

- (iii) He was unjustifiably dismissed by the MSD.
- (iv) He was discriminated against in his employment by reason of his involvement in union activities through bringing personal grievance claims against the MSD.

[3] Each claim is within one of the classes of personal grievance that are set out at s 103 of the Employment Relations Act 2000.

[4] To resolve these problems Mr Gomes seeks the remedies available under s 123 of the Act where the Authority determines that an employee has a personal grievance. As well as compensation for personal harm and reimbursement for lost remuneration, above all else Mr Gomes seeks reinstatement to his former position. Reinstatement is expressed by s 125 of the Act to be the primary remedy, which the Authority must provide wherever practicable if an employee is found to have a personal grievance.

[5] All the claims are denied by the MSD and reinstatement of Mr Gomes is strongly opposed by it. If the MSD is found to have any liability, it asks the Authority to provide remedies which take into account a high degree fault or blame on the part of Mr Gomes contributing to the situation which gave rise to his grievances.

[6] Before the Authority investigation was sought, on several occasions Mr Gomes and the MSD tried to resolve the various problems in mediation.

The dismissal

[7] Mr Gomes was recruited by the MSD in 2002 to the position of Unit Manager, Family, Child, Youth & Community Research & Evaluation. To take up this role he emigrated from Australia where he had gained experience working for several years as a counsellor and clinical psychologist. Mr Gomes is qualified to PhD level in psychology.

[8] Mr Gomes managed and led the research and evaluation work programme for the Family, Child, Youth and Community policy area in the Ministry's Centre for Social Research and Evaluation (CSRE). This was a senior management role in the MSD and it placed Mr Gomes in charge of about 20 staff who worked under his leadership on various Ministry projects.

[9] For nearly four and a half years Mr Gomes performed that role, until June 2007 when he was dismissed by the Deputy Chief Executive of the MSD, Mr Don Gray. The decision to dismiss was given to Mr Gomes in person on 29 June 2007 and was confirmed in writing the same day with the following:

Dear Allen

I refer to your letter dated 22 June 2007 and our meeting of the same date.

At the meeting, we discussed the concerns outlined in my letter dated 18 June 2007, including my view that your conduct has so deeply impaired the trust and confidence necessary for the employment relationship to function properly, that there has been a serious breakdown in that relationship and it is irreparable and I sought your feedback on that view.

I have now had an opportunity to carefully consider you and your representative's feedback and views, including as set out in your letter dated 22 June 2007. Since advising you of my preliminary view that the only course of action for the Ministry to take is to dismiss you, I do not believe you have come up with any realistic options for moving forward. You were not prepared to consider whether there might be a place for you elsewhere in the organisation; your view is that the only option is for you to stay in your current role.

For the reasons set out in my letter dated 18 June 2007 and the prior meetings we have had to discuss those issues with you, it is with regret that I confirm my decision to dismiss you.

You will not be required to work out your notice and your final pay, including holiday pay, will be direct credited into your bank account today Friday 29 June. Please ensure that you return any property belonging to the Ministry, including laptop, mobile phone, building access and computer cards, etc.

I regret that your employment with the Ministry has had to conclude in this manner.

Yours sincerely

*Don Gray
Deputy Chief Executive*

Reasons for dismissal – 18 June letter

[10] Mr Gray's earlier letter of 18 June 2007 to Mr Gomes, which is referred to in the dismissal letter of 29 June as containing the reasons for dismissal, begins as follows:

Dear Allen

Further to our meetings with you recently to discuss the Ministry's concerns about the apparent breakdown in your relationship with the Ministry and with your manager, Alicia Wright, I advise that we have carefully considered your responses and we have met with Alicia to seek her views.

I remain very concerned about the state of your relationship with the Ministry and Alicia. I am not satisfied there is sufficient trust and confidence in the relationship for it to continue. I am very concerned that what you say at meetings and in recent letters is inconsistent with the many allegations you have made in writing against the Ministry and against your manager, Alicia, and I am not confident there are many more steps the Ministry can take in an effort to resolve these incompatibilities.

You have raised a vast number of complaints and allegations against the Ministry in relation to your employment. Some of those complaints have contained very serious allegations. Some examples are:

.....

[11] There followed at this point in Mr Gray's letter in chronological order a long summary of complaints, challenges and allegations from Mr Gomes made over a period from about August 2005 until January 2007. The items listed covered nearly four pages of Mr Gray's seven page letter.

[12] The letter continued on with Mr Gray noting some inconsistency and contradiction between what Mr Gomes had previously put in writing to the Ministry and what he had subsequently said at meetings held with the Ministry to discuss the various complaints and allegations of his. Mr Gray advised that he did not consider that Mr Gomes had provided an adequate explanation for the apparent changes in the approach taken by him at different times.

[13] Mr Gray then went on to address a particular complaint raised by Mr Gomes in October 2006 that his manager, Ms Alicia Wright, was a bully. Of this Mr Gray wrote:

I am still troubled that you are now claiming you do not consider Alicia is a bully and that it was just that some of her actions were unacceptable as you have consistently alleged that she is a bully until very recently. This is simply not credible as you lodged a very serious written complaint making very serious allegations against Alicia, and you have challenged the findings of that outcome and the processes conducting that investigation. It concerns me that you would raise such serious allegations about your manager and you do

not accept our investigation yet you then expect us to continue as though the matter was never raised.

I appreciate you have recently tried to deny that you still consider Alicia is a bully, however, you still appear to be holding on to that complaint by saying that you do not accept Alicia's actions and you seem to have just simply dropped the word "bullying".

[14] Mr Gray referred in his letter of 18 June to what he had said to Mr Gomes at an earlier meeting, that:

In my view the relationship appeared to be irreparable and I do not have confidence that the relationship between you and Alicia and the Ministry can be rebuilt.

[15] Further on in the letter Mr Gray noted that Mr Gomes had a different view and was apparently confident that the relationship could continue. Then Mr Gray advised:

It is also Alicia's view that the relationship between the two of you has not improved. Alicia advises me that no personal interaction is occurring between the two of you and that any issues are being raised through third parties and not directly with Alicia. Alicia believes that your actions have caused a severe breakdown in your relationships with her and that you have no genuine wish to work with her and the Ministry to rebuild that relationship.

[16] Mr Gray said he was unable to see how the relationship between Mr Gomes and Ms Wright could be restored, given that Mr Gomes appeared to be inflexible and unable to accept the views of the Ministry to even the smallest degree. He continued:

Your actions have had an adverse effect on the work environment and I simply cannot tolerate a senior manager in your position being in such a deep level of conflict with a General Manager in whom we have expressed trust and confidence. The attacks on decisions made by your managers and your allegations that Alicia is a serial bully, have created a situation where I cannot see you working together with Alicia again.

... I do not believe you have come up with any satisfactory explanations for your behaviour or that you have proposed any realistic options for moving forward that could restore the work environment to a harmonious and functional situation.

In summary, my conclusion is that your conduct has deeply impaired the trust and confidence necessary for the employment relationship to function properly such that there has been a serious breakdown in that relationship and it is irreparable. Your behaviour has caused that breakdown due to your continual conflict and challenges with

management and your lack of acceptance of the Ministry's attempts to address and resolve issues with you.

As a consequence, it is my preliminary view that the only course of action for the Ministry to take is to dismiss you.

Before reaching a final conclusion, I want to meet with you to hear your views on the matters set out in this letter and the preliminary conclusions I have reached. Myself and Dale Farrar will attend the meeting.

I would like to meet with you on 22 June at 11am. As dismissal may be an outcome of this meeting, you are invited to bring a support person/representative.

Yours sincerely,

*Don Gray
Deputy Chief Executive
Social Development Policy & Knowledge*

Mr Gomes response of 22 June

[17] On 22 June by letter, Mr Gomes responded to Mr Gray's letter.

