

## **TASMANIAN INDUSTRIAL COMMISSION**

### **Industrial Relations Act 1974**

S29(1A) application for hearing of an industrial dispute

**Darren Fairbrother**

(T14538 of 2017)

and

**Minister administering the State Service Act 2000/Department of Primary Industries, Parks, Water and Environment.**

DEPUTY PRESIDENT ELLIS

20 March 2018

**Alleged unfair termination of probationary employment- reasonable expectation of ongoing employment- support during probation- whether valid reason for dismissal- procedural fairness- dismissal found to not be unfair- application dismissed**

## **DECISION**

### **Introduction**

**[1]** On 7 July 2017, Darren Fairbrother (the Applicant) applied to the President, pursuant to s29(1A) of the *Industrial Relations Act* 1984 (the IR Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 (Department of Primary Industries, Parks, Water and Environment)) (DPIPWE) (the Respondent), arising from a dispute in relation to termination of the applicant's employment.

**[2]** The Applicant maintains that the termination was unfair and that he was terminated by the Respondent West without proper cause and process, and seeks reinstatement to his role as a Water Ranger with DPIPWE

### **Background**

**[3]** Mr Fairbrother applied for the permanent band 2 Water Ranger Far North West (Wynyard-Woolnorth) position (707640) (water ranger) with the Water Operations Branch of DPIPWE on 10 October 2016. He commenced work on 19 December 2016.

**[4]** The position was seasonal and part time (30% of full time hours of an annual equivalent) and was subject to a six month probationary period. The seasonal program period was October to April and the probationary period extended past this period to 19 June 2017.

**[5]** The Applicant worked approximately 56 days with an average of eight hours per day to complete the seasonal program. His last rostered day was on 27 April 2017 and an additional day of work was undertaken on 4 May 2017 to enable completion of the seasonal work program.

**[6]** Mr Fairbrother attended an induction program which included a number of training days in the field consisting of a total of 14.5 days.

**[7]** A mid-term probation assessment process was commenced on 21 March 2017 with a final report provided to the Applicant on 5 June 2017.

**[8]** Additionally, an Employment Direction No. 5 (ED5) investigation was commenced on 24 April 2017, to determine an alleged breach of the Code of Conduct pursuant to the *State Service Act 2000* (SS Act). The outcome was not considered as a reason for dismissal as this process was continuing after the Applicant's last rostered day of work and the outcome was released after the Applicant's termination.

**[9]** Mr Fairbrother's probationary employment was terminated on 16 June 2017 in accordance with section 44(3)(d) of the SS Act. On 16 June, 2017, Mr John Whittington, Secretary DPIPWE wrote to Mr Fairbrother in the following terms:

"I refer you to your letter of appointment on 19 December 2016 which stated that your permanent appointment to the duties of Water Ranger Far North West (707640) was subject to satisfactory completion of a six month, probationary period.

In making my decision in regard to termination of your probationary employment I have reviewed the relevant documentation including both versions of your Mid Term Probation Report, Final Probation report, your responses to the assessment report and relevant supporting documents including emails, your water ranger report and vehicle records and additional information provided to Ms Fiona Bourne, General Manager, Water and Marine Resources Division.

It is evident that deficiencies were identified during your probationary appointment in regard to your performance, and that directions and specific requests were not followed. I have also reviewed the various training and supportive measures put in place to address these deficiencies, including both formal and informal training and instructions provided by your supervisor.

Although you demonstrated some improvement in select areas, it is evident that there remained gaps in your effectiveness to undertake the duties. On review of all the documentation, I find this to be primarily attributed to your inability to follow clear direction regarding operational matters, despite various training opportunities and supervisory support being offered to you.

Therefore, your appointment to the role of Water Ranger Far North West is untenable, as you have failed to consistently demonstrate your capacity to undertake the inherent requirements of the role."

**[10]** An application for a hearing in respect of an industrial dispute relating to the termination of employment pursuant to s 29(1A) of the *Industrial Relations Act 1984* (IR Act) was lodged by the Applicant on 7 July 2017.

**[11]** A conciliation conference was held in Launceston on 4 August 2017 before President Barclay and the dispute remained unresolved. Directions to the parties were issued on 7 August 2017 and a telephone Directions Hearing was held on 9 November. A summons was served on Mr John Gaby on 19 October 2017. The hearing was held on 13 November and 11 December 2017 in Devonport.

**[12]** Written closing submissions were received by the Commission and the parties on 24 January 2018 from the Applicant and the Respondent provided a response to the Commission on 1 February 2018. A new document was included as an attachment to the Applicant's written closing statement and this document has been weighted accordingly as it was not tendered as part of the hearing.

**[13]** There was no contest that the Applicant made a valid application within the timeframe outlined in s29 (1A) of the IR Act.

### **Statutory framework**

**[14]** The Commission is bound by s30(2) of the IR Act which provides:

In considering an application in respect of termination of employment, the Commission must ensure that fair consideration is accorded to both the employer and the employee concerned and that all of the circumstances of the case are fully taken into account.

To that effect, all material before me was reviewed and considered.

**[15]** S30(3) of the IR Act provides clear criteria with respect to termination of employment and states:

The employment of an employee who has a reasonable expectation of continuing employment must not be terminated unless there is a valid reason for the termination connected with-

- (a) The capacity, performance or conduct of the employee; or
- (b) The operational requirements of the employer's business.

**[16]** Section 30(5) of the IR Act states the onus is on the employer to prove a valid reason for termination. In this context, valid pertains to whether there was a sound, well founded reason for the dismissal. This context should be applied to the relationship between an employer and employee where both parties have rights, responsibilities and duties conferred and imposed on them. A common sense approach must be applied to ensure that the employee and employer are each treated fairly.

**[17]** Additionally, s30(6) of the IR Act states:

"Where an applicant alleges that his or her employment has been unfairly terminated, the onus of proving the termination was unfair rests with the applicant"

### **The Applicant's position**

**[18]** The Applicant alleges he was unfairly dismissed during his probation period on a number of grounds. The Applicant is seeking re-instatement as a remedy, if the termination is found to be without a valid reason and/or unfair.

**[19]** The alleged grounds are as follows:

- inadequate training provided;
- lack of procedural fairness in performance management processes during the probationary period;
- his political beliefs and activity as a Councillor of the Waratah Wynyard Council;
- different standards of work and expectations applied to himself and those to fellow work colleagues;
- communication issues including lack of availability of the RWMO to the Applicant and alleged breach of the State Service Principles.

### **The Respondent's position**

**[20]** The Respondent contends there was a valid reason for dismissal of his probationary employment in accordance with s30(3) of the IR Act based on his unsatisfactory conduct, performance deficiencies and his inability to follow directions. It was submitted that the Applicant was aware of the nature of the probationary period and had no expectation of ongoing employment if he did not meet the requirements outlined in the SOD, he failed to meet the inherent requirements during his probationary period which included failure to measure, monitor and maintain records of stream levels and flows, failure to provide daily reports on activities to the RWMO and failure to follow reasonable direction of the RWMO.<sup>1</sup> Furthermore, there was a "reasonable and appropriate amount of time for Mr Fairbrother to acquire the skills and experience necessary to satisfactorily perform the duties of the role"<sup>2</sup>

**[21]** Furthermore, it was submitted that the employment relationship had "somewhat broken down resulting from Mr Fairbrother's continued failure to follow direction from management."<sup>3</sup> The Respondent submitted that the termination was "fair and reasonable in that it was valid"<sup>4</sup>, there was adequate training and procedural fairness was followed. Furthermore, there was an adequate period of time to improve. Finally, the Respondent sought the application be dismissed and in the alternative, reinstatement was not practicable.

