

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 467/09
5158824**

BETWEEN MICHAEL JAMES SALINGER
Applicant

AND NATIONAL INSTITUTE OF WATER &
ATMOSPHERIC RESEARCH LIMITED
Respondent

Member of Authority: Leon Robinson

Representatives: Alex Hope, Counsel for Applicant
Peter Churchman, Counsel for Respondent
Penny Shaw, Counsel for Respondent

Investigation Meeting: 19, 20, 21, 22, & 23 October 2009

Determination: 21 December 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Dr Michael James Salinger ("Dr Salinger") was employed by National Institute of Water & Atmospheric Research Limited ("NIWA") in the position of Principal Scientist. He was summarily dismissed at a meeting held on 23 April 2009. The reasons for the summary dismissal were set out in a letter to Dr Salinger dated 24 April 2009 materially as follows:-

Further to our meeting yesterday, where we conveyed our decision verbally, this letter is to confirm in writing the outcome of the disciplinary proceedings which have occurred over the last seven weeks. After a thorough investigation of the matters of concern, and having given full consideration to your explanation of these matters, we have reached a decision that your behaviour with regard to repeated instances of unauthorised contact with the media does constitute serious misconduct warranting summary dismissal, and we have therefore terminated your employment with NIWA as of yesterday.

We have emphasised to you, both before, and in the course of the disciplinary proceedings, the importance to NIWA of having a well-managed and well-coordinated approach to media contact. The risks to NIWA's reputation and our

relationships with other stakeholders of unauthorised media contact by staff are significant. You have breached NIWA's media policy and our clear instructions to you, on a number of occasions (the most recent instance being only last week, in the course of disciplinary proceedings), with the result that we have been left with no confidence at all that you would in future adhere to policy and instructions in this area.

[2] Dr Salinger claims that his dismissal is unjustifiable and he also claims he was unjustifiably disadvantaged in his employment. He also has a dispute with NIWA arising out of a directive given to him. Dr Salinger asks the Authority to resolve the problem by making formal orders for the payment to him of lost salary from when he was dismissed to 25 April 2012 (when he was intending to retire), the payment to him of lost superannuation benefits in the sum of \$104,000 (being \$8,000 for 13 years), the payment to him of compensation for hurt and humiliation in the sum of \$50,000, a declaration that instructions given to him on 19 August 2008 were unlawful, and his legal costs.

[3] NIWA denies all of Dr Salinger's claims. It says that for much of his employment Dr Salinger was a diligent and productive employee. However, it says that over the last few years of his employment, his behaviour began to deteriorate and at times became quite erratic. It says the deterioration manifested itself in a number of ways including an apparent reluctance on his part to comply with various applicable policies, instances of harassment and bullying of other employees.

[4] The parties were unable to resolve the differences between them by mediation.

The facts

[5] Dr Salinger had been employed by NIWA and its predecessors since 1982. Dr Salinger reported to NIWA Group Manager Mr Darren King. Mr King reported to Regional Manager Mr Kenneth Becker ("Mr Becker"). Dr Salinger reported to Chief Scientist (Climate) Dr David Wratt ("Dr Wratt") in respect of scientific matters. Dr Salinger was employed under the terms of the prevailing New Zealand Public Service Association Incorporated and NIWA collective employment agreement effective 1 July 2006 to 1 July 2009 ("the Collective").

[6] NIWA is a Crown Research Institute established in 1992. It is established to undertake scientific research and related activities in accordance with the *Crown Research Institutes Act 1992*. It undertakes scientific research at 15 locations throughout New Zealand and is engaged in joint ventures overseas. It has 750 employees in New Zealand.

[7] NIWA is required to operate in accordance with the principles set out at section 5 of the *Crown Research Institutes Act 1992*. It is also required to be a good employer as defined at section 118 of the *Crown Entities Act 2004*.

[8] NIWA has this policy on media statements issued in July 2005 entitled *Media Statements* and numbered OP70.M01:-

A. *Policy*

All media appearances and statements must have prior approval.

The Communications Manager must be made aware of all NIWA contacts with the media.

B. *Procedure*

1. *Authorisation*

Media statements must have prior approval as follows:

NIWA Company related enquiries Chief Executive

FRST enquiries

Director, Research

Fisheries enquiries

General Manager, Fisheries

All other enquiries

General Managers, Regional

Managers or Director, Operations

2. *Process*

When NIWA employees are approached by a reporter (TV, radio, newspaper, magazine etc) the following steps should be taken:

i. No information should be given out in the first instance.

ii. Enquiries should be made as to what information the reporter requires,

iii. NIWA's policy that prior approval is necessary should be stated,

iv. Once authorisation is obtained, the reporter is then contacted with an appropriate response.

NOTE: NIWA employees should be reminded that it is the reporter's problem, not NIWA's, if there is an urgent publication deadline to be met.

The Communications Manager must be made aware of all NIWA contacts with the media; part of his role is to provide assistance with preparing and delivering media releases for print, radio, and TV.

3. *Notification*

All media releases should be sent to the NIWA webmaster (webteam@niwa.co.nz) at the time they are released, for inclusion on NIWA's web site. If possible, the material should be provided in advance of the release

time - its appearance on the website can easily be synchronised with release to media.

C: *References/Related Policies
Scientific Opinions (Op70.S01)*

("the *Media Statements* policy")

[9] NIWA has this policy on the issue of scientific opinions by its personnel dated March 2001 and entitled *Scientific Opinions issued by NIWA personnel* numbered OP70.S01:-

A. *Policy*

Personal scientific opinions issued publicly by NIWA personnel should not make any mention of or reference to NIWA. NIWA personnel communicating with the media in a personal capacity should ensure that in no way can it be construed or inferred that the opinions which they are personally expressing are the views of NIWA or have NIWA's agreement. All other opinions issued should be made in accordance with the NIWA 'Media Statements' policy.

