone. In addition, since he had already been taken to task over the school incident there were no reasonable grounds for him to believe Messrs Whiteside and Givins would not consider disciplinary action if they became aware of the Police Station incident. Mr Marshall even allowed the Police to be told that the responsibility was his. He also allowed them to be told he would be disciplined for it in circumstances where he must have known there would be no such action provided Mr Whiteside and Mr Givins were not made aware of the incident. Mr Givins was entitled to conclude Mr Marshall had not been open and honest about the matter.

The remaining ground for the dismissal was that Mr Marshall's actions had damaged LPL's reputation and brought it into disrepute. Mr Herkt's diary item was referred to in that respect, but for the reasons indicated I do not accept Mr Marshall can be fixed with responsibility for the mere fact of its publication.

The significance of the activities it recorded is a different matter, and they bore directly on the concern about Mr Marshall being publicly identified as someone who followed and photographed Mr Hosking. The comments attached to the internet item itself illustrate the way in which LPL could be brought into disrepute as a result, although they should be treated with caution since the identity of the commentators cannot be established. Most important, though, was the nationwide

publicity given to the detail of Mr Marshall's pursuit of Mr Hosking, and Mr Marshall's identification in the publicity as a Queer Nation presenter.

During the investigation meeting Mr Marshall attempted to excuse his behaviour by challenging the adequacy of the training provided to him, and relying on an allegation that he has Attention Deficit/Hyperactivity Disorder. While the latter might explain some of the general evidence about Mr Marshall's disruptive behaviour, I do not accept it as an adequate explanation of the incidents in which he showed a lack of openness and honesty.

As for the allegations about training, the company did observe its obligations in respect of the duties associated with Mr Marshall's position. Regarding the expected standard of behaviour, in a formal review of Mr Marshall's employment which LPL conducted on 30 April 2003 the public nature of Mr Marshall's role as a presenter was discussed. So was the need for him to be seen as a role model.

Then the difficulty caused by his following and photographing Mr Hosking was explained to him on 6 May and he gave an undertaking not to conduct such activity again. The importance of confidentiality was also stressed, against the background of the relationship between TVNZ and LPL. Knowing this, and knowing a story was being prepared about his activities, Mr Marshall allowed himself to be photographed in connection with the story. Further, knowing of his employer's concern about his activities and desire to avoid publicity, as well as the reasons for it, he did not warn his employer of the pending publicity or seek further assistance in addressing it. It 'occurred' to him to do so, but he dismissed the thought. Not only that, he lied about his posing for the photograph which formed part of the publicity. I do not accept that the employer's concerns about lack of openness and honesty, arising out of its investigation of these events, are adequately met by a challenge to the nature of the training provided.

The foregoing also summarises why I consider it was open to Mr Givins to conclude that Mr Marshall's conduct was deeply impairing or destructive of the basic confidence and trust essential in the parties' employment relationship. I have also accepted there was a justified finding of lack of openness and honesty in respect of the Auckland Central Police Station matter. While I have found against Mr Givins' position regarding the internet item, and considered weak his position on the "Forum" item (as well as Mr Marshall's), the substance of his concern remained. In addition to all of that, Mr Marshall had acted in a way that brought Queer Nation, hence LPL, into disrepute.

I therefore conclude the dismissal was justified. Mr Marshall does not have a personal grievance.

Counsel commented in submissions that the application for reinstatement was withdrawn because 'the time delay in holding the investigation meeting in the Employment Relations Authority' meant reinstatement was no longer an option. On one view of the submission it is no more than a bare statement of the reason for withdrawal of reinstatement. If any more was intended, then I record that Mr Marshall's employment relationship problem was filed in the Authority on 25 June 2003. For reasons not known to the Authority, mediation did not take place until 27 August 2003. Following mediation counsel's office approached the Authority's registry advising an application for a grant of legal aid had been made but not yet approved. A delay was sought to enable that process to be completed. The support officer concerned was told the matter may be withdrawn if legal aid was not granted.

**Costs**

Costs are reserved, although I note Mr Marshall is in receipt of a grant of legal aid.

The parties are invited to agree on costs themselves. If they are unable to do so they shall have 14 days from the date of this determination in which to file and serve memoranda on the matter. If either wishes to reply to anything in the memorandum of the other there shall be a further three working days from the date of receipt of the relevant memorandum in which to file and serve such reply.

**R A Monaghan**  
**Member, Employment Relations Authority**