[18] About seven times in his four page letter Mr Gomes made reference to personal grievances he had raised with the MSD. When Mr Gomes wrote to Mr Gray those grievance claims had not been resolved but a determination of them had been sought from the Employment Relations Authority, following lodgment of the claims there in January and February 2007.

[19] The claim lodged in January alleged that Mr Gomes' 2004/05 performance review had been conducted in a way that was procedurally unfair and in breach of natural justice, leading to a substantively unjustified decision about his grading.

[20] His February 2007 claim lodged was an amendment to the January claim, adding new grounds of grievance:

1. That the MSD had breached an implied term of fair dealing in the employment relationship by unilaterally varying his position; and
2. That he had been disadvantaged by the unjustified actions of the MSD in removing him from the management and leadership of the TWT project.

[21] The grievance claims lodged by Mr Gomes in the Authority had still not been investigated and resolved when Mr Gomes was dismissed on 29 June 2007. There had been no investigation of them by the Authority before the meeting held in September and October to determine his claim of unjustified dismissal lodged immediately after that dismissal.

[22] While one of the grievance claims lodged in February (relating to the alleged unilateral variation of his position) was subsequently withdrawn by Mr Gomes in August 2007, it is relevant that it was still a live but unresolved grievance at the time the MSD dismissed Mr Gomes.

[23] In his letter to Mr Gray of 22 June 2007, written just a few days before his dismissal, Mr Gomes had placed considerable importance on his right to raise a personal grievance and on the need to have his particular grievances resolved as a means of finding a way through the problems that had arisen between the parties in the employment relationship. Mr Gomes in that letter noted:

Your letter of 13 April 07 acknowledged my contractual and statutory rights to raise a concern and a personal grievance, to invite the Ministry to mediation to resolve an issue, and to take a matter to the Employment Relations Authority (ERA) – all without the fear of penalty for doing so. If you no longer mean this and are considering disciplinary action because I performed any of these actions (within which the bullet points in pages one to five of your letter of 18 June fall), please clarify as soon as possible.

[24] Mr Gomes supported his views with a passage taken from an Employment Court case, in which the right of an employee to bring a grievance without having disciplinary action or other punishment taken against him for pursuing that legal right, was upheld.

[25] With reference to various contentious matters between himself and the MSD, Mr Gomes several times in his letter of 22 June referred to the pending resolution of his grievances by the Authority, as follows:

I am hopeful that the ERA ruling will resolve this.

.....

As discussed at our last meeting, the ruling from the Employment Relations Authority will bring a finality on the particular matters before it. The Ministry will either continue operating as it currently

does because its position is supported by the Authority or implement changes if a ruling requires it.

.....

Your letter refers to my taking matters to the ERA because I have not accepted the Ministry's views as constituting unacceptable flexibility on my part. While I understand you would prefer I had accepted the Ministry's view, I presume you are not including this as a basis for disciplinary action against me given you have acknowledged I had a contractual and statutory right to do so.

.....

I have abided by all lawful directives of more senior management and will abide by the ruling from the ERA about the matters before it, and am confident that the Ministry can as well.

.....

The removal of an employee because they have exercised a contractual and statutory right to raise a concern, personal grievance or take a matter to the ERA following agreed Ministry processes, is unjustified and would seem in contempt of the Act.

[26] With these expressions Mr Gomes strongly and repeatedly urged Mr Gray not to curtail the legal process, which had been invoked and was then being followed, by making a decision to dismiss before the personal grievance procedure had been concluded. The final words to Mr Gray from Mr Gomes in his letter of 22 June were:

We can await the conclusion of the matter before the ERA and abide by its ruling.

[27] Mr Gray had said in his 18 June letter that he expected further issues would be "satisfactorily addressed and resolved" and that past issues had been resolved. He also said he had no confidence that his expectations would be met by Mr Gomes, but in saying so he seemed to have disregarded the grievances that had been lodged in the Authority and the efforts of Mr Gomes to have them determined. Either that or he was suggesting Mr Gomes should drop his grievance claims.

[28] It is a matter of considerable importance to the resolution of the unjustified dismissal claim that the disadvantage grievances had not been resolved at the time Mr Gomes was dismissed in June 2007. This was through no fault of his, as I am satisfied he had done his best to expedite an investigation of his grievances and indeed was still doing so by telephone conference with the Authority on the morning of the very day he was dismissed. It is true that, as he said in evidence, before action to

dismiss him was taken he had done everything humanly possible to get his grievances investigated by the Authority.

The implied term of trust and confidence

[29] In confirming dismissal Mr Gray in his letter of 29 June 2007 repeated the view given in his letter of 18 June that the conduct of Mr Gomes had so deeply impaired the trust and confidence necessary for the employment relationship to function properly that Mr Gomes had caused a serious and irreparable breakdown in that relationship.

[30] The law implies a term of trust and confidence into any employment agreement. Conduct destroying or seriously damaging the necessary trust and confidence may amount to a breach of an employment agreement. As was held by the House of Lords in *Malik v Bank of Credit* [1997] 3 All ER 1;

If conduct objectively considered is likely to cause serious damage to the relationship between employer and employee a breach of the implied obligation may result.

[31] It was held in *Malik* (a case where the party alleged to be in breach was the employer) that the implied term imposes reciprocal duties on the employer and employee. As the House of Lords made clear, the absence or presence of justification for the conduct is important;

.....the implied mutual obligation of trust and confidence applies only where there is "no reasonable and proper cause" for the conduct, and then only if the conduct is calculated to destroy or seriously damage the relationship of trust and confidence.

[32] The High Court considered the term in *Anderson v Attorney- General* [1992] BCL 2236, in the context of a claim brought by a senior public servant following the termination of his employment. In giving judgment Heron J observed of the implied term;

It is to be noted that within the term is an acknowledgment that some conduct may destroy or seriously damage the relationship of mutual respect, and it can be justified on reasonable and proper cause. It is not an absolute obligation

[33] In this case the MSD measured that loss of trust and confidence as the effect of Mr Gomes conduct, but in my view did so without taking proper account of whether Mr Gomes had good reason for any of his actions which caused that effect.

[34] I am satisfied that pursuant to a legal right Mr Gomes was fully justified in raising grievances and seeking to have them resolved by statutory and contractual process, which extended to the Authority making a determination if the grievances remained unsettled after earlier attempts made under the procedure. I find with regard to the bringing of grievance claims and the pursuit of a resolution of those, that what the MSD regarded as conduct contributing to the loss of trust and confidence, was conduct carried on by Mr Gomes with reasonable and proper cause.

[35] The result may be different if Mr Gomes had raised grievances vexatiously, or had pursued them vindictively or out of malice. In his evidence Mr Gray said he had not viewed Mr Gomes as acting from any such improper motives. I am satisfied that Mr Gomes genuinely and sincerely believed that what he was doing was right. He acted from strong beliefs about justice and having his rights recognised and observed by his employer.

[36] Whether he exercised good judgement and whether he was wise in the way he relentlessly and single-mindedly went about pursuing those rights regardless of the wider consequences in his work place, must remain a matter of reflection for him.

Dismissal unjustified

[37] It is the strong and clear view of the Authority that the action of dismissal taken by the MSD when the personal grievances of Mr Gomes had not been finally resolved, must be determined as being unjustified in all the circumstances. The dismissal was substantially grounded on the adverse consequences in the workplace, as had been observed and measured by the MSD, of Mr Gomes continuing to seek resolution of his disadvantage grievances.

