**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

CA 101/09
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| | BETWEEN | SUSAN JANE GREY<br>Applicant |
| | AND | DIRECTOR-GENERAL OF CONSERVATION<br>First Respondent |
| | AND | THE SOLICITOR-GENERAL<br>Second Respondent |

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| Member of Authority: | Paul Montgomery |
| Representatives: | Moka Ritchie, Counsel for Applicant<br>Hamish Kynaston, Counsel for First Respondent<br>Joanna Holden, Counsel for Second Respondent |
| Investigation Meeting: | 23-25 February 2009 at Nelson<br>4 May 2009 at Nelson |
| Submissions received: | 4 May, 7 May and 13 May 2009 from Applicant<br>4 May 2009 from First Respondent |
| Determination: | 14 July 2009 |

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**DETERMINATION OF THE AUTHORITY**

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**The applicant's claims**

[1] In a statement of problem lodged with the Authority and received on 8 December 2008, Ms Grey, who was at the time acting on her own behalf, claims that she was unjustifiably dismissed from her employment as Conservancy Solicitor, Nelson/Marlborough Conservancy of the Department of Conservation (DOC) on 15 September 2008.

[2] Further, Ms Grey claims she was disadvantaged by the unjustifiable actions of her employer prior to the dismissal occurring. Ms Grey claims:

> *This included substantive and procedural unfairness, breach of my employment contract, and/or misleading conduct in breach of the Fair Trading Act by my employer (the Director-General of Conservation) and incitement of the breach of my employment contract (in apparent breach of s.134 of the Employment Relations Act) by the Solicitor-General.*

[3] On p.19 of her statement of problem, the applicant sets out the remedies she seeks from the Authority. They are:

> *In relation to the first respondent:*
>
> - *An apology and confirmation the events will not adversely affect my employment prospects in the government;*
> - *Interim and permanent reinstatement;*
> - *Compensation for loss of income during the period since my unjustified dismissal;*
> - *Compensation for the serious stress and humiliation;*
> - *Exemplary and/or aggravated damages for the deliberate and calculated conduct which significantly added to my distress, humiliation and suffering;*
> - *Compensation and/or paid stress leave for a reasonable time into the future to help me regroup before returning to work;*
> - *Review of my salary to ensure parity with other solicitors employed by Crown agencies and to better reflect my experience and expertise;*
> - *Provision of management training opportunities to help restore my confidence and employment prospects;*
> - *An inquiry by a suitably qualified independent person or team (external to DOC and Crown Law) to ascertain how the process went by a significant government department which had legal and contractual obligations to me to be a* good employer *went so far* off the rails *and what can be done to prevent any other staff ever being treated this way; and*

*In relation to the second respondent:*

- *Recovery of penalties and payment of these to me for the Solicitor-General's conduct in inciting, instigating, aiding and/or abetting the breach of my employment agreement pursuant to ss.133 and 134 of the Employment Relations Act.*

***The first respondent***

[4] The first respondent, in its statement of reply received by the Authority on 24 December 2008, says it justifiably dismissed the applicant due to a conflict of interest. Further, it denies it disadvantaged Ms Grey in her employment and acted justifiably throughout her employment with DOC.

[5] It says that as a solicitor employed by DOC, Ms Grey was therefore employed by the Crown. The applicant however, continued to complete work for private clients who had retained her services prior to appointment as Conservancy Solicitor in Nelson/Marlborough.

[6] The first respondent says Ms Grey was employed by the Department from 12 June 2006 to 15 September 2008 pursuant to an individual employment agreement. In that role, her direct manager was Neil Clifton, the Conservator of the Nelson/ Marlborough Conservancy. It says Ms Grey's employment agreement provided in clause 5 that:

> *5. Employee's responsibilities*
> *The employee will:*
> - *Diligently, faithfully and to the best of his/her abilities at all times carry out the responsibilities of the role.*
> - *Support the policies and work practices of the Department and work towards achieving its objectives in a professional, ethical, efficient and effective manner.*
> - *Not undertake any other business or professional action that in any way conflicts with the business of the Department.*

[7] As noted above, Ms Grey had worked as a solicitor in private practice and upon her employment with DOC it was verbally agreed between Ms Grey and Mr Clifton at the time of her employment that the applicant could continue to work for existing clients, on the proviso that she not undertake any new work nor any work

that conflicted with her responsibilities to the Department. The mutual understanding was that Ms Grey's private work would diminish over time until it was complete.

[8] In the light of its stance on the claims made by Ms Grey, the first respondent declines to offer the remedies she seeks.