### **The evidence before the Commission**

**[22]** Mr Fairbrother provided various documents with his application<sup>5</sup> which consisted of the termination letter, Mid Probationary Report Draft 1 and 2, Ranger Reports December 2016-April 2017, response to Final Probationary Performance Management Review for Employee, Final Probationary Report, bundle of emails, ED 5 investigation report, accompanying letter and response, Statement of Duties (SOD) Water Ranger and his application for the position.

**[23]** At hearing, the Applicant provided a witness statement including an outline of submissions.

**[24]** Mr Fairbrother gave sworn evidence in which he confirmed his position in relation to the various assertions contained in those documents. Additionally, he summonsed Mr John Gaby, employed as a Regional Water Management Officer (RWMO) based in both

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<sup>1</sup> P66 Transcript

<sup>2</sup> P3 Respondent's outline of submission

<sup>3</sup> P5 *ibid*

<sup>4</sup> P2 *ibid*

<sup>5</sup> Exhibit A1

Launceston and Devonport who provided a witness statement<sup>6</sup> and gave sworn evidence. He stated that he provided the Applicant with some general induction and training and gave evidence on the expectations of the RWMO of the Water Ranger role including; daily updates on their activities, water meter readings to include serial numbers, GPS coordinates and locations and verbal reports on status of water flows and any flow measurements.

[25] The Respondent provided an outline of submissions which included various attachments; the application, letter of appointment, SOD, letter of termination, and bundle of emails including communication regarding the meeting with the General Manager, Performance Management reports for Probationary Appointments, roster, and witness statements for Ms Moran, Mr Price and Ms Bartrum-Terrill. The Respondent also relied on two Tasmanian Industrial Commission decisions, T12569 and T13140. Further documents were tendered during the hearing relating to phone records, the induction checklist and correspondence to the Applicant.

[26] The Respondent provided witness statements and evidence was led from the following:

- Ms Erin Moran, Acting RWMO and direct supervisor of the Applicant who performed the probationary performance assessments;
- Mr Greg Price, Water Ranger for approximately five years and colleague and peer of the Applicant reporting to Ms Moran;
- Ms Charlotte Bartrum-Terrill, Manager (Water Operations) who reviewed the material to make a final independent assessment on the unsatisfactory performance of the Applicant for his probationary period.

[27] In general terms, I found each witness gave their evidence openly and honestly. However, I found the evidence of Mr Fairbrother to be at times conflicted and confused mainly due to not directly answering some of the questions. This was particularly evident during questioning on his daily activity reporting to Ms Moran. This does not mean that I have discounted his evidence entirely but have treated those sections with caution.

### **The probationary period**

[28] The nature of the Applicant's employment was a probation period, which must be successfully completed to satisfy suitability for continuing employment to be offered.

[29] Section 3 of the IR Act defines "probationary employment" as:

**"Probationary or trial period** means a period of employment, for the purposes of determining an employee's suitability for continuing employment, which-

- (a) unless prescribed otherwise in an Act, award or agreement, does not exceed 6 months from the date commencing of employment; and
- (b) is stipulated in writing at the time of engagement; and
- (c) is relevant to the work to be performed; and
- (d) is reasonable and appropriate in the context of acquiring the skills and experience necessary to satisfactorily perform the duties of the job"

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<sup>6</sup> Exhibit A2

**[30]** It is well understood that the probationary period is a period for the employee to be supported to orientate and implement the required skills to meet the SOD and for the employer to assess the progress and final evaluation of the suitability of the employee, which informs the decision on the offer of ongoing employment or otherwise.

**[31]** The Applicant acknowledged he understood and was aware of the nature of the six month probationary period and indicated in sworn evidence that unsatisfactory performance could lead to termination, if his performance "wasn't up to the required standard"<sup>7</sup> These conditions were outlined in his letter of appointment:

"This appointment is subject to a six (6) month probation period. Your permanent appointment will be confirmed after the completion of this period, subject to satisfactory performance assessment outcomes against the Statement of Duties for this position, State Service Principles and Code of Conduct"

**[32]** The Applicant in evidence, said that there could not be an ongoing expectation of ongoing work if his performance was not deemed satisfactory. However, he also submitted that within his mid-term probation report there were references to ongoing work and work for next season which he asserted led him to believe that his employment would be ongoing.

**[33]** The Respondent refers to the decision in matter *T12569 of 2006 David Robert Mounster vs Minister administering the State Service Act 2000*, where the Applicant had asserted he held the relevant qualifications and experience, highlighting his expertise in his application, and with positive references received, which led the Commissioner to find:

"It follows the Department would have reasonably expected the applicant to be capable of performing the role after six months of training and mentoring."<sup>8</sup>

The Respondent submitted that given the extensive experience and qualification of Mr Fairbrother outlined in his application, there was an expectation by DPIPWE that he would be in a strong position to meet the inherent requirements of the role at the end of his probation period.

**[34]** The Applicant had obtained the requisite qualifications and experience to undertake the role, holding an Advanced Diploma of Health Services (Environmental Health) and a broad range of employment history. His application showed his extensive understanding of compliance with the relevant Acts, experience in water management in the rural industry and the Respondent noted in submissions that both Referees "provided a positive response indicating that Mr Fairbrother would be appropriately skilled to perform the role."<sup>9</sup>

**[35]** However, the Applicant submitted in his evidence that he had highlighted his lack of knowledge with V notch measuring systems in his application. He conceded that he received V notch training<sup>10</sup> with Mr Price but his evidence was he "didn't get the advantage of getting the training"<sup>11</sup> from Ms Moran, an experienced Water Ranger.

**[36]** The Respondent submitted that performance expectations and the subsequent support were dependent on the skills of the employee as identified in the recruitment

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<sup>7</sup> P28 Transcript

<sup>8</sup> Commissioner McAlpine at para 59

<sup>9</sup> Para 14 Respondent's Outline of Submissions

<sup>10</sup> V notch is a device used to measure water flow in rivers

<sup>11</sup> P24 Transcript

process. Their position was that the probationary period training "provided a reasonable and appropriate amount of time"<sup>12</sup> for the Applicant to demonstrate his capacity in the role.

**[37]** The scope of the role to be performed was articulated in the SOD tendered by the Applicant<sup>13</sup>, where he noted that the "primary role was outlined in the Statement of Duties."<sup>14</sup> He stated he understood the duties as outlined in the SOD. However, in cross examination Mr Fairbrother appeared uncertain that the duties arose from the SOD, when he was asked:<sup>15</sup>

"So are you saying that you undertook those duties, the duties in accordance with the statement of duties, from the period you started through to 21 March? Were you doing-undertaking your core duties during that time?..."

"I was under direction of Erin Moran, who was my direct report. Because I was a new employee, I relied on her direction, explicit direction, to – I did essentially what Erin told me to."

In his written submission Mr Fairbrother clearly outlined the expectation of the duties arising from the SOD, however, under cross examination, he was less certain.