B. *Procedure*

Individual staff members have a right to make public statements as private individuals, if they do this in their own time and at their own expense, without use of NIWA's resources, and they make no reference to NIWA. Public statements include such things as letters/emails to newspapers, magazines and websites, radio or television interviews, other media releases, and personal submissions to Parliamentary Select Committees, Town Planning Hearings or any other formal submission processes of central or local government.

However, NIWA considers that it is inappropriate for staff to make such statements/submissions in the areas or disciplines in which they work, because of the difficulty which the public, clients, politicians and others have in distinguishing between the personal views of staff and NIWA's position in such cases.

Out of courtesy, NIWA expects staff who intend to make personal statements/submissions in any areas relevant to NIWA (whether within or outside their own expertise) to inform their Regional Manager of their intentions, so that NIWA receives "no surprises".

Where a NIWA staff member is an office bearer in an NGO, professional society or similar group, participation by the staff member in the preparation and delivery of a media statement, appearance on television etc., or submission to a central or local government process (on a topic relevant to NIWA) should be governed by the above considerations, i.e., NIWA considers it inappropriate for the staff member to be involved publicly in areas or disciplines in which they work. This does not preclude a publicly anonymous, "behind the scenes" contribution by the staff member to a society's media statement/public submission.

C: *References/Related Policies
Media Statements (Op70.M01)*

[10] In 2006 Dr Salinger became President of the Commission for Agricultural Meteorology on the World Meteorological Organisation ("WMO"). That was an honorary appointment. As a result of that involvement, Dr Salinger was out of New Zealand for extended periods. NIWA continued to pay Dr Salinger's salary for his involvement in that international role. The Authority finds that Dr Salinger's extended absences began to have a negative impact on the work he was employed to do for NIWA.

[11] NIWA issued a seasonal climate outlook document on 29 May 2008. The document focused on the low hydro power lake levels in New Zealand and the prospect that rain would not fill the lakes over winter. The document further suggested the strong possibility of power shortages across New Zealand. NIWA's national climate centre wished to use the document to assist New Zealanders to better prepare themselves for the approaching winter. NIWA desired the media focus to be on climate-energy links and the critical power supply over winter. Consistent with that strategy, NIWA decided that the key media contact for any comment on the seasonal climate outlook document was to be its Chief Scientist (Energy) Dr Murray Poulter ("Dr Poulter"). That fact was made known to Dr Salinger.

[12] NIWA was not pleased when on 1 June 2008 Dr Salinger was involved in a news item on TV3 in relation to the seasonal climate outlook document, without its approval or knowledge.

[13] Dr Salinger had also failed to deliver on an important contract for the Auckland Regional Council before he left on an extended overseas trip. These matters caused NIWA to have very real concerns about Dr Salinger's performance and so Mr Becker resolved that it was necessary to discuss matters with Dr Salinger.

Meeting 1 July 2008

[14] The Authority finds that Mr Becker met with Dr Salinger on 1 July 2008. The Authority accepts Mr Becker's evidence that Dr Salinger was receptive and accepting

of the concerns NIWA held about his work. The Authority further finds that it was agreed at this meeting that:-

- i. all overseas travel was to be approved by Mr Becker and would only be approved if Dr Salinger's NIWA work commitments were on target for quality, time and budget;
- ii. Dr Salinger was to report to Mr Becker weekly as part of a performance monitoring/improvement process;
- iii. all reports, presentations, proposals and similar communications that Dr Salinger wished to release were to be viewed and approved by Mr Becker before their release, in accordance with NIWA policy.

[15] The Authority finds that Mr Becker and Dr Salinger did for the most part meet regularly each week thereafter.

[16] But almost immediately after the meeting on 1 July 2008, Mr Becker learned that Dr Salinger had accepted an invitation to debate climate change at the New Zealand Insurance Brokers conference in Queenstown scheduled for August 2008. Dr Salinger had not sought NIWA's approval in accordance with NIWA's policy to be involved in that presentation before he accepted the invitation. This event further compounded NIWA's concerns with Dr Salinger. Mr Becker determined it was necessary to meet with Dr Salinger again.

Meeting 8 July 2008

[17] Mr Becker and Dr Wratt met with Dr Salinger on 8 July 2008 to discuss NIWA's concerns about public presentations and his contact with the media. Dr Wratt explained to Dr Salinger that Dr Salinger's extended absences from New Zealand on WMO business had impacted on his NIWA responsibilities including his role as a media contact person. Dr Wratt explained that NIWA wanted Dr Salinger to focus the time he was able to spend in New Zealand on achieving the work that he was committed to do under research and commercial projects for NIWA. These commitments included work Dr Salinger carried out for the Foundation for Research Science & Technology, a statutory authority reporting to the Minister of Research

Science & Technology, and commercial work for NIWA's clients. It was emphasised that those clients were entitled to have their work done in a timely fashion and to an acceptable standard.

[18] NIWA wanted Dr Salinger to particularly refocus on its needs. It considered that its concerns about Dr Salinger's performance could be addressed by requiring him to step back from being a major routine media contact for NIWA on monthly climate matters, constraining the time he spent providing public talks around New Zealand and requiring him to be selective about the invitations he received to participate in workshops and meetings in New Zealand and overseas. NIWA also considered that these changes would also allow other of its employees involved in climate update and climate outlook information to gain experience with media and take on media roles. Dr Salinger was asked to mentor other staff to gain experience in developing material for the media.