[38] An agreement expressly entered into “in good faith” between the MSD and Mr Gomes in May 2006, recorded that if his problem relating to the 2004/05 personal assessment was not resolved by the steps agreed, “Allen will take whatever action he believes is necessary to resolve the issue.” The MSD breached that agreement when it dismissed Mr Gomes before he had completed action he had taken by raising a personal grievance. It also breached an undertaking given in the same agreement to continue facilitation meetings between Mr Gomes and Ms Wright.

[39] The matters that were the subject of the disadvantage grievance claims lodged in the Authority in January and February 2007, had been formally raised with the

MSD by Mr Gomes in April and November 2006. The course taken over several months to try and resolve the grievances, and Mr Gomes' necessary involvement in that activity, undoubtedly contributed significantly to the employers eventual loss of trust and confidence in him. The decision to dismiss was based on that loss, as Mr Gray made clear in the dismissal letter. Mr Gomes was not dismissed because of any supervening misconduct, poor performance or redundancy, but because of the cumulative effects of his conduct in several respects on the employer's trust and confidence in him.

[40] Mr Gray's letter of 18 June 2007 to Mr Gomes over some four pages lists the numerous complaints and allegations made by Mr Gomes against the MSD. The majority of these became the subject of the grievances Mr Gomes later raised, being grievances about his performance assessment and subsequent review of that, about his removal from the TWT project and about the unilateral variation of his position and his consequent demotion.

[41] In the letter of dismissal Mr Gray expressly refers to the 18 June letter as containing the reasons for his decision to dismiss Mr Gomes. It is clear he is referring to the cumulative effect on trust and confidence that Mr Gomes' actions, in making the many complaints and allegations, was regarded as having. In explaining or defending the decision to dismiss, Mr Gray also incorporated the reference in the 18 June letter to matters Mr Gomes had raised in his Statement of Problem and to matters set out by the MSD in its Statement in Reply. Those Statements had been lodged at the beginning of 2007 in relation to the disadvantage grievances. There could not be a more direct link between the reasons for dismissal and the further pursuit of those grievances, than the reference back to those Statements.

[42] By dismissing him the MSD took away from Mr Gomes the opportunity to resolve meaningfully his grievances about his 2004/05 personal assessment, his removal from the TWT project and the unfair variation of his job. The effectiveness of any resolution of disadvantage grievances will usually be much reduced once an employee loses the employment the grievances arose from.

[43] I find that the dismissal in these circumstances amounted to a rejection by the MSD of statutory and contractual procedures, a purpose of which is to provide a means of overcoming difficulties in on-going employment relationships so that some harmony might be restored without loss of employment.

[44] The rejection by the MSD of the procedure allowing Mr Gomes to have the grievances resolved by the Authority (or subsequently by the Court on *de novo* challenge) was unreasonable I find. Mr Gomes claims it was unlawful as well, for he has raised discrimination on the grounds of union activities, as defined by the Employment Relations Act 2000, as a further grievance flowing from his dismissal in these circumstances.

[45] The situation seems to have been looked at by the MSD simply as a matter of cause and effect. The effect seemed clear to the MSD; the relationship of trust and confidence and the working relationship between Mr Gomes and Ms Wright, had completely broken down. The cause of that was identified to be the questioning, complaining and challenging attitude and style of Mr Gomes, but proper account was not taken by the MSD of any justification he had for his conduct.

[46] The Authority is constrained by s.103A of the Employment Relations Act 2000 to apply that statutory test of justification to the dismissal in this case. The Authority must consider whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. The Authority cannot approach the latter from the basis that Mr Gomes may have caused a loss of trust and confidence simply because he raised his disagreement about some matters in the workplace and was frequently in dissent about matters with his manager Ms Wright. A fair and reasonable employer would have recognised that in this case he had reasonable cause to do those things and would have allowed the grievance procedure to be concluded before making any decision to dismiss.

The bullying complaint and investigation

[47] The making of the bullying complaint by Mr Gomes, the rejection by him of the subsequent investigation into it, and his later equivocality about the precise problem, were clearly pivotal matters for the MSD in deciding to dismiss Mr Gomes.

[48] In my view the MSD mistakenly and unfairly relied heavily on the bullying complaint and the investigation of it as one of the matters in respect of which Mr Gomes had appeared to be inflexible and unable to accept the views of the Ministry. I find that the MSD unreasonably rejected his complaints about the integrity of the bullying investigation.

[49] Mr Gomes invoked the “Workplace Harassment” provision of his employment agreement in making his complaint against Ms Wright on 11 October 2006. He sought an investigation of his bullying complaint, which was undertaken by the MSD in January 2007. Mr Gomes remained dissatisfied, as he found flaws in the investigation process and the conclusions the investigators had reached. In my view he had reasonable cause to be dissatisfied. Although the views he expressed caused further loss of trust and confidence, Mr Gomes had some justification for continuing to dissent over this matter as well as others. A substantial part of Mr Gray’s letter of 18 June, which is incorporated into the dismissal letter as providing the reasons for that action, is taken up with the Mr Gray’s concerns about Mr Gomes’ conduct in this regard.

[50] In October 2006, Mr Gomes wrote a lengthy memorandum to the MSD under the heading *Formal Complaint of Workplace Bullying*. The subject of the memorandum was expressed to be Ms Wright. Over some 15 pages the memorandum listed eight different forms of bullying and provided details of 25 examples given of the various types of bullying alleged.

[51] The memorandum begins with the following:

1. *This memo sets out a formal complaint of alleged workplace bullying by my Manager, Alicia Wright, that has caused me considerable distress and unjustifiable disadvantage. This complaint is made with reference to:*
 - *The Health & Safety Act 1992 (HESA 1992) and Employment Relations Act 2000 (ERA 2000) which respectively require safe working conditions and trust and confidence, and*
 - *The Protected Disclosures Act 2000 and the Ministry’s Protected Disclosures Policy, to afford protection to witnesses making disclosures such as this in accordance with the Act.*
2. *I ask that the Ministry formally investigate the authenticity of my claims by reviewing the enclosed allegations and supporting documents, and taking statements from the nominated witnesses, and then to act promptly to put an end to the bullying and prevent its reoccurrence.*

[52] The final paragraph of the memorandum reads as follows:

65. *By her actions, my Manager has indicated that she is prepared to cause me considerable distress by putting serious but wholly unsupported allegations to me to defend or as her basis for*

penalising me either in my performance review or by removing my management responsibilities – but at the same time not willing to take any action whatsoever against persons who are found to have made false and ostensibly malicious allegations to her about me. Together with her refusal to identify such complainants, this would seem to suggest that she is intent on protecting and supporting persons who intend to cause me harm. This selective behaviour clearly disadvantages me and creates a workplace that is stressful and which requires hyper vigilance to get through each day. I submit that the behaviour on the part of my Manager as described herein is bullying and clearly at odds with what is required by the HESA 1992 and the ERA 2000.

[53] The complaints in the final paragraph about being penalised in his performance review and being removed from his management responsibilities, later became the subject of personal grievance claims raised by Mr Gomes in January and February 2007.

[54] The Ministry responded to Mr Gomes' complaint by investigating it. The investigation concluded with a report issued on 15 January 2007 to senior executives of the Ministry, including then Deputy Chief Executive Mr Marcel Lauziere. The extensive and detailed report includes the following which are listed as Key Findings of the investigation team:

- (a) *While there are obvious difficulties in relationship between Alicia Wright and Allen Gomes, we do not believe there is evidence that the behaviours complained of constitute workplace bullying in accordance with the recognised legal definition.*
- (b) *Allen is genuinely of the belief that he has been the subject of workplace bullying, but there was no evidence to substantiate this belief.*
- (c) *There is no trust and confidence in this relationship now. Further, a productive and professional working relationship between Allen and Alicia is now not likely to eventuate even with further intervention and more time.*
- (d) *With the exception of Allen's complaint, no other hint of workplace bullying by Alicia or any other person within CSRE has emerged during the investigation.*
- (e) *Alicia, as General Manager for CSRE, has the right to manage and is accountable for CSRE outcomes. It is also recognised that the task of management is now always easy.*
- (f) *Alicia's management style, by her own admission, is forthright and direct. Our findings conclude, however, that her intention in her dealings with Allen were focused on*

looking forward, with the best outcome for the Ministry and/or CSRE in mind. However, with the benefit of hindsight, there are some things that could have been handled differently.