### **Findings of the nature of probationary employment**

**[38]** I am satisfied the Applicant was aware of the nature of his probationary employment which met the criteria outlined in the definition of probationary or trial period in the IR Act. Furthermore, I am satisfied he was aware he had to meet the requirements of the role to a satisfactory standard to be offered ongoing employment.

**[39]** Having submitted that his primary role and duties were outlined in the SOD, I am satisfied he understood the expectations of the role.

### **Valid reason**

**[40]** The Respondent submitted that the valid reason for termination was a result of unsatisfactory conduct, performance deficiencies of the Applicant and his inability to follow directions. While there was evidence around a range of performance and conduct issues identified during these proceedings, for example, collection of SMS numbers and tyre replacement, I have mainly considered performance of the two major duties of the role. I do not intend to comment further on the other issues outlined in the final report as they do not add to the decision, however, in determining the outcome, those matters have been duly considered.

### **Was there a performance deficit in the provision of daily activity reports?**

**[41]** The Applicant submitted that there were issues with communication and attempts to regularly contact his direct line manager, Ms Moran. In cross examination, he conceded he was required to provide daily reports on his activities, including water flows, his whereabouts, any observations and water meters, as outlined in his SOD. He stated that "all of that information was on my iPad."<sup>16</sup>

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<sup>12</sup> Ibid P3 Para 1

<sup>13</sup> Exhibit A1

<sup>14</sup> Exhibit A2

<sup>15</sup> P31 Transcript

<sup>16</sup> P31 Transcript

**[42]** His evidence at the hearing included statements that he took notes from the commencement of his employment until 21 March 2017, followed Mr Price's record keeping, kept a daily diary and kept Ms Moran abreast of issues. In cross examination, he stated that he kept contemporaneous notes and compiled them in a notebook and transferred the notes into his diary and from the diary, made the ranger reports. His diary or notepad were not provided to Ms Moran as he claimed they were never requested. He stated "so I didn't do it daily"<sup>17</sup> rather explaining that he would write up the diary when he was back in the office.

**[43]** Furthermore, Mr Fairbrother stated that the "requirement to provide daily ranger reports was only requested mid-season."<sup>18</sup>

**[44]** In closing submissions, the Applicant submitted that Ms Moran contradicted herself in her mid-term probation meeting notes dated 21 March 2017:<sup>19</sup> "at the second dot point Ms Moran states Greg also writes good notes in his diary and transcribes them at the end of the season in Ranger reports".<sup>20</sup> He further adds this is an example of her being "caught out presenting information incorrectly and untruthfully"<sup>21</sup>.

**[45]** The full note referred to above states:

- "...with restrictions on I need him to be my eyes and ears on ground so I can make decisions about restrictions. I'm not getting any flow estimates from him at the moment. This is problematic as I don't know the state of the river. I also explained that Greg's region had very good water flow and no restrictions are in place.
- I asked for Darren to put some ranger reports on the shared drive to which he said he hasn't done any ranger reports and he wouldn't do them till Greg does. I explained that Greg reports verbally to me every day which is in line with the SoD whereas Darren does not. Greg also writes good notes in his diary and transcribes them at the end of the season into ranger reports. This is what Sam's arrangement was with Greg. I personally would prefer fortnightly reports uploaded to the shared drive but I show respect for Sam's method.
- I advised that Darren can do the same if he wants to finish work before 5 pm and verbally advise me of the river flows. Darren did not think this was a valid option as he likes to work long days to maximise his time in the field. He was not satisfied with my answer."

**[46]** Mr Fairbrother submitted in his written closing submission that the above demonstrated that the "notes confirm that the recording of information in diaries was the practice in the Wynyard Office from when I started to the 21 March 2017"<sup>22</sup>

**[47]** Ms Moran's evidence was that she had not received a copy of his diary and she had asked for the information, "anything, I would've accepted this information in any form and he has refused to provide that."<sup>23</sup>

**[48]** The Respondent submitted that Mr Fairbrother did not attempt to contact Ms Moran daily, which was a critical part of the Water Ranger role. Ms Moran stated that "Mr

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<sup>17</sup> P29 Transcript

<sup>18</sup> P3 Para 1 Applicant's outline of submission

<sup>19</sup> Exhibit A1, Attachment 11

<sup>20</sup> Ibid

<sup>21</sup> Ibid

<sup>22</sup> P3 Applicant Closing submission

<sup>23</sup> P117 Transcript



Fairbrother failed to provide me with daily reports either verbally, in person or by email."<sup>24</sup> The first report supplied was in late March after his mid-term review and email requests from Ms Moran. In an email from Ms Moran to Mr Fairbrother dated 17 March 2017, she requested that he save the data on the Devonport shared drive as directed and noted, "I'm not receiving vital information from you and it's proving problematic".<sup>25</sup>

**[49]** In cross examination about the lack of reporting, the Applicant stated he provided verbal feedback, and noted in email responses to the above request, his iPad was not working correctly, he had constructed a location to populate "to better improve communication on my field visits" on the shared drive, and that he proposed to email anything of high level importance.

**[50]** The email from Ms Moran, dated 20 March 2017 noted there was only one file note and some pictures accessible but all the rest of the files were empty and she again requested his ranger reports and meter records and reporting. Following her first access to the ranger reports on 4 April, Ms Moran noted she wanted to seek some clarity on a few issues.

**[51]** The issue of daily contact was examined fully and the Applicant was unable to confirm exact details on contacting Ms Moran, saying, "so I can't categorically say that I contacted her daily" but stated that there were some days when she was sick but he understood the safety requirements to make contact. In this case he submitted that he would "ensure that Mr Price would know I was okay" He added that he made attempts to "contact Ms Moran but Ms Moran has a habit of not picking up her phone for whatever reason."<sup>26</sup>

**[52]** In cross examination, the Applicant acknowledged he did not attempt to contact Ms Moran via email and that it was easier to send emails from the work computer rather than his iPad. Phone records tendered by the Respondent indicate there were only three missed calls which were not responded to, during his employment period and the Applicant disputed this document<sup>27</sup> and believed the presentation of records had "been construed and generated by Ms Moran and selectively provided to support her false claims."<sup>28</sup> The Applicant did not provide evidence of any supporting documentation to verify his claims.

**[53]** In cross examination, the Applicant stated that he advised Ms Moran of his daily activities "verbally, by phone, calendar and that's it"

**[54]** Ms Moran, in cross examination, indicated that the absence of information was problematic and that the Applicant was not providing daily reports of what was going on in the field which was "90 per cent of the job"<sup>29</sup> and she had identified that in his ranger reports that he was doing different tasks to those he had been assigned and those assigned had not been completed by the end of the employment period. She also provided evidence that the Applicant would do a check in for safety purposes only "but actually reporting the work that he has done was certainly not daily."<sup>30</sup>

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<sup>24</sup> P14 Moran witness statement

<sup>25</sup> Exhibit R15, Attach 6

<sup>26</sup> P38 Transcript

<sup>27</sup> Exhibit R13

<sup>28</sup> P2 Applicant's written closing submission

<sup>29</sup> P152 Transcript

<sup>30</sup> P111 Transcript

**[55]** Ms Moran's evidence stated she had asked for ranger reports and information on stream flow "probably four or five times"<sup>31</sup> prior to receiving any reports which was three months into his employment.

