

employment is undertaken by the applicant? Is RNZ in breach of the Bill of Rights Act 1990 in preventing Mr Plunket from undertaking secondary employment? Does he have other grievances?

The Investigation

- [2] As the problem was not resolved at mediation and following a conference call on 26 August, the parties agreed to a two day investigation on 19 & 21 October 2009.
- [3] The parties usefully provided an agreed bundle of documents in advance of the investigation: all references in this determination to page numbers are references to the page number of the bundle.

Background

- [4] Mr Plunket is a radio presenter on RNZ's Morning Report programme. He was appointed to the position in 1997.
- [5] Mr Plunket's agreed terms and conditions of employment were first set out in a "*Letter of Appointment*" (pages 1- 4). Attached to that letter were a number of employment principles (pages 5 – 22).
- [6] "*Standards of Integrity and Conflicts of Interest*" were detailed on page 14. Amongst other things,

The company encourages your personal development through outside interests. However, you are expected to bear in mind at all times that as an employee of the company your outside interests and activities, whether of a business, personal or social nature, cannot be such that they:

- i. impinge upon or are likely to impinge upon the proper performance of your duties and responsibilities under this contract;*
- ii. conflict or may conflict with the interests of the company;*
- iii. bring or may bring the company into disrepute.*

If any of your activities have the prospect of falling into one of these categories then you have an obligation to discuss the activity in question with your Manager and obtain your Manager's express approval prior to undertaking this activity. Where any actual or potential conflict of interest arises, your Manager will determine the nature and degree of the conflict as it relates to your official duties and decide upon the best course of action to resolve it.

- [7] During his employment with RNZ Mr Plunket has undertaken secondary assignments, i.e. he has undertaken paid work outside of RNZ. Some of those assignments were with the prior approval of RNZ; others the respondent knew nothing about.
- [8] In March 2005, and following on from earlier advice to its staff, RNZ issued an “*Editorial Policies*” document (pages 23 – 105). Its Introduction provided that, “*Anyone involved with RNZ programme making or who has editorial responsibilities should be familiar with these policies and adhere to them*” (page 29).
- [9] The Editorial Policies include a “*Conflict of Interest*” section. Amongst other things they provide that “*Conflicts of interest can arise for anyone on air Presenters ... are all affected. ... It is important that no off-air activity, including writing, the giving of interviews or the making of speeches, leads to any doubt about their objectivity on air*” (page 39).
- [10] The Editorial Policies also prescribes “*Associations with Other Media*” and stipulates that, “*As a general rule RNZ employees may not work, on a paid or unpaid basis, for organisations considered by the company to be in competition, or associated with competing organisations. In some circumstances management may authorise such outside work if there is a recognisable benefit to the company For example, it may be deemed suitable for RNZ's Political Editor to take part in a discussion on TVNZ about the role played by journalists during an election campaign*” (page 41).
- [11] “*Secondary Employment*” requirements are also spelt out:

All employees who have any secondary employment outside RNZ ... must declare such employment ... and gain approval from the Chief Executive. ... Failure to do so could result in disciplinary action.

(page 42)

- [12] In a memo dated 10 March 2005 to RNZ's chief executive, Mr Peter Cavanagh, Mr Plunket stated:

Peter, thank you for my copy of the editorial policies manual. It appears to be for the most part a useful and thorough guide for editorial staff at Radio New Zealand.

However certain sections appear to me to be a change in my conditions of employment which have not been negotiated with me and under those circumstances I can not adhere to them. I refer specifically to the "Conflict of Interest" section of (pages 40 – 43). Certain parts of the section would also appear to be in breach of the Bill of Rights Act quoted on the cover of the manual.

I am more than happy to discuss the issues surrounding those sections with you.

(page 106).

- [13] Mr Plunket says he received no reply and his offer to meet was not uplifted. Mr Cavanagh says his concerns were subsequently discussed in a meeting in his office regarding an incomplete performance review.

- [14] In August 2005, by reason of becoming a member of the Engineers, Printing and Manufacturing Union, Mr Plunket's terms and conditions of employment became those set out in the collective agreement between that Union, the Public Service Association and RNZ (page 155).

- [15] Clause 30 of the collective agreement provides that *"The employee's particular terms of engagement and salary are specified under their terms of engagement letter. Those terms of engagement and salary may be varied at any time by mutual agreement between the employer and employee in any manner which does not conflict with the terms of this agreement"* (back of page 159).

[16] Clause 36 of the collective agreement sets out “*General Conditions*” including:

36.2 Code of Conduct: RNZ Employees are expected to act at all times with integrity, professionalism and loyalty and in accordance with the code of conduct laid down by the employer. They must perform their duties in a manner which will promote the business and interests of RNZ.