[19] The Authority finds that Dr Salinger was advised NIWA required him to step back from doing media interviews about its regular climate update and outlook products. The Authority also finds that with respect to Dr Salinger's other scientific activities, he was advised the normal NIWA policies applied. The Authority further finds that Dr Salinger was explicitly reminded of the NIWA *Media Statements* policy. He was also told that prior to any interactions with the media, he was first required to gain approval from Mr Becker or Dr Wratt. He was also told that if he wished to speak in an area other than climate, he was required to obtain approval from the relevant Chief Scientist.

[20] Following the meeting on 8 July 2008, the Authority finds that Dr Salinger telephoned NIWA's General Manager Communications and Marketing Mr Geoffrey Baird ("Mr Baird"). Dr Salinger told Mr Baird that he would not be going to talk to the media anymore. The Authority accepts Mr Baird's evidence that Dr Salinger also attended on Mr Baird when he (Dr Salinger) was in Wellington. Dr Salinger understood what he had been told at the meeting on 8 July 2008 and told Mr Baird that he was disappointed not to be involved with the media anymore. The Authority accepts Mr Baird's evidence that he reassured Dr Salinger of the value of Dr Salinger

focusing on his role as a leader of science for NIWA and suggested they could identify angles that would be picked up by the media, appropriate channels of communication and other aspects of media communication. They also talked about Dr Salinger being the appropriate communicator when the issue was his science and he had the appropriate approval.

[21] Dr Salinger accepted an invitation to speak at a Climate Change and Business Conference without any prior discussion with Mr Becker or Dr Wratt. Mr Becker was not pleased with Dr Salinger's continuing failure to comply with NIWA's requirements. He deemed it necessary to escalate the situation to NIWA's General Manager, Operations Mr Barry John Franklyn Biggs ("Mr Biggs"). Mr Biggs decided the situation was serious and that it was necessary to communicate to Dr Salinger again in clear and unequivocal terms what standard of behaviour was expected from him.

Meeting 19 August 2008

[22] Mr Biggs called a meeting with Dr Salinger on 19 August 2008. Present also was Mr Becker. The Authority finds that Dr Salinger was informed again who he needed to get permission from if he wished to talk to the media or make a public presentation. The Authority finds that Dr Salinger understood and accepted NIWA's concerns and undertook to comply with NIWA's requirements of him. The expectations of Dr Salinger were recorded in a comprehensive memorandum of the same date which was provided to Dr Salinger. The memorandum contained this specific instruction to Dr Salinger:-

Specific Instructions for Jim Salinger

Jim is one of our most invited and prolific speakers. These invitations cover the full gamut of fields noted above. It is therefore particularly important that Jim follow, and as a Principal Scientist champion, NIWA's public presentation approval policy.

Specific requirements raised with Jim were:

1. Due to the breadth of invitations that Jim receives, and the currently sensitive nature of the climate/climate change subject area, all invitations must be referred to both the Regional Manager relevant Chief Scientist for a decision on whether NIWA will accept the invitation, and then what staff member would be the most appropriate to give the presentation (if the Chief Scientist is unavailable then the Regional Manager will seek input from other relevant senior/Executive staff). In cases for straight technical presentations to

professional bodies, it is most likely that the invitee is the most appropriate presenter (by definition of the invitation);

2.All invitations that are accepted must conform to NIWA's approval system, which includes a 'dry run' in front of appropriately qualified peers. For public talks, we also suggest that at least one senior staff member should be included who is not from the same discipline. There is a standard approval form for that that must be signed off;

3.If insufficient time has been given between the invitation and when the presentation is due to allow appropriate review, then the invitation should generally be refused. Any exception to this must be approved in writing by the appropriate Chief Scientist.

(original emphasis)

[23] For many months Dr Salinger complied with the *Media Statements* policy and the instructions give to him in July and August 2008.

[24] On 12 February 2009, Dr Salinger was telephoned by Radio New Zealand and was asked to go on air to comment on the hot temperatures in Auckland at that time. Dr Salinger proceeded to be interviewed by Radio New Zealand in a broadcast known as "Checkpoint". Dr Salinger did not seek NIWA's approval to be interviewed by Radio New Zealand. The parties have referred to this contact by Dr Salinger as "the Checkpoint interview". The Authority refers to it hereafter that way too.

[25] Later that evening Dr Salinger telephoned NIWA's Communications Manager Ms Michele Hollis ("Ms Hollis"). He told her he "had been a naughty boy" and explained how he had given an interview to Radio New Zealand without seeking prior approval. He said he had been called at short notice and was unable to raise anyone for approval and had gone on and given the interview. Ms Hollis told Dr Salinger she would alert Mr Baird of the matter the following morning. Ms Hollis emailed Mr Baird and Mr Becker the following morning reporting the matter to them.

[26] In the evening of 2 March 2009, Dr Salinger telephoned Ms Tsehai Tiffin ("Ms Tiffin") a journalist contracted to Television New Zealand Limited ("TVNZ"). Dr Salinger advised Ms Tiffin of NIWA's annual south island snow and ice survey flight the following day. Ms Tiffin told Dr Salinger she was interested but would have to contact TVNZ first to see if it was interested in a story.