**[56]** Mr Gaby, in cross examination, confirmed he expected his Water Rangers to provide daily reports including where they had been, what they had seen, meter readings, flows and water usage in streams, to assist his understanding and facilitating decision making on restrictions.

**[57]** Mr Price gave evidence that it was "extremely important" to keep the regional manager informed and that water rangers were the "eyes and ears" and reporting daily was "a crucial part of the job role"<sup>32</sup>

**[58]** Mr Price's evidence was that he had a discussion with the Regional Manager "every day" about the daily findings and if it was a safety issue, he would "definitely ring at night" or contact someone further up the chain in Launceston, if required. He reiterated daily contact was a requirement and confirmed he provided monthly written reports to Ms Moran in addition to daily verbal reports on activities. He also provided Ms Moran with his daily diary notes upon request. In cross examination, Ms Moran confirmed that Mr Price came back to the office around 4 o'clock and showed her photos and discussed what he found in the field "and that was not happening with you," referring to the Applicant.

**[59]** In closing submissions, the Respondent stated that Mr Fairbrother's supervisor had sought "written ranger reports from him and he was not providing them. Again, Mr Fairbrother is trying to discredit others, rather than being accountable for his actions."<sup>33</sup>

## **Findings**

**[60]** The major duties outlined in the SOD include daily reporting:

"Provide daily reports on activities to the Regional Water Management Officer and assist with implementation of other Divisional and Branch Programs and projects."<sup>34</sup>

**[61]** I am satisfied that he was aware of the need to contact his supervisor, or colleague to report back on safety grounds as part of work health and safety requirements and attempt to report in, but for a range of reasons he did not provide daily verbal activity reports during his employment or ranger reports for the first half of his employment period. This was problematic for his supervisor for her performance in her role in considering water restrictions.

**[62]** I am satisfied there is sufficient evidence to establish that Mr Fairbrother did not provide activity reports to Ms Moran, his supervisor, on a daily basis despite numerous verbal and emailed requests.

**[63]** I find that the Applicant did not follow directions nor did he comply with the major duty outlined in the SOD. This was raised as a performance issue as part of his probationary reports and in numerous emails.

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<sup>31</sup> P112 Transcript

<sup>32</sup> P79 Transcript

<sup>33</sup> P2 Respondent Closing submission

<sup>34</sup> Exhibit R9

### **Was water monitoring undertaken to meet required standards?**

**[64]** One of the activities required for reporting is the assessment and measurement of water and stream levels and flows.

**[65]** Mr Fairbrother's evidence was that "stream flow assessment is a very subjective thing"<sup>35</sup> and further "the department does not have an acceptable standard to what stream flows should be monitored to"<sup>36</sup> and that Ms Moran did not accompany him to the field to make that assessment nor stated what that standard was. He stated further that "clearly we have restriction requirements, minimum environmental flows. We have a list of minimum flow requirements."<sup>37</sup>

**[66]** The evidence of Mr Fairbrother was that he:

"...treated the water meter data collection as a particular project, I was given explicit direction by Ms Moran to-to undertake, to go out into the wider community and find out how many water meters were out there."<sup>38</sup>

**[67]** He further added that he had collected the GPS location of all of the water meters and put the information on the shared drive,

"...they should have been where the photos were stored, but I scoured them and I couldn't find any coordinates. So someone had deleted them, I don't know, but the coordinates should have been with the photos."<sup>39</sup>

**[68]** Mr Fairbrother stated he used a V notch measuring system and "it's fairly basic-basic information" He also stated "I was never instructed by Ms Moran to go out and measure stream flows. It does say in my statement of duties that is one of the requirements."<sup>40</sup>

**[69]** Mr Fairbrother in evidence said that there was not sufficient information in the meter reading guides and other tools and resources provided, however clarified that the issue was the lack of "records that they could give me to go and read meters."<sup>41</sup>

**[70]** Ms Moran provided evidence that she had explained the standard of information required for adequate streamflow and that "he has accompanied Fiona Woodward and other RWMO and I in the field where we discussed flow monitoring, and he has also gone out in the field with Greg Price as well."<sup>42</sup>

**[71]** Ms Moran in cross examination noted that there was an early:

"...priority of setting your area up for the season, collecting the beginning of season water meters, finding out where they are so that you can do end of season water meter readings"<sup>43</sup>

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<sup>35</sup> P24 Transcript

<sup>36</sup> Ibid

<sup>37</sup> Ibid

<sup>38</sup> Ibid p27

<sup>39</sup> Ibid p45

<sup>40</sup> Ibid p51

<sup>41</sup> Ibid p54

<sup>42</sup> P118 Transcript

<sup>43</sup> Ibid p156

An email dated 5 January 2017, attached

"...this year's meter reading spreadsheet" and a "link to where I keep the metering spreadsheets". She acknowledged a new tab for his region as there have been none recorded previously and requested he "photograph and GPS any new meters" to make it easier to locate in future.<sup>44</sup>

**[72]** Ms Moran provided evidence that most of the photos that Mr Fairbrother had taken did not have GPS coordinates attached and she could not "piece together which photos and which GPS coordinates go together."<sup>45</sup>

She explained this was important as water monitoring:

"...is very critical to ensure that the –there was an equitable allocation of water to farmers and the environment as well. We need to know this information so that we can appropriately put water restrictions on and to ensure people are actually abiding by what is put on their water licences."<sup>46</sup>

**[73]** Ms Moran stated in her witness statement that "Mr Fairbrother failed to provide adequate reporting of streamflows" and that the photos "do not meet the requirements of the Water Ranger role". Additionally, he "failed to provide a satisfactory water meter reading for his region the Arthur-Pieman for the duration of his employment as Water Ranger."<sup>47</sup>

**[74]** Ms Moran also gave evidence that as part of the ranger reports which he submitted at the end of the season, "there were no real usable measurements of flow"<sup>48</sup> Additionally, she commented in the Final Probation Report that "some patchy streamflow observations were verbally told to the RWMO however none has been recorded. This raw information supplied and was not converted into flow measures."

**[75]** Mr Price's evidence provided what was required for stream flow observation including the insertion of V notches upstream to potential non-compliant farmers, to enable the flow to be measured, and noted that using a V notch was "not really rocket science"<sup>49</sup> and that it was the only method he has used and that he transferred that method to Mr Fairbrother.

**[76]** In evidence, Mr Gaby expected his Water Rangers to provide full details including serial numbers, water meter readings and location and GPS coordinates for any new meters and a verbal report detailing low measurements and flow status.

**[77]** Mr Gaby's evidence was that the water gauges would be monitored "once or twice a week"<sup>50</sup> by water rangers and he confirmed that he provided Mr Fairbrother with training in V notch weirs at two different sites, discussed the spreadsheet which showed the rates and noted "I might have said at that level, 15 meters a second, is a first restriction put on, or point eight-eight...today is the full restriction"<sup>51</sup> He also said that the procedures for monitoring streams are in the restriction protocols. And in cross

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<sup>44</sup> Exhibit R15, Attachment 1

<sup>45</sup> P117 Transcript

<sup>46</sup> Ibid p118

<sup>47</sup> P3 Exhibit R15

<sup>48</sup> P116 Transcript

<sup>49</sup> Ibid p93

<sup>50</sup> Ibid p63

<sup>51</sup> Ibid p63

examination he confirmed that the practical guide to water meter reading would provide a new water ranger with a satisfactory level of guidance on how to read a water meter.