***The second respondent***

[9] The second respondent, in a separate statement of reply received on 19 December 2008, states that at no time has the second respondent incited, instigated, aided or abetted the first respondent to act in breach of the employment agreement with the applicant. Further, it says the second respondent has, at all times, acted properly and in accordance with his obligations as the Solicitor-General and that there is no basis for the imposition of a penalty under the Employment Relations Act 2000. It too resists the applicant's claims for remedies.

[10] The applicant and the first respondent attempted to resolve their problems between them in mediation but were unsuccessful. The second respondent says he did not attend mediation and first became aware of the applicant's claim on 28 November 2008 and *in any event, this is an employment matter between the applicant and the first respondent (as the applicant's former employer).*

**The Authority's procedure**

[11] In this matter, the Authority, by consent of counsel, addressed the applicant's claims against the second respondent in the first instance. After hearing from Ms Grey, Mr Morrison, the Director-General and from Dr Collins, the Solicitor-General, the Authority observed the evidential threshold to establish, on the balance of probabilities, that the Solicitor-General had aided and abetted a breach of the applicant's employment agreement, was particularly demanding. At that point, Dr Collins put his proposal that if the applicant withdrew her claim against him, he would not pursue costs. An adjournment was provided to allow Ms Grey and her counsel to consider this proposition. Upon reconvening, Ms Ritchie withdrew the claim in respect of the Solicitor-General and that withdrawal ended that aspect of these proceedings.

**The relevant factual matrix**

[12] Ms Grey was initially employed by DOC on a part-time basis to enable her to complete her private work. At the time her employment became full time in 2008, Ms Grey had one private matter unresolved on behalf of clients.

[13] In her *private* capacity, the applicant acted for a group of wool growers (Saxmere) in an application for judicial review in the High Court. The respondent at the time was the Wool Board Disestablishment Company Limited. The wool growers were successful in this application. However, the Disestablishment Company successfully appealed in the Court of Appeal.

[14] That, in the usual course of events, would have been the end of this particular matter. Not so. On or about 21 August 2008, Ms Grey lodged an application on behalf of her wool grower clients for special leave to appeal to the Supreme Court. A central plank in seeking leave was that one of the three Judges on the Court of Appeal Bench hearing the appeal from the High Court, ought to have recused himself on the ground of bias. This is because, it was claimed, the Judge in question had business relationships with the senior counsel acting for the Disestablishment Company.

[15] The application for special leave cited the Attorney-General as second respondent. The Attorney-General had not had any previous involvement with the associated matters in the lower Courts.

[16] On Sunday, 24 August 2008, the *Sunday Star Times* published an article detailing the litigation between the wool growers and the Disestablishment Company, a major focus of which was the alleged bias of the Court of Appeal Judge in question.

[17] The following day, the Solicitor-General telephoned Mr Morrison and informed him Ms Grey had filed the application and joined the Attorney-General to those proceedings. Dr Collins told Mr Morrison that, in his view, Ms Grey's role in this litigation was in conflict with her role as solicitor in DOC's employment.

[18] Following this call, Mr Morrison says he took himself to a quiet space and began thinking this information and its possible repercussions through. He says he came, unaided, to the conclusion that if the information was accurate, Ms Grey did have a *conflict of interest*. At this time, the Director-General did not know Ms Grey well and had had no occasion to be concerned about her working in the Department.

[19] On 26 August 2008, Mr Morrison telephoned and left a message for Ms Grey to contact him. She returned his call and, as a result, a later call was arranged to enable Ms Grey to have a support person with her. Ms Rachel Ennor, another Conservancy Solicitor, attended the teleconference with Ms Grey. Joining the Director-General at the Wellington end of the call were his Executive Assistant and the Acting Chief Legal Adviser, Mr Andrew MacPherson.

[20] In the course of the conversation, it is clear that Mr Morrison told the applicant of his serious concern of the conflict between her role as a solicitor in a government department and her acting for private clients bringing litigation against the Attorney-General. He says he told Ms Grey he was concerned that as the litigation was now in the media, she risked criticism and the Department risked seriously adverse publicity. In closing the discussion, Mr Morrison asked Ms Grey how long she needed to consider and respond to the conflict situation and says Ms Grey believed she could get back to him that same day. Ms Grey had indicated to Mr Morrison that she would need to consult her clients as they needed to know where things stood by the Thursday of the same week.

[21] What was not disclosed at the time, and in fact only following the applicant's dismissal, was that the discussion was recorded at the Wellington offices.

[22] Later that day, the applicant emailed her notice of resignation to Mr Morrison stating he had left her with no option other than resignation and that the Director-General was acting on instructions from Dr Collins to resolve the conflict of interest matter. Ms Grey also stated she could not pull out of the Supreme Court application as her duty as a solicitor was to her client.