- (g) *Because of the length of time that this, and other processes (determining whether the Protected Disclosures Act applies) have taken, it is important to conclude this matter swiftly.*
- (h) *In future if any email or other written complaints emerge about Allen's timeliness or performance that these should be provided to him at the time for his review and comment. Although it was felt that complaints were not withheld for manipulative or punitive reasons, it is acknowledged that sharing this information may assist Alan to better understand issues or concerns that have arisen.*

[55] The executive summary included a recommendation that the Ministry consider options with regard to the future working relationship between Mr Gomes and Ms Wright.

[56] In the body of the report there is reference to the lack of a standard definition of bullying, but it lists a number of specific behaviours which, the authors of the report find, may constitute bullying.

[57] After the investigation report had been sent to Mr Lauziere he sent it to Mr Gomes and Ms Wright. His memorandum accompanying the report begins as follows:

1. *We have received the full report of the investigation into the allegations of workplace bullying made by Alan Gomes involving Alicia Wright.*
2. *We agree with the findings and accept the investigating team's recommendations that we:*
 - (a) *note the investigation has not found substance to the allegations relating to workplace bullying;*
 - (b) *consider options with regard to the future working relationship between Alan and Alicia;*
 - (c) *note that in future, any issues notified to Alan's manager regarding his timeliness or performance should be notified in writing to him for his review and comment.*

[58] In expressly accepting and agreeing with the findings of the investigating team, Mr Lauziere might be taken to have accepted and agreed with the key finding

that there was no trust and confidence in the relationship left and that a productive and professional working relationship between Mr Gomes and Ms Wright was unlikely to eventuate, even with further intervention and more time. Nevertheless, he went on his memorandum to say the following:

5. *In accepting the detail of the report, we have also reached the conclusion that Alan does not appear to receive feedback in a positive or appropriate way, nor seek ways to improve or respond adequately. We will provide additional coaching and support for Alan to enable him to address this development need.*

[59] From the report of Mr Lauziere, the fate of Mr Gomes had not necessarily been sealed by the key finding that trust and confidence had disintegrated in the relationship and that there was no productive and professional working relationship left between Mr Gomes and Ms Wright. Mr Lauziere promised to see that Mr Gomes was given coaching and support to assist his development.

[60] After Mr Gomes had received the memorandum and report from Mr Lauziere, he immediately wrote back his response to it. Mr Gomes was highly critical of the investigation and the report produced from it. He noted that although the report had made reference to definitions of workplace bullying, no definition was included in the report and he took this to mean that there was actually no legal definition. This in my view is a fair criticism of the report.

[61] Mr Gomes went on to describe the report as containing a substantively flawed analysis and a conclusion reached without a procedurally fair process.

[62] Mr Gomes was critical of the report's finding that there was no trust and confidence in the work relationship, saying that this had not been the brief of the investigators, who had been tasked with investigating the specific examples of bullying he had alleged. Mr Gomes noted from the written record of interviews with witnesses, that none of them had been asked about the degree of trust and confidence they had observed in the relationship between Mr Gomes and Ms Wright. He said in this regard:

Having no apparent evidence to review in this regard makes the analysis behind this conclusion speculative and together with being out of scope, undermines confidence in the report.

[63] Mr Gomes noted that some of the people interviewed had not been asked about bullying at all by the investigators:

In terms of procedure, the investigators did not actually ask any of the interviewees if they knew of A Wright bullying other people in CSRE, nor did they seek to interview others from CSRE about this. Having not sought to gather even rudimentary evidence about A Wright's conduct in CSRE, the analysis behind this finding was not based on evidence but instead uniform speculation. This undermines confidence in the quality of the investigation and analysis performed.

[64] In several other respects he referred to the report and the investigation as being, "procedurally out of scope and incomplete, and substantively flawed analysis."

[65] Mr Gomes noted that particular complaints the investigators had agreed to investigate were not in fact investigated.

[66] In my view, Mr Gomes had reasonable grounds for criticising the report and the soundness of the investigation upon which it was based.

[67] The investigation was not a judicial inquiry but an internal or in-house review conducted by management into a serious state of dissension that apparently existed in the workplace. Given the nature of the inquiry, it seems to me appropriate for the investigators to comment more widely than perhaps the narrow scope of the investigation might have required. In my view they were able to, and bound to, bring to the employer's notice any wider problems they discovered during the investigation. In this regard there is no criticism that can be made about the finding of lack of trust and confidence and the breakdown in the working relationship.

[68] However, that finding, a key finding, should have been discussed further with Mr Gomes so that he had an opportunity to comment on it, before it was cast into the report and sent to the Deputy Chief Executive, Mr Lauziere. The finding is a strong, significant and possibly prejudicial one that was likely to have had an impact in the mind of the employer reading it. The report made no finding about any lack of *bona fides* on the part of Mr Gomes in raising his complaint of bullying.

[69] Whatever Mr Lauziere thought of that key finding, he advised Mr Gomes that additional coaching and support for him would be provided to him to enable him to address his development needs. This implies that Mr Lauziere saw an ongoing

working relationship for Mr Gomes within the Ministry. Unfortunately the MSD did not deliver on its promise in this regard.

[70] Another matter of concern about the investigation, and which is an obvious one from reading the transcript of the interviews held with various witnesses and as supplied to Mr Gomes, was that the persons put forward by him as witnesses seem not to have been told the scope of the investigation and were not asked anything about bullying in the workplace whether by Ms Wright or anyone else.

[71] This is notable in the transcript of the interview with Mr John Jensen, a Principal Analyst with CSRE. He began the interview by asking, “what is the question we want answered?” After being given some explanation, he asks again, “What is the complaint about? Issue you are trying to reach a view on?” It does not appear that any precise explanation was given to some witnesses as to the nature of the investigation, and the detailed allegations made by Mr Gomes about bullying behaviours on the part of Ms Wright are not discussed during the interview. The interview transcript with Mr Ross MacKay, also a Principal Analyst at CSRE, indicates a similar approach taken to the investigation by the investigators. In his evidence Mr MacKay confirmed that the purpose of the investigation was not clearly explained to him.

[72] After a meeting was held between Mr Gomes and Ms Wright together with Mr Gray on 27 February 2007, Mr Gray wrote to Mr Gomes noting his advice given at the meeting, that he still considered Ms Wright to be a bully. He also noted his concerns that whenever the Ministry or its managers attempted to raise matters with Mr Gomes it seemed to result in an invitation to mediation or notification of a personal grievance. Mr Gray said in his letter:

As you still maintain Alicia is a bully, we do not consider it is safe or appropriate for the two of you to continue working together. Regrettably, it appears to us that your relationship with Alicia is dysfunctional and you have also advised that you have a lack of trust and confidence in the Ministry.

[73] Mr Gray expressed his concern that matters, “could lead to an unsafe workplace for Alicia if we allow these tensions to continue.”

[74] Mr Gomes was advised in this letter that he appeared to be the cause of the “incompatibility” and that he had been exercising an inflexible attitude in the face of

efforts made by the Ministry to resolve differences he had raised to date. Mr Gray said:

We have reached the point where we feel that, despite the Ministry's significant efforts to resolve the difficulties between you and Alicia, as a result of your attitude and conduct the relationship is deteriorating further and this appears to have led to an irreconcilable breakdown of your relationship with Alicia and the Ministry.