36.3 Company Policy: The terms and conditions of this agreement shall also incorporate policy decisions made from time to time by the employer which are not specified in this agreement. New employment policy shall be introduced or significant changes to the existing employment policy proposed only after consultation with employees and the unions.

(page 160)

[17] Mr Plunket says RNZ did not consult him or his union in respect of its Editorial Policies: the Company says it did. Mr Plunket says the Editorial Policies amount to a unilateral attempt to vary his terms and conditions of employment which he does not consent to; the respondent does not agree that is their effect.

[18] RNZ says that in September 2008 it became aware of a television advertisement being carried on a New Zealand website promoting an upcoming election debate on internet-related issues. The advertisement feature Mr Plunket describing himself as a TVNZ host and urging members of the public to watch this debate either on TVNZ 7 or through a website. This was the first the respondent knew about Mr Plunket’s proposed secondary employment.

[19] The Company subsequently advised Mr Plunket that “*his high profile involvement with the election coverage of another media organisation represented a direct conflict of interest*” for RNZ and his “*belated request for approval to host the TVNZ 7 Internet debate was declined*” (pars 101 & 102 of Mr Cavanagh’s witness statement).

[20] The Company denies the claim that, in July 2008, TVNZ proposed to RNZ that Mr Plunket front a series of six or seven hour long interviews. Mr

Cavanagh says he was instead asked by TVNZ how would he feel about either the applicant or another Company employee being a guest questioner on TVNZ's leaders debate and answered that RNZ was in the midst of planning its own election coverage and its resources were fully stretched.

[21] Mr Cavanagh says that at an RNZ social event on 14 May 2009 he was approached by Mr Plunket who advised he had been approached to "*write a column*" for a magazine (par 119 of Mr Cavanagh's witness statement). He asked the applicant to put his request in writing so that it could be properly considered.

[22] On 19 June Mr Cavanagh received a copy of a media release from the magazine advising "*the arrival of Morning Report host Sean Plunket as the magazine's political columnist*" (par 122, above). Mr Cavanagh wrote to the applicant reminding him of his undertaking to put his request in writing. He received Mr Plunket's reply the same day, in which the latter said, "*I apologise for not having written to you prior to your letter of today, an oversight on my part. Please take this letter a somewhat belated written communication as regards this matter*" (page 112).

[23] Following a meeting of the parties on 1 July and by letter dated 15 July RNZ declined Mr Plunket's request. During the Authority's investigation, Mr Cavanagh said Mr Plunket was free to write a column for the magazine provided it was not a political column.

[24] By letter dated 31 July Mr Plunket's solicitors raised his concerns with RNZ.

Discussion and Findings

[25] In submissions received on 23 October and 2 November, Mr Plunket's counsel, Mr Davenport, claims that, amongst other things, "*This case is about an employer, in the broadcasting industry, purporting to control an employee's spare time, and curtailing that employee's fundamental freedoms, in a manner that is unjustified and in breach of contract and statutory freedoms*" (par 1.1). For the following reasons I reject that argument and his client's other claims.

- [26] The evidence in this case is clear that RNZ has no interest in Mr Plunket's spare time but is, properly, concerned about the applicant's secondary employment opportunities that may cause it conflicts of interest.
- [27] The respondent's concern is contract-based. Mr Plunket's terms and conditions of employment are set out, first, in his letter of appointment, and second in his collective employment agreement. The latter, at clause 30, ensures the survival of the former.
- [28] Amongst other things, the letter of appointment requires that if any of the applicant's outside activities, whether personal or business related, has the prospect of conflicting with the interests of the Company then Mr Plunket has an obligation to discuss the matter with his manager and obtain express approval prior to undertaking that activity: "*Where any actual or potential conflict of interest arises, your **Manager will determine** the nature and degree of the conflict ... and decide upon the best course of action*" (emphasis added, page 18).
- [29] This provision is a commonplace term and condition of employment, albeit one that possesses a particular resonance in the parties' situation because of Mr Plunket's public image and RNZ's statutorily prescribed role. It is a term reflective of the fundamental and well-known obligation of good faith and duty of fidelity on an employee not to do anything that is likely to damage his or her employer's business: see the Court of Appeal decision *TISCO Ltd v Communication & Energy Workers* [1993] 2 ERNZ 779.
- [30] I do not accept that the wording in the applicant's letter of appointment means it is for Mr Plunket to first decide whether any of his activities have the prospect of conflicting with the interests of the Company, before any proposed secondary employment is (or is not) raised with the respondent. That is because of the plain meaning of the sentence, "*Where any actual or potential conflict of interest arises etc ...*" (page 18).
- [31] I am satisfied those words alone contractually require Mr Plunket to put any proposed secondary employment to RNZ so that it might measure the likelihood of any conflict of interest and manage that risk.