[27] The following morning on 3 March 2009 Ms Tiffin and her accompanying camera operator met Dr Salinger at the Queenstown airport. The camera operator boarded the flight and Ms Tiffin drove to Wanaka and joined the flight there as it travelled further north. Before the flight departed, Dr Salinger telephoned Ms Hollis at 8.30am and left a message on her phone advising that the reporter and cameraman had turned up and would be on the flight. He asked Ms Hollis to call him. When Ms Hollis phoned Dr Salinger back at 8.49am she got Dr Salinger's answer message. They eventually made contact at 9.05am. Ms Hollis asked Dr Salinger to share the coverage with other NIWA employees on the flight. Ms Tiffin interviewed Dr Salinger and Dr Trevor Chin and prepared a report which was broadcast on TVNZ's television news. Dr Salinger had also left a message for Mr Baird advising that the television crew had fortuitously turned up at the airport and that he had only five minutes to respond to their request that they accompany the flight. Dr Salinger's contact with Ms Tiffin is referred to by the parties as the "snowline survey incident". The Authority refers to it hereafter that way too.

[28] As a result of Dr Salinger's interview with Radio New Zealand and reports of other behaviour in the office, Mr Becker decided to formally institute a disciplinary investigation. He wrote by letter dated 4 March 2009 to Dr Salinger. The letter advised that a formal disciplinary meeting would be held to formally put to Dr Salinger two key areas of concern that NIWA had. The first concern was specified as Inappropriate Communication and related to the Checkpoint interview on 12 February 2009, a discussion Dr Salinger had had with the Minister of Research, Science and Technology and an observation that he had handed out non-NIWA business cards at the opening of NIWA's new offices. The second concern was specified as Inappropriate Behaviour in the office and related to altercations with staff and inappropriate use of office facilities. A disciplinary meeting was scheduled for 10 March 2009. This letter was given to Dr Salinger the same day.

[29] Late on 4 March 2009 Mr Becker became aware of Dr Salinger's interview with Ms Tiffin the previous day. Dr Salinger told Mr Becker he had been approached by Ms Tiffin as he was setting off on the snow and ice survey flight. Mr Becker

considered the matter as a further incident of Dr Salinger failing to comply with instructions.

[30] Mr Becker wrote by letter dated 5 March 2009 advising of an additional matter for the disciplinary meeting to be held on 10 March 2009. The addition was this further allegation:-

You advised me yesterday that you were approached by a TV1 reporter when setting out on the snow and ice survey by helicopter. My understanding from what you said is that you agreed to the reporter accompanying you on the helicopter to film, and you provided comment to the reporter, without gaining approval from myself or David Wratt. If this is what occurred, it would constitute a direct breach of the specific instructions given to you by Dr Wratt and myself in July 2008, that you were no longer authorised to speak to the media on behalf of NIWA, and needed to gain prior approval from David or myself to do so. I regard this as an extremely serious matter.

Disciplinary meeting 17 March 2009

[31] The disciplinary meeting proceeded on 17 March 2009. Present were Mr Becker, NIWA's general manager of human resources Ms Mary-Anne Dehar ("Ms Dehar"), Dr Salinger and his lawyer Mr Alex Hope ("Mr Hope"). Dr Salinger told the Authority he accepted the notes of this meeting were accurate.

[32] In relation to the Checkpoint interview, Dr Salinger admitted his conduct and said he thought it was appropriate to comment. He said he had tried to contact people to gain approval. He said he had made a decision that he thought was in NIWA's best interests because otherwise it would have looked silly. He said he did not deliberately flout the policy but rather, he had considered a comment was not inappropriate. He said he was trying to make NIWA look "up with the play". He said compliance with the policy and procedure would have made NIWA look foolish in his view. Mr Hope said he would have expected that in the circumstances NIWA would regard the matter as minor.

[33] In relation to the snowline survey incident, Dr Salinger said that he had responded to a last minute request by the media. Mr Hope stated that Dr Salinger acknowledged the meetings he had had with Mr Becker and Dr Wratt and knew that he needed to get approval for contact with the media. Dr Salinger said he had thought

it was an option to obtain Ms Hollis' approval but now acknowledged she could not give approval. Mr Hope said that Dr Salinger thought he was doing the right thing in calling Ms Hollis. He said Dr Salinger felt he had complied and had taken on board Ms Hollis' comments about sharing the interview with other NIWA employees. Mr Hope explained it was Dr Salinger's perspective that he had asked and he had done what he was told to do. He said Dr Salinger had made an effort to be compliant but had not succeeded.

[34] Mr Becker wrote to Dr Salinger by letter dated 20 March 2009 advising NIWA's preliminary response to Dr Salinger's various responses. NIWA advised it accepted Dr Salinger's explanation on certain matters but it remained concerned about the contact apparent from the Checkpoint interview and the snow and ice survey incident. Dr Salinger was instructed to attend a further disciplinary meeting.

Meeting 2 April 2009

[35] There was a further meeting on 2 April 2009 at which Dr Salinger, Mr Hope, Mr Becker, Ms Dehar and Mr Briggs attended. Dr Salinger told the Authority he accepted the notes of this meeting were accurate.

[36] In relation to the Checkpoint interview Dr Salinger offered no further comment. In relation to the snow and ice survey incident Mr Hope said that Dr Salinger had already explained. Mr Hope asked if Mr Becker had spoken to the reporter Ms Tsehai Tiffin to which Mr Becker replied that he had and that the reporter was unwilling to provide any specific information. Mr Hope disputed that Dr Salinger had contacted the reporter first but was unable to provide any further explanation as to why the reporter had unexpectedly arrived at Queenstown airport and at the particular time, prepared for filming. Mr Hope then advised that Ms Tiffin was resident in Queenstown, that her partner was the cameraman and that she had contacted Dr Salinger. Ms Dehar asked why Dr Salinger had not provided that information in the previous meeting. Mr Hope said he thought he had. The meeting ended prematurely because Mr Hope had to leave.