It is our preliminary view that your actions may have caused, or at the least, substantially contributed to the deterioration in your relationships at work and this is impacting on the basic trust and confidence necessary in a workplace.

We therefore want to meet with you to discuss our preliminary view that a continuance of the relationship does not appear possible and to address the points we have raised. We advise that disciplinary action may be an outcome of this meeting, including but not limited to, dismissal. You are invited to bring a support person/representative to this meeting.

[75] After 20 March 2007 when Mr Gray wrote to Mr Gomes seeking a meeting to discuss his concerns about the continuation of the employment relationship, there was a flow of correspondence between the Ministry and Mr Gomes and their solicitors, and there were further meetings. It was nearly three months later on 18 June 2007 when Mr Gray wrote again, saying that he remained very concerned about the state of the relationship. He summarised the, "vast number of complaints and allegations against the Ministry" that had been made by Mr Gomes in relation to his employment.

[76] The bullying complaint and investigation that followed form a substantial part of those allegations and complaints referred to. Mr Gray noted that Mr Gomes had, "challenged the findings of that outcome and the processes of conducting that investigation." He said he was concerned that Mr Gomes had raised such serious allegations and had not accepted the investigation, yet expected the employment relationship to continue as though nothing had happened.

[77] I find that in dismissing Mr Gomes the Ministry held him to account partly for making the bullying complaint and for challenging or criticising the report from the investigation and the investigation process itself. I find that Mr Gomes had reasonable grounds for some of his rejection of the investigation report and the process that had been followed by the investigating team. I do not consider that a fair and reasonable employer would have relied on this matter as part of the grounds for dismissing Mr Gomes.

[78] In my view the Ministry owed it to Mr Gomes, and to Ms Wright, to conduct a thorough and rigorous investigation, and to report on it fully and fairly. Mr Gomes had cause to question the investigation. Doing so caused further loss of the employer's trust and confidence, but not without good reason on the part of Mr Gomes. He could not fairly be blamed for that loss in respect of the bullying complaint and investigation.

[79] The danger for the Ministry lay in taking the view that because Mr Gomes seemed to have complained so many times about so many different issues, a further complaint about the investigation was simply one more to add to the list, without looking to see if there was any substance to his concerns.

Information required to be given by employer in good faith

[80] As a further matter of unfair and unreasonable treatment of Mr Gomes by the Ministry, Ms Lear submitted that he had not been given access to information possessed by the employer and which was relevant to the continuation of the employment, before the Ministry made the decision to dismiss him. In this regard Ms Lear relied on s 4(1A) of the Act. That provision requires an employer who is proposing to make a decision likely to affect the continuation of employment of an employee, to provide the employee with access to information relevant to the decision, and to also provide an opportunity for the employee to comment on that information before the decision is made.

[81] During the investigation meeting Mr Gray was asked about the timing of his decision to dismiss Mr Gomes. In particular he was asked why the Ministry had not waited until Mr Gomes' two grievances lodged in the Authority had been resolved. Mr Gray said he could not wait as he believed they could take several months to resolve. Mr Gray said that by this time, June 2007, he considered that the workplace was, "seriously dysfunctional and dangerous to Alicia Wright." Based on observation of Ms Wright, he and others held serious concerns about her state of health, and he was aware that she would probably resign if matters were not resolved with Mr Gomes one way or another. Mr Gray told the Authority that the health of Ms Wright had influenced the need for him to make a decision as soon as he could.

[82] I accept the submission that Mr Gray had knowledge of information within the meaning of s 4(1A), and I find that information was clearly relevant to the decision made to dismiss Mr Gomes, particularly the timing of that decision.

[83] I find that Mr Gomes had not been given the employer's view that the workplace was dangerous or dysfunctional and that he was not aware, at least in any detail, of any threat to the health of Ms Wright. He was also unaware that she was seriously considering resigning or that Mr Gray believed there was strong risk of her doing so.

[84] At best, Mr Gomes had been advised in a letter from Mr Gray on 20 March 2007 that the issues in his relationship with Ms Wright, "could lead to an unsafe workplace for Alicia if we allow these tensions to continue." That provided some information about the employer's assessment of the workplace, but after that three months went by during which Mr Gomes remained at work without receiving any warning or further advice about Ms Wright's state of health or stability in the employment.

[85] Under s 4 of the Act parties to an employment relationship must deal with each other in good faith. I find that the Ministry did not comply with that duty as required under s 4(1A)(c), and I must find that its actions in this regard were not those of a fair and reasonable employer in deciding to dismiss Mr Gomes. This is another reason why the dismissal was unjustified.

Lack of any disciplinary warning

[86] Mr Gomes received no explicit warning of a disciplinary nature before he was dismissed.

[87] Mr Gray in his evidence explained that the reason for this was because Mr Gomes seemed to lack willingness to accept or acknowledge the seriousness of his conduct. In this regard I agree with the submission of Ms Lear that it was surely the whole point of a warning to give an employee a sense of the seriousness of the situation, and also to give a fair opportunity to avoid dismissal by changing or improving specific behaviour raised in the warning. A failure by an employee to heed a warning fairly given by the employer, strengthens the hand of the employer who resorts to dismissal in that event.

[88] If a warning is to be given it must be assumed that the employer has grounds for giving one and is not just completing a checklist. In this case it is not surprising that a disciplinary warning was not given. In my view it would have been difficult to formulate a fair warning when a substantial part of the loss of trust and confidence as measured by the MSD had not arisen through any misconduct of Mr Gomes. In the circumstances he could not fairly or properly be warned against continuing to pursue his grievance claims, or against continuing to express to the MSD his dissatisfaction of the bullying investigation.

[89] At the most, the MSD could have warned Mr Gomes of the imminent need to take some action to prevent harm or injury to Ms Wright, or the loss of her services if she resigned to escape the conditions in the workplace. On that basis an explicit warning could have served to make Mr Gomes aware, if he was not already, that the breakdown of his relationship with Ms Wright required the employer to intervene and address the issue of incompatibility.

[90] Mr Gomes said in evidence that he had been unaware of the way Ms Wright was reacting to his behaviour and certainly the MSD did not give him any detail about that. While one might be sceptical that someone so intelligent and qualified could have no insight into the effects of his behaviour on another person, it does seem to me that Mr Gomes pursued his causes with such narrow focus and intensity that he may not have appreciated the consequences to others of his actions.

Suspension

[91] An appropriate action for the MSD to have taken in the circumstances would have been the suspension on pay of Mr Gomes until his outstanding disadvantage grievances had been resolved. Even if only temporarily, suspension could also have addressed the concern Mr Gray had about safety in the workplace, particularly with regard to any threat to the health of Mr Wright. Suspension was not considered.

[92] Since his dismissal Mr Gomes has been working for the MSD from home, so there seems no good reason why that arrangement could not have been tried while the disadvantage grievances were being finally resolved.

[93] I cannot agree with the submission for the MSD that the outcome of the grievances would have made no difference to the situation. The MSD could have waited to find that out, but did not.

Dismissal unjustified

[94] For the above reasons I uphold the claim by Mr Gomes that his dismissal was not justified. Considered on an objective basis, I find that the Ministry's actions and how the Ministry acted, were not what a fair and reasonable employer would have done in all the circumstances at the time dismissal occurred.

Disadvantage grievance – 2004/05 personal assessment

[95] This is the first of the two disadvantage grievances now to be resolved by the Authority.

[96] In the written performance assessment for Mr Gomes in 2004/05, under the head of Capability he was awarded a B rating in all six areas of assessment. Under Objectives he was awarded an A, three B's and a C. His overall rating was ME, short for Meeting Expectations/Objectives. It is the second to top rating of the four available. A positive and constructive comment about Mr Gomes was handwritten on the assessment form by his manager Ms Wright.