**[78]** Ms Bartrum-Terrill, in cross examination, noted that a ranger has normally around 1700 points or 'off takes' to capture over the irrigation season and that Mr Fairbrother had around 1300 she went on to explain:

"...the balance of water resources between environment irrigators is critical over the summer season and we double our team size as a result of that"<sup>52</sup> She said that the photographs provided by Mr Fairbrother were "completely different to what she had asked for and was not useful at all in being able to calculate water usage or determine if people were over using or over taking water usage and the properties they relate to."<sup>53</sup>

## **Findings**

**[79]** Water monitoring is a major duty outlined in the SOD:

"Measure, monitor and maintain records of stream levels and flows to determine compliance with regulatory requirements and to meet water restriction protocols."<sup>54</sup>

There is consistent witness evidence of the importance of water monitoring and reporting as a major duty for the role of the Water Ranger. I am satisfied that Mr Fairbrother received appropriate training and resources to undertake water monitoring and reporting. However, I accept the task was made more difficult as there were no records of water meter locations in his area, but the onus was on Mr Fairbrother at this point to ask for further guidance or accept offers for further training.

**[80]** He was directed in January 2017 by Ms Moran to find the water meters and record the location on the spreadsheet, photograph and record the GPS of each meter. This was not completed.

**[81]** I am satisfied that although Mr Fairbrother encountered challenges, he did not meet the requisite standard to fulfil the duty outlined in the SOD and did not follow directions to complete the report on water meter locations, including GPS and photographs or to provide daily stream observations.

**[82]** Accordingly, I find that the Respondent had a valid reason for termination of the probationary employment based on unsatisfactory conduct, performance deficiencies and his inability to follow directions.

**[83]** I now turn to the consideration whether the dismissal was unfair.

## **Was he provided with adequate training during the probation period?**

**[84]** The Applicant submitted he was provided with induction and training consisting of "six or more" days in the field and worked for 51 days and his Ranger Report indicated his orientation continued until 30 January 2017.

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<sup>52</sup> Ibid p176

<sup>53</sup> Ibid p177

<sup>54</sup> Exhibit R9

**[85]** However, the Applicant stated in cross examination:

"So did you resist any offers for further training?...

"No offers for further training was offered. No-no offers for further training was ever offered."<sup>55</sup>

"Darren has been offered further field training with Greg Price."

"That is contested. There was no offer and there was nothing refused.  
Yes?..  
On multiple occasions-

"Not true. Greg will confirm that."

"However Darren was keen to work alone."

"I wasn't keen to work alone."

**[86]** The Applicant's evidence was that he did not have sufficient training:

"But essentially the training claim, there was no training offered that I refused."<sup>56</sup>

In cross examination he conceded he could have had further training with Ms Moran but;

"I think there was a missed opportunity there, in hindsight, but I didn't- I didn't articulate that, verbally to Erin but I think that there was a missed opportunity."<sup>57</sup>

**[87]** Mr Greg Price provided evidence which indicated he had provided three days of field work training with the Applicant and further responded to questioning:<sup>58</sup>

"And did you ever offer to taken Mr Fairbrother on the field with you at any other stage?...

"Yes. I did-I did ask him- we were both in the office and I had a little tricky -like workplace health and safety one where I had to go to Henrietta and really slog my way through a lot of electric fences and over paddocks and- to read three meters and I asked him if he would like to come along and he was- he declined because he said he had a report to do, I think, from memory. Yes...."

Did Mr Fairbrother ever ask you for assistance in how to perform his water ranger role?—Not that I can recall. No."

**[88]** Furthermore, Ms Moran in evidence confirmed that further training was offered but not accepted as evidenced but rather poorly transcribed:

"In your witness statement, you indicate that Mr Fairbrother did not take up opportunities to work on the field with Mr Price?...Yes."

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<sup>55</sup> P46 Transcript

<sup>56</sup> P13 Transcript

<sup>57</sup> P38 Transcript

<sup>58</sup> P85-86 Transcript

"So it's noted in attachment 11 on your witness statement in your mid-term probation discovery notes - - -?---Mmm.  
- - - you suggested to Mr Fairbrother that he would gain further experience with Mr Price?"

...Yes.

"Did you offer this field .....on other occasions?"

"...Yes, I did on other occasions. He indicated that he would learn and think from Mr Price, and he said that it would be inefficient to have two rangers together, and he said that he was proficient in his fieldwork and that it was rather basic."

**[89]** The Respondent submitted the induction was 14.5 days of the 56 days of employment<sup>59</sup>.

**[90]** Ms Bartrum-Terrill's evidence was that the best way to train a new water ranger was through a variety of components being standard introduction to DPIPWE, the overall requirements of the role, on line modules for occupational health and safety and three days of field training which would take "10 days all up."<sup>60</sup>

**[91]** She confirmed that Mr Fairbrother had received all the components of training;

"What level of training did Mr Fairbrother receive?"

"A combination of all those. Mr Fairbrother, through his own ranger report, received fourteen and a half days of training. That includes familiarisation with operation manuals, I field training with a number of different people, RWMO's, which is the role that Mr Fairbrother would report to, other rangers within the area—some of our experts, as well as---understanding of how to read water meters and take water and information that was required to be captured or within the filed."<sup>61</sup>

**[92]** In cross examination, Ms Bartrum-Terrill stated that she had investigated the training provided from Mr Fairbrother's records and water ranger reports. A summarised list was included in her witness statement and she said the twelve and half days training in addition to two days reading training manuals "should have provided you with sufficient enough information and training in order to perform that role effectively."<sup>62</sup>

**[93]** The midterm and final assessment and directions provided verbally and through emails, ensured Mr Fairbrother was aware of his performance deficits and he was given opportunities to respond. His performance improved after the mid-term assessment meeting but it did not meet the inherent requirements outlined in the SOD.

### **Consideration of training**

**[94]** Training in a probationary period is the responsibility of both the employer and employee. Although the Applicant did not agree with some of the assessment, it is beholden on the probationary employee to undertake professional development during this probationary period to ensure they meet the acceptable standards of the role as outlined in the SOD. It is equally the duty of the employer to provide such training.

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<sup>59</sup> Exhibit R16

<sup>60</sup> P162 Transcript

<sup>61</sup> Ibid P162

<sup>62</sup> P170 Transcript

[95] In *T13140 of 2008 Wynde Mason vs Minister Administering the State Service Act 2000*, Commissioner McAlpine made the following observation<sup>63</sup>:

"For any form of training or coaching to be put in place and be effective, the recipient of such attention must actually accept the need for support.....However without the applicant acknowledging the need for support there were limited options open to the agency."

[96] Mr Fairbrother's evidence was that his employment was affected by his Councillor status and his working relationship and lack of trust in his supervisor, Ms Moran.

[97] I am satisfied that the evidence provided by Mr Price, Ms Moran and the Applicant was that the Applicant did not seek out or accept such opportunities for additional training.

[98] I find that the evidence of his training, included induction, access to resources and on the field initial training in addition to his previous experience and qualifications were adequate to enable him to complete the duties to a satisfactory level for during the probationary period.

**Was procedural fairness afforded during the probationary performance assessment process?**

[99] The first Mid Term probationary performance assessment meeting was held on 21 March 2017<sup>64</sup> and was three and a half hours in length.