[23] Mr Morrison emailed Ms Grey after receiving her message and after consulting with the Department's Human Resources Manager. He addressed each issue the applicant had raised, declined to accept her resignation and urged her to reconsider her decision. Owing to a technical systems fault, this email did not reach Ms Grey as it was sent. The respondent says that Ms Grey was aware that the Director-General had declined to accept her resignation and wished to have her reconsider her decision because he had spoken with Ms Ennor and advised her of the key contents of the email prior to it being sent to the applicant.

[24] On 27 August 2008, Mr Morrison resent the email to Ms Grey with a covering email asking her to advise him by 29 August how she intended to resolve the conflict issue.

[25] Later that day, a teleconference was convened. Mr Morrison and Mr MacPherson from head office participated and in Nelson Mr Euan Brownlie and Ms Ennor took part. Ms Ennor expressed her view that there may not be a conflict and also that the Department needed to consider alternative approaches to the difficulties. These alternatives had earlier been emailed to Mr MacPherson and he had forwarded them to Mr Morrison.

[26] After the teleconference, the Director-General telephoned the Solicitor-General to inquire whether Dr Collins was still of the view that a conflict existed. The Solicitor-General confirmed his view, adding that some senior colleagues shared that opinion.

[27] Mr Neil Clifton, Ms Grey's and Ms Ennor's manager, had been overseas and to allow Ms Grey the opportunity to discuss the matter with him prior to responding to the Director-General, the date for her response was extended to 2 September 2008. The Director-General advised Ms Grey by email on 29 August that he was prepared to review his position that there was a conflict if she was able to persuade him otherwise. In doing so, Mr Morrison confirmed the Solicitor-General's view that there was a conflict. Significantly, Mr Morrison told Ms Grey he wanted a result which would allow the Department to retain her valued skills.

[28] Ms Grey and Mr Clifton met on 1 September and Mr Clifton reiterated the high value the Department placed on the applicant's skills and contribution to the local Conservancy. Ms Grey said she took, on a sheet of paper, some considered suggestions as to how the situation could be managed to mutual advantage. Mr Clifton's evidence was that she never gave him that paper although he concedes she may have raised some of the issues on it. Mr Clifton suggested Ms Grey take some leave to give her time to address the matter without day-to-day work pressures.

**Mr Clifton's evidence**

[29] Mr Clifton told the Authority:

*In my conversations with Ms Grey I have never stated or conveyed a view that her role with the Department was somehow separate from her broader obligations as a public servant.*

*From my perspective, Ms Grey understood that her role as a conservancy solicitor went beyond her immediate obligations to the conservancy and the Department, and that she had broader responsibilities to the Crown as a solicitor employed by the Crown and as a public servant.*

*After my return to New Zealand, on 30 August 2008, and after becoming aware of the situation (through telephone calls from the Director-General and another senior manager of the Department), … I formed a clear view that Ms Grey had a conflict of interest. This was because Ms Grey was employed as a solicitor in the public service, and was at the same time acting for a plaintiff in litigation to which the Attorney-General was a respondent. I considered that Ms Grey, a public servant in a managerial position, could not be involved in representing a party privately in litigation against a Minister of the Crown.*

*I have reviewed the statement of problem that Ms Grey filed. … On page 2 of the statement of problem, she states that this interpretation of her role is consistent with understandings developed in discussion with me.*

*Further, I have seen the 14 January 2009 email that Ms Grey sent the Department's solicitors, in which she states that she understood from me that she* "was entitled to do whatever I liked in my own capacity" *and that* "there would be a conflict if the private matter involved conservation issues or matters which I may have to advise on as part of my employment".

*I do not understand how Ms Grey could have developed the narrow interpretation of her role at the Department from discussions with me, or I think her interpretation is incorrect.*

*An employee of the Department must not only avoid conflicts of interest between private interests and his or her work at the Department, but must also avoid conflicts of interest between private interests and his or her wider obligations to the Crown as a public servant.*

*I disagree that I conveyed otherwise to Ms Grey. In particular, I disagree that I led her to understand that there would be no conflict provided she was undertaking work in her own capacity, there were no conservation issues, or there were no issues she had advised on as part of her employment.*

*… The Director-General asked me to try to assist Ms Grey in understanding that he had received clear advice that there was a conflict of interest, and to assist her in understanding why there was a conflict. The Director-General was also clear that there was no issue with Ms Grey's performance as a solicitor of the Department, and that it came down to a narrow issue on this one point. It was agreed that I should have the opportunity to meet with Ms Grey as her manager in order to try and resolve the situation in a manner that would allow her to continue her role in the Department.*