[97] Mr Gomes was dissatisfied with the assessment and did not accept it, despite the significant pay increase attached to it. He had assessed himself as A for all key capabilities, and he had given himself three A's and two B's for the key objectives. Overall he regarded his performance as CE, short for Clearly Exceeding Expectations/Objectives.

[98] Mr Gomes rated himself the equivalent of Excellent, whereas he had been marked what seems to be the equivalent of Very Good. Ms Wright said in evidence she considered that the overall rating awarded by her was a positive result reflecting a high level of performance by Mr Gomes.

[99] The dispute over the assessment began in August 2005, when Ms Wright presented it to Ms Gomes. In September the formal process the MSD had for reviewing performance assessment outcomes was invoked by Mr Gomes as a means of establishing a correct rating. Under that process a reviewing manager is to be appointed as an independent person to review the original assessment. The appointee is to be an MSD employee at equivalent management level to the original assessor and is to come from outside the immediate work area. The decision of the reviewing

manager is to be final although, as is noted in the process outline, the staff member seeking review retains the right to lodge a personal grievance at any time.

[100] Mr Ross Judge was appointed reviewing manager by agreement between Mr Gomes and the MSD. Mr Judge is the general manager of an MSD division and has many years experience as a senior public servant. He estimated that he has conducted over 100 performance assessments, 15 to 20 of those at the senior level of position held by Mr Gomes.

[101] Mr Judge viewed his role as being to consider whether the performance assessment by Ms Wright of Mr Gomes had been reasonable. Mr Judge, who was delayed in completing his review until March 2006, found Ms Wright's assessment to have been a reasonable one. He found that "clearly exceeds" expectations, the overall rating that had been sought by Mr Gomes, was not due for his performance in 2004/05. Mr Gomes disputed this with Mr Judge and argued about the methodology he had used in carrying out his review.

[102] I am satisfied that the review was conducted fairly and in accordance with the purposes of the review process. I find that Mr Gomes was not disadvantaged by the assessment he received from Ms Wright, as the independent review by Mr Judge resulted in the same rating. Having a review process, submitting to it and accepting its outcome, were what a fair and reasonable employer would have done in the circumstances where there was a dispute over the original assessment. It is not the function of the Authority to itself review the assessment in the way Mr Judge was appointed to do.

[103] Following s 103 of the Act, this disadvantage grievance is a claim that Mr Gomes' employment, or one or more conditions of that employment, was affected to his disadvantage by some unjustifiable action of the MSD. The Authority must be satisfied that the MSD acted unfairly and/or unreasonably, in a way that adversely affected the performance of his employment by Mr Gomes.

[104] I am satisfied that the assessment eventually given under the review process resulted from justifiable action by the MSD. The assessment confirmed as correct Ms Wright's original assessment for the performance of Mr Gomes in 2004/05, even although he disputed that. It follows that he was not disadvantaged as alleged by loss of remuneration either in the assessment period or at any future time.

[105] Ms Wright identified with Mr Gomes the areas where he could improve his performance, and she gave him examples of where that improvement was needed. Mr Gomes believed some of this guidance was based on unsubstantiated allegations or complaints, from anonymous staff members. That is a separate issue in this case. The fact remains that Mr Gomes was not disadvantaged as he alleges, by not receiving any advice from his employer as to where he could improve. It was over to him to heed the advice or ignore it.

[106] Mr Gomes also complains that he was disadvantaged by losing trust and confidence in the performance review process. In my view the major cause of that loss was his failure to get the overall rating, Clearly Exceeding Expectations, which he felt he deserved. The Meeting Expectations rating given to Mr Gomes was subsequently confirmed by a fair process of review, carried out by Mr Judge. Therefore the failure of Mr Gomes to achieve the highest rating did not flow from any unjustified action of the MSD.

[107] Nevertheless I consider that Mr Gomes did expose a deficiency in the personal assessment process or in the way it was administered to him.

[108] Mr Gomes required Ms Wright to provide him with specific examples and evidence to support her assessment that his performance did not warrant the top rating. He was within his rights asking for that sort of information, as the MSD had required its managers to provide it in the event of disagreement over the facts on which a performance assessment had been based. That requirement was set out in the comprehensive 44 page guide published by the MSD for its managers which, in a part dealing with managing reactions to constructive feedback, states;

DISAGREEMENT

If the person disagrees with the facts, give examples and evidence.

[109] In another part of the Guide about negotiation to resolve rating disagreements, managers are instructed to;

Outline what evidence you have for supporting the rating you have made.

[110] The guide refers to “appropriate evidence” being recorded in the form of “written feedback from colleagues, managers, clients (including emails).” It also

advised that more time should be given to allow for the collection of further evidence with which to inform the discussion about the rating in question.

[111] Mr Gomes pressed the MSD and Ms Wright for more information. The contents of the guide gave him a reasonable expectation of getting that. There was some resistance to his requests in this regard but eventually, in July 2006, he received a memorandum from Ms Wright. In it she gave what she described as examples of relationship management issues. She advised that the examples indicated to her that Mr Gomes was performing at the level of meeting expectation rather than clearly exceeding expectations.

[112] The four examples given referred to advice obtained from other managers of the Ministry or from its external stakeholder clients, but did not give names or any information that might immediately identify Ms Wright's sources of evidence.

[113] The examples disclosed strong criticism that had been made of Mr Gomes in his behaviour. He had been found by nameless other managers and external stakeholder clients to be obstructive, arrogant, unhelpful, difficult to understand and unnecessarily complex. Unspecified emails he had sent to some nameless staff including junior employees, had been viewed as arrogant and bullying in tone or content by an unnamed manager.

[114] Mr Gomes was highly incensed by this information and wanted to know the identity of those who had apparently given it to Ms Wright. She declined to give names or provide further particulars, because an undertaking of confidentiality had been given to those who had given her the information.

[115] In the face of Mr Gomes insistence, the MSD decided the issue should be resolved by withdrawing Ms Wright's memo of 3 July 2007 containing the examples of relationship management issues Mr Gomes was considered to have. When the MSD did this Mr Gomes then maintained that since the adverse information against him had been put aside, so too should his disputed performance rating, as there was nothing remaining against him to justify less than the top rating.

[116] It seems likely that some of the information had been provided to Ms Wright in the form of complaints about Mr Gomes. He viewed them as such and as allegations about him. This overlooks the fact that however this information may have been given to Ms Wright and taken by her, it was not subsequently used or

processed by the MSD for any disciplinary purposes in relation to Mr Gomes. The material may have amounted to adverse comment or criticism but it was treated as evaluative information for the purposes of personal assessment, a non-disciplinary process. It is the kind of information that is directly relevant for the purposes of personal assessment in employment.

[117] I do consider that Mr Gomes had reasonable cause for some concern about his original assessment, particularly in relation to the information he was given in the 3 July 2006 memorandum from Ms Wright providing examples of perceived management relationship issues. If anything a possible issue is highlighted about the interpretation, operation or application of the employment agreement.

[118] That issue is in relation to representations made in the managers guide for performance appraisals, that facts are to be established with examples and evidence. Some including Mr Gomes, might reasonably interpret this as requiring appraisals to be conducted by applying a forensic standard of evidence. Constraints of time would suggest that proof to that degree is not intended and would make the process unworkable, or bigger even than performance of the employment itself. The MSD may wish to reconsider the wording of the guide or make it clear to employees what they can expect from the process in this regard. In particular, how clear and strong must the "evidence" be, and what ability does a staff member under assessment have to effectively challenge and rebut it?