[100] The Applicant submitted that a copy of that report, dated 19 March 2017, was provided five weeks later with the instruction to sign, scan and email back to his direct report. The Applicant's position is "that she has taken liberty of her position to embellish the report with her personal view" and the report did not include the issues raised by the Applicant of problems encountered during the course of his employment, including lack of availability and trust, poor communication and inaccurate assumptions by Ms Moran.

[101] Furthermore, the Applicant submitted that the original document did not contain a recommendation either way on his performance and contained information which was not discussed at the review. He also noted that an expectation of ongoing employment was created in the original draft report when it referred to next season with "emphasis on more stream monitoring and reporting for next season" and the comment in the report supported this, it "has been a good season for water operations further focus on stream monitoring for next season."<sup>65</sup>

[102] This original report included an asterix comment in the recommendation section "\*As advised by Peter Stafford (Act Branch Manager) a separate Code of Conduct investigation to take place in due course" and this report was dated 27/4/2017 and signed by Ms Moran.

[103] The Applicant submitted that he should have been provided with a Performance Improvement Plan (PIP) at his midterm probation review. He submitted that he did not have access to a fair process in line with not having opportunity to have input into the

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<sup>63</sup>At Para 19

<sup>64</sup> Exhibit A2

<sup>65</sup> Ibid



end document which did not reflect the discussion held. He stated that he was portrayed in a fair light in the mid-term review, but received limited positive feedback from his supervisor and was unclear of his performance expectations as he submitted nothing met with Ms Moran's expectations. Ms Moran provided evidence that there was a draft PIP but it was not implemented due to the ED5 Code of Conduct investigation commencement but her superiors were aware of the performance deficiencies.

**[104]** The Respondent submitted that Ms Moran's notes from the original mid-term review, indicate the Applicant was informed of his performance and conduct deficiencies and was provided with expectations and additional support. Ms Moran also noted to "summarise Darren had a very large part in writing his first mid-term probation report".<sup>66</sup> It was noted that his performance did improve but not to a satisfactory standard.

**[105]** Ms Moran's notes state that during this meeting Ms Moran offered to reschedule the meeting to enable an employee from people and culture to be present but that Mr Fairbrother "changed his mind about that option"<sup>67</sup> and the meeting progressed. It was noted that Mr Fairbrother expressed concerns about undertaking the probation report because he was being treated differently to Mr Greg Price and she "didn't give him enough space to make his own mistakes"<sup>68</sup> Ms Moran notes that she advised Mr Fairbrother he could take any grievance regarding unfair treatment higher and or stop the assessment process, but he declined to do so.

**[106]** Under cross examination, Ms Moran clarified that HR and senior management provided differing views on completing the recommendation section and therefore she did not tick either box.

"So the original report that you provided to me, why was it –why was it so at 2.1 that you failed to tick the box 2.1 on the original report that says,"2.1 Mid-probation report, supervisor's recommendation". You had signed it, but you had not ticked the box for the recommendation?"

"I was told that I could not tick "satisfactory" and that I had to make that notation to say "as advised by Peter" – no, hang on. Yes, as – that a separate code of conduct investigation was to take place...So I did not tick either box, because I was not sure if I was actually allowed to make that decision or not, because I was being told different information from different branch managers."

"Is it normal for water rangers to have this much interest in their performance; that you have three high level managers?"

"It is not normal for a water ranger under probation to break a code of conduct..."<sup>69</sup>

**[107]** However the second document titled Performance Management Probationary Appointments was also dated 19 March 2017<sup>70</sup> and included in the Mid Probation Report-Supervisor's Recommendation section a tick next to "Work performance or behaviours are not satisfactory" (see attached Performance Improvement Plan where there was an added notation "Delayed until next season \*As advised by Peter Stafford (Act Branch Manager) A separate Code of Conduct investigation is to take place in due course" This was signed by Erin Moran on 27 April 2017, which was the Applicant's last rostered day.

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<sup>66</sup> Exhibit R15, Attachment 11

<sup>67</sup> Exhibit R15

<sup>68</sup> Ibid

<sup>69</sup> P150 Transcript

<sup>70</sup> Exhibit A1

There was also a comment included under Employee's comments and signature section, dated 4/5/17, "Employee stated he disagrees with the report and if it was not changed then he was not willing to sign it. This was witnessed by Peter Stafford A/BM on speaker phone". This occurred during a meeting with Ms Moran on 4 May 2017, attended by Mr Peter Stafford on the phone, to discuss the Mid Term report but the Applicant left without signing as he was concerned that the manager was not willing to change anything in the report.

**[108]** The latter report included the recommendation box signature but did not include further documentation on the Applicant's performance. Mr Fairbrother submitted at no time was he advised he could sign the box that he disagreed with the review and was able to provide reasons in that section.

**[109]** The Respondent submitted at the time of the first draft of the mid-probation report and meeting, Ms Moran had not received any notes or reports from the Applicant, and in further reports the newly identified deficits were included and taken into account. Ms Moran stated she assumed the work had been done. Performance deficits were then clearly revealed to Ms Moran on receipt of the reports.

**[110]** The Respondent stated that the Applicant was provided with an opportunity to respond to the report of the 27 April 2017 and an updated report was provided to him on 24 May 2017 and he was provided with a further opportunity to respond to this report by 31 May 2017.

**[111]** The final Probation report was provided to the Applicant on 5 June 2017, noting his previous response had been considered when drafting the final report by Mr Peter Stafford and the report was supported by Ms Charlotte Bartrum-Terrill. He was invited to provide a response by 9 June 2017, which occurred and he was offered access to the Employment Assistance Program. The covering email also noted that following assessment of his final response, a recommendation regarding confirmation of his employment would be made to the General Manager.

**[112]** The Applicant submitted that most of the content contained in the final report had not been discussed with him at a face to face meeting and believed that there was an alleged breach of State Service Principles due to the alleged lack of honesty by his manager.

**[113]** Ms Moran's evidence included an attachment which was uncontested, consisting of a six page document containing notes taken at the mid-term assessment meeting, titled Darren Fairbrother mid-term probation, 21 March 2017. These notes contain comprehensive documentation of performance issues discussed, areas of improvement and provided him with examples of required standards.

"I again said that daily reports aren't happening at present and they need to..... so I suggested he does two long days in the field then make the 3<sup>rd</sup> day of the week a short day in the office to write ranger reports and discuss issues with me.....Darren agreed to this (but it didn't happen)  
Again I showed Darren examples of my ranger reports and how they had flow figures of streams from the beginning to end. I explained that my ranger reports were stored on the shared drive and were uploaded onto doc one."<sup>71</sup>

**[114]** The Applicant requested an opportunity to have a face to face meeting with the Secretary or the General Manager before they made their decision and Ms Fiona Bourne,

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<sup>71</sup> Exhibit R15 Attachment 11

General Manager agreed to hold a teleconference with the Applicant, in which eighteen summarised issues were raised as outlined in the email dated 15 June 2017 from Ms Lisa Bessell, HR to the Applicant. Following this meeting the Applicant provided an amended lengthy response to the General Manager and made a formal complaint against Ms Moran.