[37] Mr Hope wrote to Mr Becker by email on 6 April 2009. Mr Hope advised that Dr Salinger had contacted Ms Tiffin on the day before the flight in question to advise her of the flight. Mr Hope said that contact was not a media interview, nor a press release nor the giving of a personal scientific opinion. NIWA was further advised the contact with Ms Tiffin was part of Dr Salinger's duties under a contract with TVNZ in which Dr Salinger was project leader ("the TVNZ consultant employment agreement"). Mr Hope further advised that when Dr Salinger contacted Ms Tiffin, she did not indicate that she would seek an interview or express a wish to take part in the flight. Mr Hope also advised that Ms Tiffin "at the 11th hour" shortly before the flight, turned up at the airport and it was then that Dr Salinger had contacted Ms Hollis. Mr Hope advised he did not consider a further meeting necessary and requested NIWA make a decision and communicate it by email.

[38] Mr Becker wrote to Dr Salinger by letter dated 9 April 2009. That letter acknowledged the points made by Mr Hope in his email of 6 April 2009. The letter materially stated:-

You failed to comply with NIWA policy and a reasonable and lawful instruction by initiating contact with the media and/or providing information to the media without notice to or approval from myself or David Wratt, as you are required to do. This allegation relates to two incidents. Firstly, you supplying information to Radio New Zealand's Checkpoint on February 12 2009, and secondly, your advice to TVNZ of the End of Season Snowline Survey flight, March 3 2009. NIWA's Media policy is absolutely clear that all media appearances and statements must have prior approval (please see attached). There is significant background to this as our policy has had to be continually emphasised to you following previous incidents of breach. Our directions to you were specifically included in a memo to you dated 19 August 2009, which related to two unauthorised speaking engagements. In addition I have met with you weekly to facilitate the approval process. You accepted in our meeting of 17 March that you were aware that you were instructed to seek approval before speaking to the media.

NIWA's contract with TVNZ gives you no ability to breach this policy and in fact its existence means it is even more important that we have trust and confidence that you follow our media policies and directions.

As well as being in breach of our instruction and policy (which you have accepted) you have given me no confidence, through this process, that you understand and/or accept our position in relation to the media. I remain very concerned that you continue to be employed by us it is likely that you will again breach these. This is taken very seriously by us as non-compliance with policy and instructions in this area poses considerable risk to NIWA's reputation and

credibility. We need to be very careful in managing our external communication, as we provide advice and report on matters of national and international significance. In some cases our work is used to support government policy. It can also be used as evidence in legal cases, influence business decisions, affect infrastructure decisions and matters related to Resource Management consents.

If the above is correct I believe your conduct is capable of amounting to serious misconduct and I will be considering dismissal as an option. Before a final decision is made I would like to give you an opportunity to comment.

The letter concluded proposing a further meeting for 20 April 2009.

[39] By letter dated 14 April 2009, Dr Salinger formally raised a dispute and a personal grievance for unjustifiable disadvantage.

[40] By letter dated 15 April 2009 Mr Becker wrote to Mr Hope acknowledging receipt of the advice of 14 April 2009. Mr Becker continued to seek a response from Dr Salinger to the preliminary views stated in the advice of 9 April 2009. Mr Becker reiterated that Dr Salinger was required to abide by the same policies that apply to all staff when dealing with the media and/or making public statements.

[41] On 16 April 2009, the weather presenter on TVNZ evening news broadcast one Mr James (Jim) Hickey ("Jim Hickey") made a statement during the evening's broadcast "It has been raining on the West Coast, and Jim Salinger of NIWA called from Greymouth to say the rivers were in flood". NIWA regarded that statement as evidencing further contact by Dr Salinger with the media that had not been authorised. The parties have referred to this contact by Dr Salinger as "the Jim Hickey incident". It is referred to by the Authority hereafter that way too.

[42] Mr Becker wrote to Mr Hope by letter dated 17 April 2009 raising the Jim Hickey incident as a further incident of serious misconduct and invited a response from Dr Salinger.

[43] Mr Hope wrote to Mr Becker and Ms Dehar by email letter of 23 April in response. The response was essentially this:-

- a. Dr Salinger contacted Jim Hickey and advised him of a climate issue of interest.*
- b. The above information was provided under the TVNZ contract.*
- c. The information was not a statement or an appearance and therefore the media policy does not apply.*
- d. The information was not a scientific opinion therefore the personal scientific opinions policy does not apply. The information was not a public presentation therefore the public presentations policy and the 19 August 2008 letter do not apply.*
- e. Dr Salinger did not ask for his name to be used and Jim Hickey did not say he would use it.*
- f. Dr Salinger's actions were consistent with the way he has managed the TVNZ contract since its inception in the early 90s.*

[44] There was a final meeting held on 23 April 2009. Present were Dr Salinger, Mr Hope, Mr Becker and Ms Dehar. Mr Becker advised NIWA's findings that the office altercations incidents and the use of a non-NIWA card at NIWA's office opening was considered misconduct. The second finding was that Dr Salinger's unauthorised contact with Radio New Zealand on 12 February 2009, the interview on the snowline flight on 3 March 2009, and the contact with Jim Hickey on 16 April 2009 constituted serious misconduct. Dr Salinger was informed that he was summarily dismissed effective as of 4.30pm that day. Dr Salinger elected to leave immediately.

[45] By letter dated 24 April 2009, NIWA confirmed its oral advice terminating Dr Salinger's employment.

[46] Dr Salinger raised a personal grievance for unjustifiable dismissal.

The merits

[47] The relationship between Dr Salinger and NIWA is entirely an employment one. That employment relationship is founded in contract. The parties owe each other mutual obligations including a duty to act towards each other in good faith. The merits of each of Dr Salinger's claims are now dealt with in turn.