> *I met with Ms Grey at the conservancy on 1 September as arranged. Aspects of Ms Grey's recollection of what occurred at the meeting are different from my own recollection, and the notes that I made at the time … in the sense that she states (in her statement of problem, at page 8) that* " all [I] was at liberty to discuss was why [Ms Grey] would not stand down from the Wool Board case".
>
> *This is not a correct recollection or interpretation of the situation. While I was mindful of the actions that had taken place, and the discussion that had been had up to that point, I was not under instruction to constrain the discussion in any way.*
>
> *I did ask Ms Grey why she considered that she was not able to step down from the Wool Board case. Ms Grey was adamant that this was not an option for her. She stated that this was because she considered that to do so would be to breach her obligations to the wool growers, and also because she considered that no other person could take the case on.*
>
> *Ms Grey then made some brief references to a draft issues paper she had with her and to possible options for resolution. There were three in particular I noted, which were the same as those I had discussed with Ms Ennor earlier, namely:*
>
> *(a) Declare the conflict and have it accepted by the parties, which would enable her to continue in both roles.*
>
> *(b) Take leave until this aspect of the Wool Board litigation had been resolved.*
>
> *(c) Resign and apply later for her job if and when the opportunity arose.*
>
> *I did not comment on the merits of these options, but encouraged Ms Grey to make them available to the Director-General for his consideration in accordance with his request. I understood at the time that Ms Grey intended to do this the next day, as requested by the Director-General.*

Finally, Mr Clifton challenged Ms Grey's evidence on two issues. He denied telling Ms Grey *to stay home on stress leave*, but suggested she take leave. He also rejects the applicant's view that at the meeting Mr Clifton *was very nervous and looked like a broken man*. After backgrounding his experience in senior management roles, he told the Authority *I was not nervous or broken, merely careful*.

[30] On the evening of 2 September, Ms Ennor went to the applicant's home and assisted her compose a paper setting out Ms Grey's views on the conflict issue and a range of options for dealing with it. The Department's evidence is that it never received that paper and therefore was not able to consider it.

[31] On 3 September, Ms Grey emailed Mr MacPherson stating she could not reply that day, also saying she needed a *decent break and space from DOC before* [she would] *be able to reply*. In a letter of 5 September, Mr Morrison expressed his empathy with the difficulties Ms Grey was experiencing. However, he also indicated the importance of getting a resolution in the interests of all concerned. He also extended the period for the applicant's response to 12 September 2008.

[32] 11 September saw Ms Grey email the Director-General a letter which probably shattered any attempts to resolve the key issue between the parties. It appeared to and was accepted by DOC as, the awaited response from Ms Grey. It is a curious document given the forbearance of the Director-General and DOC in waiting for Ms Grey's considered proposals on managing the situation with the prospect of a win-win outcome.

[33] The letter covers two pages and the sections relevant to this matter before the Authority are set out below.

> *Dear Al,*
>
> ***Employment Issues***
>
> *Thank you for your letter of 5 September 2008.*
>
> *I remain very surprised that you and the Solicitor-General think that I have a conflict of interest that can only be resolved by one of the two very stark choices that you offered on Tuesday 26 August and reconfirmed on Friday 29 August.*
>
> *I am still very hurt and I am now also very angry about the way you treated me. I believe I have been an exemplary employee. I have consistently worked at the highest level to achieve excellent outcomes for the Department. My performance review and my relationships with the Nelson/Marlborough team have been outstanding. I had a very clear agreement with Neil Clifton about the terms under which I was prepared to accept employment with DOC. I kept to what was agreed and discussed the significant developments with Neil to ensure that we were operating "on the same page". …*
>
> *I take great pride in my work and strive very hard to do the right thing and to give robust, practical and lawful advice, often when under considerable pressure. Central to that is standing up for what is right and just and maintaining loyalty to friends and colleagues. Your claim that I am effectively a "Crown solicitor" rather than a DOC solicitor puts me in a very uncomfortable position, as I do not condone the recent conduct that I have observed from the Crown. I learned at law school that the Crown was supposed to be the perfect litigant. My recent observations place its performance dismally below this level and well below what the public can rightfully expect.*
>
> *I remain deeply shocked and humiliated by your actions. As my thoughts have begun to refocus I have started researching employment law and reviewing the State Services' website. I am now*

*much better apprised of the obligation of the State as an employer. I find it impossible to reconcile your conduct with my rights as an employee to both procedural and substantive fairness. The process that you followed was truly appalling. You formed a conclusion based on advice from the Solicitor-General without even listening to me. You rang me and expected an instant explanation, which I provided. Your comments which I overheard after our conversation, make it very clear that you were not prepared to change your predetermined view. This was confirmed by your advice that it was the Solicitor-General who perceived I had a conflict and that you felt you had no choice but to take his advice.*