### **Consideration and findings on procedural fairness**

**[115]** The performance review during the probationary period included the correct forms albeit timeliness was an issue. However, further clarity on the exact performance deficits and expectations would have been more appropriately documented and provided with a PIP. It is unclear why the Code of Conduct investigation effectively denied the implementation of the draft PIP, which was not discussed with the Applicant. I also note the mid-term review form requires a PIP where work performance or behaviours are not satisfactory.

**[116]** The question then arises did this procedural deficiency make any difference to the fairness of the outcome. I am satisfied while the implementation of the PIP may have assisted the Applicant to improve his performance during the probationary period, the mid-term meeting and outcome, follow up emails and offers of support, outlined the expectations, provided direction and opportunity to develop the requisite skills for the role in the probationary period.

**[117]** There appears to be other procedural issues which may have impacted on the provision and uptake of support due to the apparent break down in trust and communication which impacted on free discussions. The evidence of Mr Price demonstrated that he had a productive relationship with his supervisor, Ms Moran, which facilitated daily verbal activity reporting and performance, but the Applicant did not enjoy such a relationship.

**[118]** Despite the Applicant alleging the lack of perceived procedural fairness, which was mainly due to the difference of documented performance arising from the discussions and the reports. The reports were signed and approved by his manager and senior management, although not agreed by the Applicant.

**[119]** The Applicant refused to sign the reports and provided lengthy verbal and written responses which were considered. The Applicant was offered access to support through HR representatives and the EAP program.

**[120]** The Code of Conduct investigation process concluded post the termination of employment of the Applicant and the outcome was not a reason for termination. However, this process was linked to the mid-term performance assessment as demonstrated through the notation on the assessment report. The complexity of this probation assessment and the lack of experience of the direct line manager necessitated a range of levels of management being involved in this process.

**[121]** I am satisfied that the evidence provided by Ms Moran outlined the discussions of the areas of deficit, expected standards and strategies for improvement. He was offered support throughout the process.

**[122]** I am satisfied that the Applicant was afforded procedural fairness through numerous opportunities to provide responses at each stage of the process, culminating with a meeting with the General Manager by teleconference and the offer of support through HR support and EAP.

**Did his role as elected councillor impact on this decision?**

[123] Mr Fairbrother held an elected Councillor role with the Waratah- Wynyard Council. This role and the potential for a conflict of interest was discussed with Mr Fairbrother and a decision was made that he would not have any involvement with the relevant municipality. Mr Price was delegated responsibility for this region. As part of his induction, the State Service Principles and Conflict of Interest Policy and Disclosure of Gifts and Benefits Policy were included.

[124] There was an ED5 investigation into the Applicant for an alleged breach of the Code of Conduct which related to a potential conflict of interest with his Councillor role and his employment with DPIPWE. This investigation was not concluded at the time of termination.

[125] Mr Fairbrother submitted that "there was a heightened level of interest in my employment"<sup>72</sup>. His evidence was that prior to him being employed there was discussion between Mr Peter Strafford and the General Manager about his local government experience.

"Whilst I recognise that it wasn't a reason for my termination of my employment. During my stay with the department there was an underlying themes or heightened interest in my external activities as a councillor. And I believe that it was because of that role that there was an added degree of interest in what it was that I did."<sup>73</sup>

[126] His evidence was that after 11 days he had "already run into trouble and I guess that was a consistent theme that whatever it was that I had done wasn't satisfactory."<sup>74</sup> He also said he felt he was a target and that his supervisor had "gone beyond what I consider to be reasonable in assessing my performance."<sup>75</sup>

[127] In his application, Mr Fairbrother noted his concern about Mr Peter Stafford's participation in both his performance review and the ED5 investigation.

[128] Mr Fairbrother gave evidence that:

"During – during my appointment, I, as a councillor, made front-page news of the paper, where I assisted two disabled people out of a burning house, put my own life at risk."<sup>76</sup>

He said that Ms Moran broadcast this news and he perceived that she was trying to bring him down to size.

[129] In the closing statement, the Respondent notes "Mr Fairbrother was a probationary employee who was underperforming. This naturally and justifiably attracts significant attention from management."<sup>77</sup>

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<sup>72</sup> P4 Transcript

<sup>73</sup> Ibid p4

<sup>74</sup> Ibid p5

<sup>75</sup> Ibid P5-6

<sup>76</sup> P26 Transcript

<sup>77</sup> P4 Respondent closing statement

## Findings

[130] Based on the evidence, I am satisfied that both the Applicant and Respondent have noted the potential conflict of interest, it had been disclosed and the appropriate training had been undertaken.

[131] I am also satisfied there was no evidence before the Commission that would support a finding that there was any detrimental impact on Mr Fairbrother resulting from the Council position. I note that the ED 5 outcome is separate to the issue at hand.

### Were different standards applied between Mr Price and the Applicant?

[132] The Applicant submits that there were different standards applied to Mr Price and himself. He states "I was required to provide written ranger reports Mr Price was not. I auditor program- I completed 4 IAuditor reports in 3 months. Other employees have not completed one in five years employment with DPIPWE."<sup>78</sup>

[133] In his application he raised the issue that a differing standard of work and expectation was applied to his work colleague who were both undertaking the same role.

[134] In cross examination, Mr Fairbrother said he "replicated what it was that Greg did in terms of keeping a diarised entry of my activities"<sup>79</sup> Responses to this issue have been covered in the previous section.

[135] In his closing statement, Mr Fairbrother noted that Mr Price had a short fall in his computer skills and he stated he thought the management of the identified deficits in his own performance, was treated differently.

[136] Ms Moran provided evidence about the IAuditor report assigned to Mr Fairbrother. She said she would not ask either of her two rangers to complete it but it appeared to be a development opportunity for Mr Fairbrother and stated that he:

"....seemed to understand the process quite well. He did not ask for help. I offered to help a number of times during that. Yes. The issue is that he just never submitted it. She then went on to say that he eventually submitted it after being asked and setting a deadline and "he said he was having more troubles with the iPad, and then, eventually, he finally submitted the second one."<sup>80</sup>

[137] In cross examination, Ms Moran agreed that Mr Price was more experienced than the Applicant but "you were both afforded the same opportunities to go out into the field and perform your tasks equally."<sup>81</sup>

[138] In cross examination Ms Moran responded to the question of a "special deal" with Mr Price:

"I put it to you that it was Mr Price's evidence that he had a special deal with Erin Moran that wasn't afforded to me. Is that true?"

"It's just a partnership. That's how it works. That's how – he was showing me a lot of the area. He was providing me with a lot of information, and I was – I

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<sup>78</sup> Exhibit A1 p4

<sup>79</sup> P32 Transcript

<sup>80</sup> Ibid p116

<sup>81</sup> Ibid p136

would just print things off and show him how to use the equipment when necessary. And I did the same thing to you. I was there and I showed you how to use the LIST, which is exactly the thing that he is talking about. I also showed you how to use WIST, which is exactly what he is talking about. You were both given the same opportunity there. It's just Greg is not very technically savvy and it took him a little bit longer to grasp those concepts."<sup>82</sup>

"So, Ms Moran, why wasn't this opportunity afforded to me to have time spent with you?---Because by the time that you came along in December, that's the middle of the season. That's when it starts to get-starts to get dry. You start to get restrictions on."<sup>83</sup>

**[139]** In further cross examination, Ms Moran explained the differing roles:

"So I take it that is – is that the reason why you spent more time with Mr Price than what you did with me?"