[119] To some extent the MSD addressed Mr Gomes' concerns about stored up complaints as he called them, that arose out of his 2004/05 review. Ms Dale Farrar in her memorandum of 17 August 2006 to Mr Gomes recorded an agreement between him and Ms Wright that when concerns were raised about Mr Gomes by other staff or stakeholders, that information would be shared with him and he would be given specific details of time, place and people in relation to the concerns.

[120] The declarations sought by Mr Gomes about issues of policy in relation to the personal assessment procedure are not personal grievance remedies but are more appropriate for a dispute under the provisions of Part 9 of the Act.

[121] In relation to the claim that the employer acted to the disadvantage of Mr Gomes and without justification in relation the 2004/05 performance review, the grievance is not sustained.

Disadvantage grievance – removal from TWT project

[122] The Toddlers Without Tears Project is a major project of the MSD currently being carried out at the requirement of Cabinet. A report is due on the work in 2008/2009.

[123] Until his removal from it Mr Gomes had responsibilities for important parts of the project, reporting directly to Ms Wright. At the same time he had about 20 other projects assigned to him. His involvement in TWT was estimated by Ms Wright to be about 5% to 10% of his role overall.

[124] Ms Wright became concerned about a breakdown in the relationship Mr Gomes was required to maintain with other key participants in the project, both internal and external, and she regarded progress on the project to be unsatisfactory. She received complaints about the work being done by Mr Gomes from a key unit involved in the project, and she assessed as inadequate some of the work Mr Gomes had managed.

[125] Consequently Ms Wright reviewed the suitability of Mr Gomes for the TWT role he had been assigned to. No doubt being cautious because of other issues that had arisen and which remained unresolved, the MSD and Ms Wright were careful to involve Mr Gomes in this review. Representations from his solicitors were received and responded to. Mr Gomes was consulted in meetings with Ms Wright and others involved in TWT, from whom input was sought. Although a firmer line could have been taken, the MSD cannot be criticised for its handling of this review with Mr Gomes. Every effort was made to preserve a good working relationship necessary for the future.

[126] It was decided to present Mr Gomes with two options for addressing the concerns about his management of TWT work. His response was to challenge Ms Wright for taking action against him. He advised that he would seek arbitration as to whether his removal was justified. Ms Wright rejected that as a reasonable and practicable way to resolve the issue. She concluded that the role of Mr Gomes in TWT should be assigned to a different manager. Upon advising Mr Gomes of her decision he responded by raising a personal grievance.

[127] I find that this particular disadvantage grievance claim cannot succeed. Mr Gomes was removed from the project for genuine operational reasons of his

employer, rather than disciplinary reasons. Whether required or not, there was consultation with Mr Gomes before the decision was made and he was offered an alternative which would have left him with some involvement in the project. He ignored the offer of a reasonable compromise that would have allowed him to retain overall management responsibility for TWT while another manager handled the direct client and stakeholder relationship.

[128] In my view the decision made by Ms Wright and the process she used in making it, were entirely fair and reasonable with regard to Mr Gomes and his legitimate interests. Even if her actions were unjustified for any reason, Mr Gomes suffered no disadvantage in his employment. He retained the same position under the same terms and conditions of employment. He was not left idle or given work of a kind he had not been employed to do. Mr Gomes had no guarantee that he would be assigned to, or retained upon, any particular project work that fell within his job description.

[129] It cannot be the role of the Authority in determining a personal grievance claim to intervene or interfere in operational decisions that have to be made by managers on a routine daily basis. From personal observation and feedback from stakeholders and others directly involved in the TWT project, Ms Wright was entitled to form her own views and opinions about the way Mr Gomes was managing and leading that project. It was well within her discretion to make changes of personnel where she saw that as necessary. As Mr Gomes' manager, it was her job to do so and she could have been criticised if she had not stepped in and exercised that responsibility.

[130] This was a matter best addressed and resolved internally by exercise of management discretion. An employee such as Mr Gomes cannot insist that in all matters to do with work performance his interests must have precedence over those of the employer in achieving the reasonable objectives of its business or operation. Even although it was a step available to Mr Gomes as a matter of right, the raising of this grievance served only to contribute to the development of an increasingly poor employment relationship and the eventual loss of trust and confidence by the MSD in Mr Gomes.

[131] I find that Mr Gomes does not have a sustainable grievance in relation to his removal from the TWT project.

Discrimination grievance

[132] The fourth grievance of Mr Gomes is a claim that he was discriminated against in his employment. Under s 103(1)(c) of the Act, discrimination in employment on the grounds prohibited provides a basis for a grievance claim.

[133] Specifically, Mr Gomes' claim is that he was dismissed by reason directly or indirectly of his involvement in the activities of a union within the meaning of s 107 of the Act. The definition of involvement in the activities of a union by an employee includes, under s 107(1)(e), having submitted to the employer another personal grievance within 12 months of the latest action complained about.

[134] There are two foundation grievances; the 2004/05 personal assessment grievance first submitted on April 2006, and the TWT grievance submitted in November 2006.

[135] Dismissal in June 2007, the latest action complained of, occurred inside a 12 month period after the submission of the second grievance and therefore the reasons for the dismissal can be examined under s 107 with regard to the TWT grievance.

[136] As to the 2004/05 grievance first submitted in April 2006, it is contended that within 12 months of that being done the MSD subjected Mr Gomes to detriment in his employment. Detrimental action is an element of the definition of discrimination at s 104(1)(b) and s 104(2). In this case the detriment is contended to be the commencement by the MSD of disciplinary action against Mr Gomes in March 2007, a time inside the statutory 12 months after the submission of the first grievance.

[137] It is clear that Mr Gomes was dismissed. I also find that he suffered some detriment in his employment. Regardless of the eventual outcome, the commencement of a disciplinary procedure will usually effect job performance and job satisfaction, and it may have other adverse effects on the employee while the process continues. This is so even if an employer acts reasonably in commencing the procedure.

[138] I am satisfied that each of the two disadvantage grievances submitted by Mr Gomes was in substantial part a reason for the act of discrimination committed within 12 months in each case. While not "directly" the reasons for commencement of the

disciplinary process or for the dismissal, they were “indirectly” those reasons and therefore fall within s 104 as discrimination.

[139] Directly the reasons for the disciplinary process and the dismissal were the deep impairment of trust and confidence viewed by Mr Gray in his letter of dismissal to have been caused by the conduct of Mr Gomes. The loss of trust and confidence is substantially attributed by Mr Gray in his 18 June letter to conduct including the pursuit by Mr Gomes of his two grievances. The link is clear that if the grievances had not been submitted or if they had been dropped by Mr Gomes, any loss of trust or confidence would have been much less.

[140] I find the presumption in discrimination cases under s 119 of the Act, that the employer discriminated against the employee on the grounds or for the reasons specified in s 104, has not been rebutted. The discrimination grievance claim is therefore upheld.

Remedies

[141] Mr Gomes strongly seeks reinstatement to remedy his dismissal which has been found by the Authority to be unjustified. Reinstatement is the primary remedy provided by s 125 of the Act, which directs that the Authority must reinstate “wherever practicable.”

[142] Since dismissal Mr Gomes has been receiving full pay working for the Ministry from home and his former position has been kept unfilled, under arrangements made between the parties pending the outcome of this investigation by the Authority.

[143] Mr Gomes has remained insistent that reinstatement, if ordered, must be to his former position in which he reported to Ms Wright. I am satisfied that reinstatement to his “former position” under s 123(1)(a) of the Act is impracticable, for the following reasons.