- [32] Mr Plunket's collective agreement does not change that obligation (see clause 30, back of page 159).
- [33] Despite the changed wording contained therein, I do not accept that the respondent's Editorial Policies alter or go beyond the scope and reach of Mr Plunket's original terms and conditions of employment: fundamentally, they replicate the requirement that prior approval is required for any proposed outside activity or secondary employment that may result in a conflict of interest. Because of this finding it is unnecessary for me to determine the claim RNZ breached clause 36.3 of the collective agreement by introducing its Editorial Policies without consulting employees and the unions. However, having regard to the evidence, particularly that from Mr Edwards which was essentially not contested, I make the observation that consultation with the unions in this instance has been light to non-existent. At the risk of stating the obvious, I will also add that 'consultation' and 'agreement' are not synonymous terms.
- [34] There is no evidence of RNZ singling out Mr Plunket for disparate or unfair or unreasonable treatment. I accept the reasons advanced by the respondent that account for other employees appearing to enjoy secondary employment opportunities denied to Mr Plunket. Witnesses to the Authority's investigation also expressed a common view that secondary assignments and employment typically required the respondent's prior approval. It is appropriate to note here that the respondent has agreed to a number of secondary employment activities by Mr Plunket.
- [35] The reasons advanced for declining his wish to appear for TVNZ and write for another media outlet are, on their face, coherent and objective (refer to Mr Cavanagh's correspondence from pages 107, 110 and 113 and its counsel's letter from 125). They include: regard to Mr Plunket's role within RNZ, the likelihood of change in audience perception of the applicant and hence the respondent, the requirement to maintain broadcasting standards, effects of industry competition, potential consequences regarding listeners' loyalty, the perception of likely interviewees, etc.

[36] These are likelihood or risk calculations that by terms of their employment contract Mr Plunket cedes to RNZ's fair and reasonable exercise.

[37] In *Bagchi v The Chief Executive of the Inland Revenue Department* unreported, Colgan CJ, 26 Sep 2008, AC 40/08 the Court recorded how:

Counsel for the CEO reminded the Court that it was not to be the arbiter of standards set by the employer or with the employer's judgment of the question whether the standards had been met. The Court should not normally interfere with a judgment honestly reached by an employer following proper and adequate procedures. Judgments such as Airline Stewards and Hostesses of NZ IUOW v Air NZ Ltd [1990] 3 NZILR 584 confirm that in cases of dismissal for incompetence, significant latitude should be allowed to an employer for the exercise of professional judgment about such issues. I accept and have applied these principles.

[38] Obviously this is not a case of dismissal but, like *Bagchi*, is one challenging an employer's exercise of its discretion. The evidence provides no basis to challenge RNZ's position that it applied an honest and professional judgement following proper and adequate procedures; there is no evidence of irrational or unfair decision-making. There is therefore no basis for the Authority upsetting the standards set by RNZ in this instance: it is not for the Authority, any more than it is for Mr Plunket, to usurp those standards. In undertaking its right to manage I find the respondent has met its statutory and contractual obligations to the applicant.

[39] Because it condoned many instances of other secondary assignments, and after having regard to the reasons for refusing its sanction, I do not accept the separate submission that the instances of RNZ refusing Mr Plunket secondary employment opportunities are in breach of its contracted obligation to promote the applicant's development: the terms are not synonymous.

[40] I do not accept that RNZ's actions amount to a breach of Mr Plunket's rights under the Bill of Rights Act 1990: subject to his contractual undertakings to work sincerely toward meeting his and his employer's mutual objectives (page 7) and not undertake outside interests that might conflict with the interests of the Company (page 18), Mr Plunket remains free to exercise his right to

freedom of expression (s. 14 Bill of Rights Act) other than by way of paid secondary employment situations where his primary employer has determined there are potential or real conflicts of interest. Freedom of expression is not to be conflated or confused with secondary employment potential derived from the parties' "Morning Report" status.

[41] Finally, I find no evidence of Mr Plunket being disadvantaged in conversations he had with Mr Cavanagh or in his performance review. Mr Cavanagh's comments were (and remain) self-evident statements of fact and there is no reliable evidence they were expressed otherwise. The applicant has advanced no argument to support a claim his performance review ratings (most of which are very good or excellent) are unfair or perverse, or that he has been in any way disadvantaged by those ratings.

[42] This is an ongoing employment situation: the talents of Mr Plunket and the important role undertaken by RNZ can only be enhanced by responsive communication between the parties resulting in clearer guidelines as to what are and are not suitable secondary assignments.

Determination

[39] Mr Plunket's claims are dismissed.

[40] As requested, costs are reserved.

Denis Asher

Member of the Employment Relations Authority