*I have repeatedly asked for a written explanation of exactly why the Solicitor-General thinks that I have a conflict and what legal analysis he has done to support and justify this view. To date you have failed to provide any analysis and I understand from Andrew's comments that you consider it inappropriate to seek a proper explanation from the Solicitor-General. I simply cannot understand the basis for this view. In the absence of a written explanation, I cannot help wondering if there was ever any analysis to support the Solicitor-General's reaction.*

*There are clearly different ways of interpreting the situation. The bald claim that I have a conflict because I am employed by the Crown is simplistic. This very inflexible view is unsupported by the State Services Act, the State Services Code of Conduct, the Law Practitioners' Code of Ethics, the Human Rights Act, the New Zealand Bill of Rights Act, the very clear understanding that I had from my previous discussions with Neil and subsequent advice from senior practitioners. Even if there is any potential conflict, there were many ways it could have been addressed and managed effectively and sensitively if you had been prepared to open your mind to alternatives. I surely deserve much better than the treatment I received.*

*You gave me two choices from a potential array of many. Neither was palatable to me, so I took the awful choice rather than the totally impossible choice. You then effectively refused to accept that choice and told me that I had to do something that was completely contrary to all my legal training, my ethics and the public interest.*

*I have suffered significant distress and humiliation from your heavy-handed and unfair treatment of me. I feel like I have been bullied from the highest levels. Treatment of that type is unacceptable from any employer. However, it is unforgivable coming from such senior representative of the Crown. My stress was seriously compounded by the knowledge that you were apparently acting on instructions from the Solicitor-General, the most senior Crown lawyer in New Zealand. This meant that there was, in practice, nothing I could say to you or to Neil that would make any difference. It was like shadow boxing with an invisible hand.*

*I remain very confused, sad and increasingly angry about the unfair treatment I have received. I am still waiting for a proper analysis of the options and an apology. I am not sure how the damage caused by your conduct and that of the Solicitor-General and the resulting breach of trust and good faith can be rectified. Meanwhile, I am missing my friends, colleagues and my important work at Nelson/ Marlborough Conservancy.*

*I invite your comment.*

*Sue Grey*

[34] Mr Morrison replied the following day.

*Dear Sue,*

***Conflict of Interest Issue***

*Thank you for your letter dated 11 September 2008. For the sake of clarity:*

1. *Your record as a valued lawyer within the Department is not, and has never been, in question. It is not relevant to this issue.*

2. *On the particular case you are involved in, I make no comment. The only relevance of this case is that it has progressed to a point where your role in the case as the lawyer of record taking proceedings against the Attorney-General is, in my view, in conflict with your employment as a lawyer for a Crown Department.*

3. *I have considered your view regarding my supposed reliance on the Solicitor-General's advice. I formed my own view of the matter and have never been under instruction from the Solicitor-General. I nevertheless felt it prudent to seek independent advice on the matter. On the basis of advice I have received, my view remains unchanged that your two roles create a conflict of interest in this particular instance.'*

4. *While it is correct that you had a verbal agreement to pursue private cases while working for the Department that does not, and cannot, release you from the requirement to avoid conflicts of interest.*

*In the absence of further information from you on the matter since my last email to you, I have reached the view that your actions with respect to your involvement in the current Wool Disestablishment Board litigation are inconsistent with your role here as a Departmental solicitor.*

*To date you have not exercised the option that I laid out for you on repeated occasions to resolve this conflict of interest issue. I am aware that this week there has been further activity around the private case which has led to this issue. It is not tenable to allow this issue to remain unresolved.*

*As it stands, you have left that decision with me but I do not have a choice, since I have no right to determine your involvement with private matters. That would leave me with no option but to terminate your employment.*

*Accordingly, my proposed course of action is to terminate your employment as at 5pm on Monday 15 September, taking effect immediately, but with the Department paying you one month's salary in lieu of your contractual period of notice.*

*If you have any comments you wish to make in relation to my proposed course of action then they will need to be with me by 12*

> *noon on Monday so that I can consider them before making my decision.*
>
> *Yours sincerely,*
>
> *Alistair Morrison*
> *Director-General*

[35] The independent advice referred to in para.3 of the Director-General's letter refers to Mr Morrison seeking advice from Mr Bruce Corkill QC.

[36] The Director-General, through Andrew MacPherson, sought advice on two issues:

- Does a solicitor employed by the Department of Conservation (the Department) have a conflict of interest if he/she represents a private client in Court proceedings against the Attorney-General while being employed by the Department at the same time?

- Does the Solicitor-General himself have a conflict of interest in determining that the departmental employee has a conflict of interest?

[37] This latter matter arose from an allegation contained in an email from Ian Ewen-Street, the applicant's husband, on 1 September 2008. The email was sent to Mr Neil Clifton and at numbered paragraph 3 the writer states:

> *David Collins is wrong. He presumably knows the law, but he has decided that he wants there to be a conflict of interest and has decreed it to be so. The law does not agree with him and he has refused to put his legal opinion in writing. Sue does not have a conflict of interest.*

[38] Mr Corkill provided his advice to DOC on 10 September 2008. He advised the Department Ms Grey had a direct conflict. He also advised the Solicitor-General did not have a conflict and further, acted appropriately in informing the Director-General.