The dispute

[48] Dr Salinger's lawyer's advice of 14 April 2009 purports to raise a dispute. That advice says that "Jim also has a dispute (section 129, Employment Relations Act

2000) in respect of a directive given to him at meetings during July/August 2008 and reduced into writing in a letter dated 19 August 2008".

[49] By Section 5 of the *Employment Relations Act 2000* ("the Act"), a dispute is defined as "a dispute about the interpretation, application, or operation of an employment agreement".

[50] As Dr Salinger does not raise any issue relating to any aspect of the Collective, there can be no dispute. **There is therefore no dispute. There is no merit in this claim. There will be no formal orders in relation to it.**

[51] The Authority does not accept that the directions given to Dr Salinger of 19 August 2008 were unlawful. **There will be no declaration in that regard.**

The unjustifiable disadvantage

[52] The letter of 14 April 2009 also purported to raise a personal grievance for unjustifiable disadvantage. **The Authority accepts the submission that no personal grievance was raised within 90 days of anything that occurred in July or August 2008 and therefore the claim is not permitted by law. There will be no formal orders in relation to it.**

The unjustifiable dismissal

[53] This the Authority regards as the real problem. Dr Salinger claims that his dismissal on 23 April 2009 is unjustifiable. The Act prescribes a test for justification set out at Section 103A as follows:-

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.

[54] The Authority is bound to apply that test of justification to the established facts.

[55] Although NIWA wrote to Dr Salinger by its letter dated 4 March 2009 raising multiple allegations for him to explain, in the end he was summarily dismissed for his direct contact with the media. That being so, it is unnecessary to assess the merits of the other allegations. It is enough to note that NIWA found the allegations that Dr Salinger had had altercations with staff and had handed out a non-NIWA business card at NIWA's opening of its new offices, proved and it concluded that such conduct constituted misconduct.

[56] NIWA dismissed Dr Salinger because it considered he had breached its *Media Statements* policy and clear and repeated instructions given to him. It ultimately concluded it could no longer have confidence and trust in him to adhere to its policy and instructions in the future. It therefore considered summary dismissal was necessary.

[57] The Authority finds that NIWA did have a policy on contact with the media. That was the policy known as the *Media Statements* policy. That policy meant that all media statements and appearances were to be prior approved. The Authority finds that this policy was long established and known to NIWA staff. The Authority finds this policy was known to Dr Salinger because it was particularly drawn to his attention principally in the meeting held on 8 July 2008 and repeated subsequently in meetings and correspondence thereafter.

[58] In addition to that *Media Statements* policy, there were specific instructions given to Dr Salinger in the meeting held with him on 8 July 2008. At that meeting Dr Salinger was told that he was no longer to be the media commentator on the monthly climate summaries or the outlooks. He was reminded of the *Media Statements* policy and he was told that prior to any interactions with the media, he was required to first gain approval from either Mr Becker or Dr Wratt. Dr Salinger was told that if he wished to speak in an area other than climate, he needed to obtain approval from the relevant Chief Scientist.

[59] This instruction was clear and accepted by Dr Salinger. Dr Salinger's evidence to the Authority expressly acknowledges that he was told at that meeting that he was

to seek the appropriate approvals if he was to make any media appearance. Dr Salinger's evidence also verifies his compliance with that instruction in that he told the Authority he complied with his new media communications role, he spent many hours assisting Dr Andrew Tait, writing and editing monthly climate summaries so that they could be successfully released to the media. He said he largely wrote the 2008 annual climate summary and assisted Ms Hollis and others in arranging the media briefing for the 2008 annual climate summary in Auckland. Dr Salinger also told Mr Baird that he would not be going to talk to the media anymore. Dr Salinger understood what he had been told at the meeting on 8 July 2008 and told Mr Baird that he was disappointed not to be involved with the media anymore.

[60] The Authority finds the *Media Statements* policy was perfectly legitimate. It is an employer's right to determine how its interaction with the media is handled. That is consistent with the employer's management prerogative or its right to manage its workplace.

[61] The Authority also accepts the instruction given to Dr Salinger and repeated, was legitimate, lawful and reasonable. NIWA was entitled to adopt its strategy that Dr Murray Poulter was to be media contact person so that the focus was on climate-energy links and the critical power supply over winter. NIWA was right to be unhappy that Dr Salinger's interaction with TV3 had undermined and detracted from the public focus it desired.

[62] The Authority accepts that the instruction given to Dr Salinger was lawful and reasonable in a general sense. NIWA is a large organisation with over 750 employees. It has a national and international reputation for its work. As a result of that reputation it competes successfully both nationally and internationally as providers of objective science and analysis. Statements made by NIWA staff to media or at presentations are taken seriously as being supported by top-level research and analysis. Its research has very important practical implications and it is critical that its public communications are consistent. As well, some of NIWA's commercial contracts involve very substantial sums of money and the research produced under

those contracts is often commercially sensitive. For all these reasons, NIWA has consistent, universal, structured and agreed policies behind public communications.

[63] The Authority accepts that these general policy considerations are aimed at ensuring:-

- (i) all information released is well supported by facts;
- (ii) the relevant staff member has not introduced extraneous or biased information/views when interpreting the science;
- (iii) the correct "context" is given to information releases and conclusions so that NIWA is not misunderstood or misrepresented in subsequent reports on its findings;
- (v) averting unnecessary conflicts of conclusion amongst NIWA staff, particularly where generated by different parties having different/other information at their disposal;
- (vi) avoiding making statements on issues that are internally or externally commercially sensitive.

[64] These same policy considerations generally justified the instruction given to Dr Salinger as well.