"I didn't spend more time with Mr Price than you. Mr Price was in the office more, but I did not go out into the field and spend more time with Mr Price."

"Okay. That's contested, but can you tell me why Mr Price spent more time in the office than what I did?"

"His area was in flood recovery. His area did not have any restrictions anywhere near hitting the triggers. His area had substantial amount of water for that time of the year. It was an incredibly good season for water in that region."<sup>84</sup>

**[140]** Mr Price included in his evidence that;

"I don't believe Ms Moran treated me any different from Mr Fairbrother. I don't believe Ms Moran treated me more favourably than Mr Fairbrother."<sup>85</sup>

Mr Price described the arrangement to support Ms Moran when she was new to the Water Ranger role and said:

"So we had this deal going, "Yes. Whenever you're not tied to the office and you want to go out and have a look around, I'm happy to run you through, meet farmers, show you the hotspots, show you the – the smaller systems that can be troublesome in dry seasons and so on."<sup>86</sup>

### **Consideration and findings**

**[141]** There appears to be some assumptions made by the Applicant which blurred the exact reporting and standards delivered by each respective employee. There is clear evidence that Mr Price would report every day on the activities and provide monthly written ranger reports, however this was not the case for Mr Fairbrother.

**[142]** It is also evident that Mr Price did not have the level of computer skills which Mr Fairbrother possessed, and the SOD, dated 23 September 2016, included maintaining

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<sup>82</sup> P136 Transcript

<sup>83</sup> Ibid p138

<sup>84</sup> Ibid p139

<sup>85</sup> Ibid P89

<sup>86</sup> Ibid P83

records based on computer based word, spreadsheet and database programs as part of a selection criteria. Mr Price had been employed for approximately five years and there was no evidence to demonstrate the criteria were the same on his application. His skill deficit was managed and his strengths utilised to assist orientation of Mr Fairbrother, noting he acknowledged that he received IT support from the Applicant. Mr Fairbrother was given additional computer program tasks with IAudit reports, which he accepted and required minimal assistance, as a professional development opportunity.

**[143]** I am satisfied that there was no evidence the Applicant was treated less favourably. Mr Fairbrother was employed on a six month probation period, which necessitates close supervision and support during this trial period. Regular reviews and follow up by his manager was required and could not be perceived as anything but proper process.

**Could the employment relationship be re-established?**

**[144]** The Applicant is seeking re-instatement as a remedy, if the termination is found to be without a valid reason and/or unfair.

**[145]** S30(9) of the IR Act states

"The principal remedy in a dispute in which the Commission finds that an employee's employment has been unfairly terminated is an order for reinstatement of the employee to the job he or she held immediately before the termination of employment or, if the Commission is of the opinion in all the circumstances of the case, an order for re-employment of the employee to that job."

**[146]** Mr Fairbrother's evidence supporting reinstatement was, in summary, that he was generally compliant with the SOD, the areas identified for further training were subject to an arbitrary standard of acceptable practice, he exceeded his peer's performance, especially in regard to electronic media, he was open to learning and had a good knowledge of the local area and key personnel and he would provide continuity and commitment to the circular head area. He further stated that "strategies have been suggested and agreed by both Darren and the Acting RWMO on moving forward"<sup>87</sup> and a PIP would be "appropriate to address any perceived shortcomings."<sup>88</sup>

**[147]** The Respondent disputed that reinstatement is practicable and submitted that the employment relationship had broken down as a result of Mr Fairbrother's continued failure to follow directions. The Respondent also submitted that there are doubts whether he would be responsive to future direction from management.

**[148]** The Respondent submitted that reinstatement would not be practicable as s30(9) of the IR Act requires the employee to be reinstated to the position he held immediately before termination which is a position of probation. State Service Employment Direction 1 provides for probation to be a period of "no more than 6 months from the date of appointment" and that statutory period has been exhausted.

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<sup>87</sup> P5-7Exhibit A1

<sup>88</sup> P7 Exhibit A1

**[149]** The Respondent referred to the matter *T13140 of 2008 Wynde Mason vs Minister Administering the State Service Act 2000*, where Commissioner Mc Alpine stated;

"There is no opportunity to extend probation in this matter. The agency had two routes open to it, either appointment the person or terminate the probation. However, it is my view that the agency does not have the discretion to appoint a person to a permanent position whom they are aware does not demonstrate the required level of competence during probation."<sup>89</sup>

The Respondent notes further that in this decision, Commissioner Mc Alpine refers to s 37(5) of the SS Act which states:

"A person is not to be appointed as an employee or a permanent employee is not to be promoted unless he or she possesses such qualifications and meets such other requirements as are determined by the Commissioner as being required for the duties to which the appointment or promotion relates."

The "other requirements" were deemed to be "the successful completion of the probation period."<sup>90</sup>

**[150]** The Respondent submits that confirming the permanent appointment would be the only option due to employment greater than the six month probation period cap, which would not be considered as Mr Fairbrother did not meet the inherent requirements of the role.

**[151]** Both the Respondent and Applicant have indicated that the relationship has broken down to such a state that there is a lack of trust on both sides. I am satisfied that the relationship has irretrievably broken down and the working relationship could not be re-established.

## **Conclusion**

**[152]** Mr Fairbrother submitted in closing submissions that the Secretary made the decision to terminate his probationary employment based on "inconsistent untruthful information from persons with improper motives"<sup>91</sup> and his decision was therefore "unfair and flawed". He stated that some of the witnesses could not be relied upon and inaccurate information was deliberately produced.

**[153]** The nature of employment was a probation period, which must be successfully completed to satisfy suitability for continuing employment to be offered. This process was clearly understood by Mr Fairbrother, through his letter of appointment, cross examination and his own evidence.

**[154]** His ongoing performance reviews outlined performance deficits. During probation periods, an employee has a responsibility to seek clarification of what is required if unsure, seek out opportunities and regular feedback and work to the expected standards, which are outlined in the SOD.

**[155]** The evidence provided by Mr Price and Ms Moran was that the Applicant did not seek out or accept such opportunities. Mr Fairbrother stated he did not seek out

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<sup>89</sup> At paragraph 181

<sup>90</sup> Commissioner McAlpine at para 184

<sup>91</sup> P1 Applicant written submissions



opportunities. His evidence was that his employment was affected by his Councillor status and his working relationship and lack of trust in his supervisor, Ms Moran.

**[156]** I am satisfied that the Applicant did have performance issues as described earlier in the decision, did not follow directions and did not meet the inherent requirements of the Water Ranger role during his probation period. This is a requirement for continuation of employment to be offered at the conclusion of the six month probation, therefore, the Respondent had a valid reason to terminate the probationary employment of Mr Fairbrother.

**[157]** I find the Applicant was afforded procedural fairness, was provided numerous opportunities to respond, appropriate support and training, that his supervisor did not apply different standards to his colleagues and that his role as an elected Councillor did not affect the outcome. Therefore, I find that he was not treated unfairly.

**[158]** Accordingly, having considered all the matters, the dismissal was valid and not unfair and this application is dismissed.



NM Ellis  
**Deputy President**

**Appearances:**

Darren Fairbrother in person  
Jackie Peterson and Lisa Bessell for the Respondent

**Date and place of hearing:**

13 November, 11 December  
2017  
Devonport