[39] Mr Corkill's opinion was not made available immediately to the applicant as it was privileged. However, it was provided to the applicant prior to the matter being investigated by the Authority.

[40] Returning to Mr Morrison's letter of 12 September 2008, Ms Grey, on receiving it, emailed a number of her local work colleagues claiming the Director-

General had terminated her employment and attached Mr Morrison's 12 September letter to the emails.

[41] An email from Rachel Ennor and copied to Mr Neil Clifton was sent to Ms Grey and asked whether she was considering *putting up any other options* for the Director-General's consideration. Ms Grey's reply was she doubted she had anything more to say further to what she had already communicated to Mr Morrison. Ms Grey went on to tell Ms Ennor:

> *It really comes down to what kind of place we want New Zealand to be and whether we value and are prepared to stand up for freedom, democracy and informed discussion over "blind obedience". For me the answer is very obvious. Otherwise we might as well re-live Nazi Germany. I accept that others see it differently.*

[42] This email was copied to Mr Clifton who forwarded it and Ms Ennor's reply on to Mr Morrison.

[43] That same day at 5.23pm, Mr Morrison again wrote to Ms Grey noting he had received no response to his 12 September letter and pointing out her allegation, sent to other Nelson/Marlborough staff, that he had terminated her employment with DOC was factually incorrect. Mr Morrison told Ms Grey that because she was not prepared to withdraw from acting in the wool growers' action against the Attorney-General, he had no option other than to terminate her employment with DOC on one month's notice paid in lieu.

**Approaches for information**

[44] After the termination, Ms Grey sought a range of information from DOC regarding her dismissal. There were also requests made under the Privacy Act 1993 and the Official Information Act 1982.

[45] The applicant is critical of the respondent withholding the Corkill report. Understandably, DOC regarded the report as legally privileged, however, provided Ms Grey with it in the course of preparing for the Authority's investigation.

**The issues**

[46] To resolve this matter, the Authority needs to make findings on the following issues:

- Was Ms Grey's dismissal justifiable *in all the circumstances*; and

- Did the dismissal on the ground of conflict of interest create a *new ground for dismissal*; and

- If the dismissal was unjustified, what remedies are due to Ms Grey, including the primary remedy of reinstatement; and

- Was Ms Grey disadvantaged by the unjustified action or actions of the first respondent; and

- Did Ms Grey contribute to the circumstances which gave rise to the dismissal; and

- If so, how is that contribution to be reflected in adjustment to the remedies?

**The test**

[47] The Employment Relations Act 2000 and amendments sets out at s.103A the test for justification in a case such as this. It requires the Court or the Authority to consider the employer's actions and how it acted in all the circumstances.

> ***103A Test of justification***
> *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering 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 or action occurred.*

**The investigation meeting**

[48] Following the withdrawal of the applicant's claim in respect of the Solicitor-General, the Authority recalled Ms Grey to give her evidence in regard to her claim of unjustified dismissal and disadvantage.

[49] The Authority was assisted in receiving further evidence from Mr Morrison and also from Mr MacPherson and Ms Ennor. Mr Clifton was on leave overseas at the time. His affidavit was lodged with the Authority prior to the investigation meeting and arrangements were made to reconvene the investigation in order to take his evidence formally and to provide Ms Ritchie the opportunity to question him.

[50] The investigation involved copious documents assembled into four bound folders. Folder 1 was an agreed bundle, the other three were documents presented and referred to in support of Ms Grey's claims.

[51] The applicant's statement of evidence was extensive and the Authority ensured Ms Grey had a largely unfettered opportunity to tell her side of the story. It was clear the issue before the Authority was of considerable interest to the local DOC staff and Ms Grey's family and there was an unusually high public attendance at the meeting.

[52] I express my appreciation to all witnesses involved for their openness and patience in working through contentious and, at times, emotionally charged issues. In particular, I record my thanks to Ms Ritchie and Mr Kynaston.

**Analysis and discussion**

[53] The genesis of this employment matter arose with the filing of the application to the Supreme Court and its service on the Attorney-General on Friday, 22 August 2008. The Director-General's attention was drawn to Ms Grey being the solicitor on the record in a telephone call from the Solicitor-General.