[65] The Authority further accepts that the instructions given to Dr Salinger were lawful and reasonable in a specific context too. The Authority accepts that NIWA had performance concerns with Dr Salinger. It was concerned that Dr Salinger refocus on his core responsibilities. NIWA's instruction was perfectly lawful and reasonable because it was directed at better managing Dr Salinger's performance in respect of his core responsibilities to NIWA.

[66] Dr Salinger breached the *Media Statements* policy and the instruction given to him principally on 8 July 2008 and repeated subsequently.

[67] In giving the Checkpoint interview on 12 February 2009 and not having prior approval, Dr Salinger acted in breach of the *Media Statements* policy and the

instruction given to him on 8 July 2008 and subsequently repeated. Dr Salinger told Ms Hollis that he had been "a naughty boy". That was an admission by him that he had acted contrary to NIWA's requirements. As well, when he was asked to explain his conduct, he openly admitted it. He did not seek to excuse or justify his failure. NIWA was justified and correct to make a finding that Dr Salinger had failed to follow the *Media Statements* policy and the instruction given to him.

[68] In relation to the snowline survey incident, Dr Salinger gave various explanations. The Authority finds that Dr Salinger did not at first disclose to his employer that it was he who had first contacted Ms Tiffin. It was he who had initiated the contact with the media. Dr Salinger persisted in maintaining to NIWA that Ms Tiffin and her camera operator had fortuitously turned up at the airport for a flight that had only diverted to Queenstown. It was only on 6 April 2009 in Mr Hope's email to NIWA that Dr Salinger admitted it was he who had contacted Ms Tiffin the day before the flight. There was then ample time for Dr Salinger to have sought the appropriate approvals. It was in that same email that Dr Salinger raised the TVNZ consultant engagement agreement in explanation for his unapproved media contact. Neither of those points was raised at the outset.

[69] NIWA was particularly concerned by Dr Salinger's conduct. It appeared to NIWA that Dr Salinger had deliberately gone out and sought involvement with the media, knowing full well that he was not authorised to do so. NIWA considered that Dr Salinger had deprived it of the opportunity of releasing the data gained from the snowline survey in a way that maximised its organisational objectives.

[70] NIWA was right to regard Dr Salinger's inconsistent responses with suspicion. It was also right to conclude that Dr Salinger had acted in breach of the *Media Statements* policy. Nor did the TVNZ consultant engagement contract excuse Dr Salinger either. Dr Salinger's email to his representative about the matter suggests this response is contrived and not genuine. The TVNZ consultant engagement contract was not a licence which permitted Dr Salinger to ignore policy. Dr Salinger's fulfilment of the NIWA's obligations under the TVNZ consultant engagement contract was subject to NIWA's *Media Statements* policy. In addition, the TVNZ consultant

engagement contract concerned collaboration about monthly and seasonal climate summaries. The snowline survey was something altogether different and outside the ambit of the contract.

[71] But the instruction given to Dr Salinger on 8 July 2008 was sufficiently absolute and unequivocal such that Dr Salinger cannot subsequently be heard to have any credible doubt. Equally implausible is Dr Salinger's explanation that only interviews had to be approved and that he believed other types of media contact was permitted. NIWA was right to reject Dr Salinger's inconsistent responses and to regard them as not genuine. NIWA was right to conclude that Dr Salinger had failed to comply with policy and the instruction he had been given on 8 July 2008 and subsequently.

[72] Dr Salinger had also acted in breach of policy and the instruction given to him in respect of the Jim Hickey incident. At first blush the communication to Mr Hickey appears quite innocuous and unremarkable. NIWA however regarded it as inherently deleterious. It regarded the communication objectionable both as to the fact of its making and as to its content. Firstly, the rivers were not in fact in flood as that term is known scientifically. Dr Salinger is not a hydrologist and he was not qualified to make such an assessment it being out of his area of expertise. The information NIWA gives triggers certain consequences and responsibilities particularly on the part of local authorities and civil defence. That information is expected to be accurate. NIWA was rightly embarrassed. As well, the subject matter was not within NIWA's sphere of expertise as there is a memorandum of understanding between NIWA and the MetService that NIWA does not comment on weather within five days of it occurring. NIWA was professionally embarrassed and its Chief Executive Mr John Morgan ("Mr Morgan") felt obliged to apologise to the Chief Executive of the MetService. Most significant however, is that the fact of its making was never prior approved by NIWA. That was the salient issue. These are the reasons why NIWA took such a serious view of what Dr Salinger had done.

[73] Dr Salinger relied on the TVNZ consultant employment agreement again in respect of this contact. But he had been explicitly told in the letter dated 9 April 2009 that that contract did not permit any breach of policy. His suggestion to the Authority

that he contacted Mr Hickey "as a friend" is not consistent with his reliance on the TVNZ consultant agreement as he told NIWA. It ought to have been appreciated by Dr Salinger because his employer had made it quite clear to him on multiple occasions, that it expected the *Media Statements* policy to be observed. But the specific instruction given to him on 8 July 2008 also put the matter beyond doubt. NIWA was again right to reject Dr Salinger's various explanations. It was right to conclude that Dr Salinger had failed to comply with policy and the instruction he had been given on 8 July 2008 and subsequently.

[74] I regard NIWA's findings with respect to the Checkpoint interview, the snowline survey incident and the Jim Hickey incident, sound, correct and appropriate. Each of those incidents constituted separate and distinct breaches of both NIWA policy and of a lawful and reasonable instruction.

[75] It is not correct to argue that Dr Salinger was "gagged". He was not. His employer simply required that he obtain approval before he commented.

[76] As a question of degree should Dr Salinger's established conduct be considered so serious that his immediate termination was required? This is a very important question to ask having regard to Dr Salinger's extensive period of service with NIWA and its predecessors. I accept that each separate incident on its own would not have justified serious misconduct. However, there were three incidents all of a like nature which happened in quick succession.