[144] Nothing was clearer from the Authority’s investigation that the working relationship between Ms Wright and Mr Gomes has completely broken down, and this of course was the assessment of the MSD prior to Mr Gray deciding to dismiss Mr Gomes. The situation reached a stage where as a means of coping Ms Wright drew some comfort from carrying with her a resignation letter she had prepared and

kept in readiness to use if necessary. I accept as a statement of genuine intention rather than a threat, her evidence that she will resign if Mr Gomes returns to his former position. The interests of her health and career will understandably compel her to leave. I have found that Mr Gomes was wronged by the MSD when it dismissed him, but I consider it will be a further injustice if Ms Wright becomes a casualty of the determination of this case by the Authority. She acted according to the requirements of her employer and with its approval, and she did not make the decision to dismiss Mr Gomes.

[145] Particularly in view of the bullying allegation and the investigation that followed, I find it would be entirely unreasonable for Mr Gomes and Ms Wright to be thrown back together in the workplace by order of the Authority. Mr Gomes was entitled to invoke the workplace harassment provisions of his employment agreement and make the complaint of bullying. An express finding was made in the investigation report that he genuinely believed he had been bullied in the workplace by Ms Wright. I have found that he had reasonable cause for rejecting some of the findings of the investigation and the methodology used to conduct it.

[146] It is an unfortunate circumstance that Ms Wright has had a strong complaint of bullying hanging over her for a year, since the end of 2006. The depth of her concerns about the bullying complaint and delay by the MSD in resolving that, is evident from what she wrote in the resignation letter she kept ready to give to the MSD. She has recently had to relive the whole episode in the course of the Authority's investigation, and the bullying complaint may still not yet be properly resolved, in view of the problems that have emerged with the investigation.

[147] The *status quo* is that Ms Wright has not been established to have harassed or bullied Mr Gomes, or anyone else in the workplace. The Authority has seen no evidence to support that allegation. I do not think it would be reasonable for her to have to work again with Mr Gomes while there remains a cloud over the integrity of the investigation into his allegations. He also made those allegations with unnecessary vehemence, as Mr Gomes has conceded, in the way he portrayed the behaviour of Ms Wright. Lingering hurt from that personal attack will not help restore a good working relationship.

[148] In my view overall there was and is a demonstrable lack of mutual trust and confidence between Mr Gomes and Ms Wright, making it impracticable for them to

work together. Reinstatement to the former position would also present once again a risk of the workplace becoming unsafe and causing harm to the health of Ms Wright. Given the particular senior management roles Ms Wright and Mr Gomes had, reinstatement is also likely to unduly interfere in the delivery of work and the performance of functions by the MSD, a major department of state.

Placement in no less advantageous position

[149] While I accept that the MSD now has no trust and confidence in Mr Gomes, I have found that the MSD did not have good reason for reaching that conclusion about him. It would be wrong to deny Mr Gomes a return to work at the MSD when he was not to blame for a significant part of the employers lost trust and confidence, the loss caused by the pursuit of his grievances and his rejection of the bullying investigation.

[150] Returning Mr Gomes to work for the MSD raises a concern with the Authority that the level of distraction and preoccupation that these matters may continue to cause him, will prevent Mr Gomes from fully and effectively performing work that the MSD will be entitled to require of him. It is obvious from the sheer volume of written material generated by Mr Gomes and various managers of the MSD over the last two years or so, that the time and energy put into the employment relationship problems in this case has been very great. A core objective of the employment relationship, the efficient output of useful work, at times may not have been met as a result. The Ministry can reasonably expect that having had his problems resolved, Mr Gomes will now concentrate on co-operatively and constructively performing the employment and advancing the objectives of the MSD.

[151] On the basis that the MSD does have other positions that can be performed by Mr Gomes without disadvantage in respect of his former terms and conditions of employment or his reasonable career expectations, I order under s 123(1)(a) of the Act that Mr Gomes is to be immediately placed by the MSD in a position no less advantageous to him than his former position (to which reinstatement has been declined).

Reimbursement of lost remuneration

[152] An order for reimbursement of lost remuneration was sought against the event that reinstatement was not ordered. Following the order made by the Authority, Mr Gomes is now able to resume permanent employment with the MSD and

consequently there will be no future loss. Any loss following the dismissal was fully mitigated with the arrangement reached that enabled Mr Gomes to continue receiving pay while working for the MSD from home. No order is necessary therefore.

Compensation

[153] Compensation of \$20,000 is sought for hurt feelings, humiliation and distress associated with the unjustified dismissal. Some of the tragedy of this case is that Mr Gomes was deprived of a job to which he was fully committed and dedicated, performing valuable work for the Ministry. He described it as just about the perfect job for him. The MSD regarded his work performance generally as good and sound, or better, although not warranting an assessment as high as he argued it should have been given. Mr Gomes had many in his team prepared to testify that he was a good leader and manager who they wanted returned to his job.

[154] The scale on which Mr Gomes produced memoranda and other reports in pursuing his problems before he was dismissed indicates how deeply and conscientiously he believed in rectifying those problems. Mr Gray very fairly described him as a principled person of integrity. Mr Gomes described himself to the Authority as a hardy resilient individual, but of course he has feelings too.

[155] I do not consider the unfortunate premature communication to him of the dismissal decision or the manner in which Mr Gomes left the office on the day of dismissal, added significantly to his distress. It is clear he had already realised from Mr Gray's letter of 18 June that he would be dismissed. It was inevitable and unavoidable that there would be some awkwardness for himself, his colleagues and MSD representatives while he was packing up, saying goodbye and departing.

[156] In my assessment of the overall impact immediate dismissal had on him in the circumstances, he should receive for the dismissal \$10,000, taking into account the reinstatement ordered.

[157] For persons like Mr Gomes who strongly believe in their rights, discrimination accompanying a dismissal exacerbates the wrong of the dismissal itself. On my assessment Mr Gomes should receive \$4,000 for that grievance, allowing for the other remedies given to him.

Contribution

[158] Undoubtedly the MSD lost trust and confidence in Mr Gomes and undoubtedly his actions or conduct caused that. However, as the Authority has found, in large part he did not act without reasonable and proper cause. He did not act in bad faith or calculate by his conduct to destroy the employment relationship.

[159] While some of the actions of Mr Gomes can be criticised as regrettable, inadvisable, unwise and excessive, I do not regard them as being matters of blame in an employment disciplinary context. Fault in that sense, if any, was minimal on the part of Mr Gomes. Accordingly no reduction is made to the remedies given above.

Summary

[160] In summary, the determination of the Authority is;

- a) The dismissal of Mr Allen Gomes by the MSD was unjustified.
- b) In relation to his 2004/05 performance assessment, Mr Gomes was not disadvantaged in his employment by any unjustified action of the MSD.
- c) In relation to his removal from the TWT project, Mr Gomes was not disadvantaged in his employment by any unjustified action of the MSD.
- d) Mr Gomes was discriminated against on grounds prohibited by the Employment Relations Act.
- e) Mr Gomes did not contribute to the situation giving rise to his personal grievances.
- f) Pursuant to s 123(1)(a) of the Act the MSD is ordered to place Mr Gomes in a position not less advantageous to him. No order is made for the reinstatement of Mr Gomes to his former position.
- g) For his unjustified dismissal the MSD is ordered to pay Mr Gomes compensation of \$10,000 pursuant to s 123(1)(c)(i) of the Act.

h) For discriminating against Mr Gomes the MSD is ordered to pay him compensation of \$4,000 pursuant to s 123(1)(c)(i) of the Act.

Costs

[161] Mr Gomes is entitled to a reasonable contribution to the costs and disbursements expended by him on the Authority's investigation. The parties should try and settle themselves the amount he is to be paid, but if they are unable to an application may be made to the Authority by memorandum, with a copy to be served on the MSD, which shall have 14 days to reply. Any determination of costs to be made by the Authority will apply the principles given in *PBO Ltd v Da Cruz* [2005] ERNZ 808, as well as any other relevant law.

A Dumbleton
Member of the Employment Relations Authority