[54] The following Tuesday, 26 August, in the course of a teleconference involving the Director-General, Ms Grey and others, Mr Morrison asked Ms Grey to confirm she was the lawyer of record acting for the Saxmere company and others. Ms Grey confirmed this and explained how her involvement came about. The Director-General then asked *am I correct that the Attorney-General has been joined as a defendant in this case in the Supreme Court*? Ms Grey replied, *he has*. The Director-General then asked Ms Grey *Can you explain to me what is going on with that?* Ms Grey did so. She acknowledged the matter was *sensitive*.

[55] From that point, considerable efforts, evidenced by emails and notes of meetings, were made by the parties in an attempt to resolve the difficulties. The details need not delay us at this time.

[56] Mr Kynaston submitted DOC's interests were well down Ms Grey's list of priorities. I do not entirely agree. Until this issue arose, the evidence before the Authority clearly set out the high regard in which the local Conservator, legal team and fellow staff held Ms Grey's work in the Department. I think it fair to say the

applicant, motivated by her loyalty to her private clients and her dedication to what she sees as her obligations as a solicitor of the High Court to ensure justice is done and seen to be done, made her decision in the genuine belief no conflict was involved.

[57] Her position is the individual employment agreement and the Standards of Integrity and Conduct did not expressly preclude her acting in a matter for private clients and further, Mr Clifton had authorised her to complete work already in train for such clients. Ms Grey's evidence was she advised Mr MacPherson and Ms Ennor the application had been filed in the Supreme Court, yet neither can recall being told the Attorney-General had been cited as second respondent.

[58] I am certain, had that salient information been conveyed to either, its implications would have been apparent immediately and in all probability Mr MacPherson would have alerted Mr Morrison before the Director-General was contacted by Dr Collins. I have no doubt they would readily recall such a significant event.

[59] Simply put, Ms Grey took the view the situation could be managed to enable her to retain her DOC role while acting as solicitor on the record in the Supreme Court application. A range of options was prepared by Ms Ennor and Ms Grey and these were discussed by Ms Ennor with Mr MacPherson. Mr Morrison's view was that none avoided the conflict or the perception of conflict, and he continued to provide extensions to the period in which Ms Grey could supply him with viable alternatives. This, despite the high media interest in the Saxmere case.

[60] In the face of the evidence before the Authority from both the Solicitor-General and the Director-General, Ms Grey continued to assert Mr Morrison was under instructions from Dr Collins in how to deal with the issue. Her view is that the comment made by Mr Morrison to Mr MacPherson at the close of the teleconference on 26 August 2008 but before the call was disconnected *she's not getting it mate* indicates predetermination of the outcome and a closed mind on the part of the Director-General. I do not agree with that view because Mr Morrison reassured Ms Grey he was searching for an outcome which would enable DOC to retain her services and further, in an attempt to meet that objective, extend the deadline for Ms Grey's input until 5pm on 12 September 2008. These actions are not indicative of a decision-maker hell bent on being rid of a problem.

[61] Very little turns on Mr Morrison's post-conference comment. The same is true in respect of the Director-General not advising Ms Grey the telephone conference was being recorded. Professional etiquette suggests this was unwise. There is no dispute the transcript is accurate and was eventually provided to Ms Grey. I am of the view however, that once it was disclosed, Ms Grey's mistrust of DOC, and in particular the Director-General's actions, was heightened significantly and clearly coloured her evidence before the Authority.

[62] Counsel for Ms Grey submits the Department has created a new category of dismissal, that is, conflict of interest. It is clear from the evidence of the respondent's witnesses the dismissal was not on the ground of misconduct nor was it due to a redundancy of Ms Grey's position. While maintaining there was in fact no conflict of interest, Ms Ritchie urged the Authority to accept the dismissal as unjustified since no such ground exists in the employment jurisdiction.

[63] I have considered this submission closely and come to the view that conflict of interest is within the orbit of capacity or performance. DOC is a government department (see Conservation Act 1987). The Public Finance Act 1989 s.2(1) defines the Crown:

> *Crown or the Sovereign*
> *(a) Means the sovereign in right in New Zealand;*
> *(b) Includes all the Ministers of the Crown and all Departments.*

[64] Clearly, the Department forms one of the entities or organisations which constitute the Crown.

[65] As is clear from the employment agreement, Ms Grey was employed as a solicitor by one such entity.

[66] An essential requirement of every employee in government departments is the duty of loyalty to both his/her immediate employer and to the Crown of which the Department is an integral part. There is also a duty on such employees to avoid conflicts of interest and also to avoid actions which could give rise to the perception of conflict. The citing of a Minister of the Crown as a respondent in any matter before the Court, let alone in a matter alleging bias on the part of a Judge of the Court of Appeal, must constitute a palpable breach of the duty of loyalty. No matter this *caveat* is not explicitly enshrined in the employment agreement. It is one of the fundamental plinths underpinning the business of government.