[77] What is particularly concerning is that the snowline survey incident and the Jim Hickey incident, occurred during the course of NIWA's formal disciplinary enquiry. NIWA's particular and prevailing concern about unauthorised media contact was spelt out loud and clear to Dr Salinger. It is extraordinary then that Dr Salinger should, when fixed with that knowledge, have behaved and conducted himself so completely contrary to that very obvious and clearly communicated concern.

[78] It is for this very reason NIWA concluded it could not repose the necessary confidence and trust in Dr Salinger to comply in the future because he had

immediately demonstrated himself to lack any instant appreciation of his employer's concern. That was hardly confidence inspiring. I agree that NIWA was entitled to form this view.

[79] Relevant too is that NIWA made other findings of misconduct on Dr Salinger's part. The Authority accepts that NIWA had previously been sympathetic and understanding towards Dr Salinger during periods of personal difficulty. That compassion and forbearance is to be contrasted with my perception of Dr Salinger's participation during the disciplinary process. I regret to say I characterise Dr Salinger's presentation during that process euphemistically as unhelpful and counter-productive.

[80] It is fundamental to any employment relationship that an employer is permitted to instruct and direct its employee's performance. Dr Salinger was paid his salary in exchange for serving NIWA faithfully. His employer was entitled to direct his performance according to its requirements. Dr Salinger's productive effort for NIWA was not primarily a public good and this is not a case about the merits or desirability of the free dissemination or imparting of scientific knowledge. It is simply a case about an employer's right to manage its workplace and direct the performance of its employee where both parties owe a duty to act towards each other in good faith.

[81] I find that NIWA was correct to regard Dr Salinger as an employee who had reached a point in his very extensive service with it, as an employee who was incapable of following and unlikely to follow the rules in the future. That is a most remarkable and astounding situation but having met the personalities of NIWA's senior management, I suspect that had Dr Salinger shown suitable contrition the conclusion might have been different. Dr Salinger might have implored and prevailed upon his employer to respond to him with the similar compassion it had shown him previously. But I suspect too that Dr Salinger's unhelpful engagement during the disciplinary process most likely rendered that response unattractive to NIWA.

[82] I conclude that Dr Salinger failed to comply with NIWA's policy and a repeated lawful and reasonable instruction, on three separate occasions. Those separate

instances taken together justifiably led NIWA to form a view that it could no longer repose the necessary confidence and trust in Dr Salinger that he would continue to serve it faithfully. That confidence was significantly undermined by the total lack of insight demonstrated by the perpetration of two instances of misconduct during the progress of the disciplinary process itself. The result was that Dr Salinger's extensive period of service, and largely distinguished service too, came to an unfortunate but inevitable end. An employee who will not take instruction from his employer renders a continuing employment relationship entirely untenable. That is no triviality. NIWA justifies its summary termination of Dr Salinger's employment.

[83] Dr Salinger challenges the legality of Mr Becker's decision to dismiss him by arguing that Mr Becker had no authority to dismiss. NIWA has a Delegations of Authority document which refers to specific human resource authorities ("the Delegation document"). That document specifies that human resources delegations are governed by those incorporated in a relevant Policy & Procedures Manual ("the Manual"). The Manual annexes a Human Resources Delegated Authority Listing at Appendix 1. But there is no specific reference to any authority to terminate employment.

[84] The Authority accepts however that there is this general statement in the Manual at (apparently) clause 1.5:-

1.5 Delegated Authority

Principle

Ultimate authority and responsibility for decision-making in NIWA resides in NIWA's Board and Executive. However, in practice, human resources decision-making authority is frequently delegated to another level of management closer to the situation. This section indicates where these delegated authorities lie in relation to this Policy and Procedures Manual.

Procedural Guidelines

*Unless otherwise stated in this manual, Regional and Support Managers generally possess the appropriate delegated authority to carry out NIWA policy in accordance with this manual. A more detailed listing of Human Resources delegations appears in Appendix 1 of this manual. **Delegated Authority must always be complied with.***

(original emphasis).

[85] The Authority is persuaded that Mr Becker as Regional Manager possessed a general authority to dismiss. There is no express delegation. The Authority further notes that the Delegation document at clause 7.2 permits the Chief Executive alone or in conjunction with the General Manager - Human Resources and/or Operations to authorise all activities or actions relation to the conditions of employment for all Employees or other employment related matters, which are not dealt with under the Manual. The Authority is easily persuaded that Mr Morgan and/or Ms Dehar authorised Dr Salinger's eventual termination.

[86] The Authority accepts that Mr Morgan had no involvement with the disciplinary process leading to Dr Salinger's termination.

The determination

[87] **The Authority determines that NIWA's actions in summarily dismissing Dr Salinger and how it acted, were what a fair and reasonable employer would have done in the circumstances at the time the decision to dismiss was taken. The dismissal meets the test of justification as prescribed at section 103A of the Employment Relations Act 2000. Dr Salinger does not have a personal grievance and there will be no formal orders as sought by Dr Salinger.**

[88] As a result of this Determination, it is unnecessary to consider the assessment of remedies and any related matters going to contribution.

Non-publication

[89] The order made in the Authority's determination of 16 July 2009 is now made final. **I order that the pleadings lodged not be published. I further order that the Authority's file may not be inspected without order of the Authority.**

The costs

[90] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Churchman is to lodge and serve a memorandum as to costs within 28 days of the date of this Determination. Mr Hope is to lodge and serve a memorandum within 14 days thereafter.

Leon Robinson
Member of Employment Relations Authority