[67] Further, the duty is set out in the standards of integrity and conduct, *as a general principle what we do in our personal lives is of no concern to our organisation unless it interferes with our work performance or reflects badly on the integrity or standing of the State services*.

[68] Ms Ennor, in her evidence, summed up the position in which Ms Grey found herself rather succinctly. *How could Sue represent the Crown in one forum and say it was trustworthy, and yet say in another* [forum] *it was not?*

[69] No matter the Attorney-General, as a matter of law, was not a party and thus no conflict could exist. Dr Collins took the view, logically in my opinion, the *parties had to proceed on the basis that the Attorney-General was there in a procedural sense*. Nor does it assist Ms Grey's cause the Attorney-General was later removed as second respondent and applied to the Court for status as an intervener. By that time, the brick had hit the wall and Ms Grey had been dismissed.

[70] In *Aupa'au v. Gillett New Zealand Ltd* (CEC5/97; C5/97, March 1997), Judge Palmer did not uphold the applicant's application for reinstatement in a situation in which Mr Aupa'au worked for the respondent but was also engaged in developing an Amway business for himself and his wife. The company's view was the applicant had an irreconcilable conflict of interest and asked him to choose one or the other. Mr Aupa'au wanted to retain both and was dismissed by the company. Palmer J concluded the plaintiff had a conflict of interest between his two roles.

[71] For the avoidance of any doubt, I am thoroughly satisfied on the evidence before me:

- Dr Collins informed Mr Morrison of what the Solicitor-General saw as a conflict of interest and did not advise Mr Morrison of what steps the Director-General could or should take;

- Mr Morrison took himself off to a quiet space and reflected on the situation. He came to the view a conflict existed and he needed to address that conflict.

- The Director-General arranged for Ms Grey to engage in the teleconference of 26 August 2008 to seek information from her regarding her reasons for her actions and to advise her of his concern.

- Ms Grey suggested she could respond to the Director-General later that same day. She did so, tendering her resignation.

- Mr Morrison declined to accept the resignation and provided more time for Ms Grey to consider her position and reconsider her resignation.

- The Director-General sought advice from Mr MacPherson and independent advice from Mr Corkill QC to determine whether his view was sound.

- Mr Morrison maintained an open mind as to possible outcomes of the apparent impasse while continuing to hold his view a conflict existed.

- Ms Grey was treated courteously and well in that the Director-General did not pressure her unduly, but continued to expect her considered responses and proposals.

- Mr Morrison did not, at the outset nor in the process, require Ms Grey to withdraw from the case in the Supreme Court. From the outset he made it clear the decision was hers as he had no right to determine Ms Grey's involvement in a private case.

- The Director-General, having had no substantial reply or proposed course of action from Ms Grey, except her letter of 11 September 2008, sent his letter of 12 September, still providing an opportunity for Ms Grey to respond.

- Ms Grey did not respond to the Director-General but attached the Director-General's letter to an email advising colleagues she had been dismissed.

- Ms Grey was dismissed only after failing to provide Mr Morrison with an effective resolution to the conflict.

**Applying the test**

[72] Given the above findings, the Authority is satisfied the respondent acted properly in coming to its decision to dismiss Ms Grey. Not only did it provide

considerable time for the applicant to present her alternatives, it also employed significant resources in its attempt to resolve the impasse. I find the respondent acted as a fair and reasonable employer would have done in all the circumstances and acted appropriately throughout.

**Determination**

[73] Returning to the issues set out above in this determination, I find:

- The Director-General was entitled to decide Ms Grey had a conflict of interest; and
- In taking his decision to dismiss, he was not directed by the Solicitor-General as to how the matter was to be addressed; and
- The Director-General appropriately addressed his concerns to Ms Grey and afforded her the opportunity to provide him with proposals to deal with the issue; and
- The Director-General took independent legal advice which confirmed his view; and
- Ms Grey failed to provide any proposal within the extended timeframe; and
- The dismissal, though regrettable, was justified in all the circumstances.
- Ms Grey was not disadvantaged by any of the first respondent's actions.

**Remedies**

[74] Having found Ms Grey's dismissal to be justifiable, the Authority is not required to address the matter of remedies.

**Closing comments**

[75] This is a case in which there is no winner. Counsel may well dispute that view. However, in the wash up, the Department has lost a passionate and skilled advocate for conservation issues. The applicant has lost a career, at least in the

interim, and the primary income on which her children and her husband depend. The whole matter is thoroughly regrettable.

**Costs**

[76] Costs are reserved. Counsel are urged to attempt resolution of this issue between themselves. If that is not able to be achieved, Mr Kynaston has 30 days from the date of issue of this determination to lodge and serve his memorandum. Ms Ritchie has a further 14 days to lodge and serve her memorandum in reply.

Paul Montgomery
Member of the Employment Relations Authority