

Attention is drawn to the  
order prohibiting publication  
of certain information in  
this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 148A/10  
5308885

BETWEEN                      A  
   Applicant

A N D                              PACIFIC                      BLUE  
   EMPLOYMENT & CREWING  
   LIMITED  
   Respondent

Member of Authority:        James Crichton

Representatives:              Tim McGinn, Counsel for Applicant  
   John Rooney, Counsel for Respondent

Investigation Meeting:        On the papers

Submissions Received:        6 and 7 December 2010 from Applicant  
   6 and 7 December 2010 from Respondent

Date of Determination:        10 December 2010

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**FURTHER DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1]     When this matter first came before the Authority on 20 July 2010, A requested prohibition of the publication of his name. That was agreed to by the respondent (Pacific Blue) on the basis that it too could have prohibition of its name being published. The Authority made those orders and as to A that order remains in place. In respect of Pacific Blue, the prohibition order was removed by the Employment Court when the Authority's decision on interim reinstatement went on challenge.

[2]     The Authority's conclusion in respect of A's application for interim reinstatement was that he ought to be reinstated to garden leave. That decision went

on challenge to the Employment Court and was overturned. The underlying substantive personal grievance remains and is to be heard by the Authority in February 2011.

[3] In the meantime, there are interlocutory matters concerning disclosure which counsel have agreed to be dealt with on the papers and it is those issues which are the subject of this determination.

### **Issues**

[4] There are three matters requiring the Authority's decision:

- (a) The disclosure of the email traffic between Pacific Blue and the Police concerning A;
- (b) Disclosure to Pacific Blue of A's Police file; and
- (c) Disclosure to Pacific Blue of correspondence between A and the Civil Aviation Authority.

[5] It is a truism that, strictly speaking the Authority has no power to order disclosure. However, the Authority does have power to summons witnesses and to require those witnesses to bring with them relevant documents and other materials. It follows that, in a practical sense, the orders sought from the Authority are more than an academic exercise; the Authority can and will determine the issues in a practical way.

### **Should the Police emails be disclosed?**

[6] The factual position is that in the preparations for the substantive and interim investigation meetings of the Authority, counsel for A sought disclosure of all the email traffic between Pacific Blue and the Police relating to A. It is Pacific Blue's position that it has complied with that request on 15 July 2010 but that in accordance with s.29(1)(a) of the Privacy Act, parts of some of the emails were redacted to prevent either the disclosure of the affairs of other individuals or because the information did not contain personal information on the applicant. Also sought by A is communication details between Pacific Blue and Ms Collins, a former colleague of A.

[7] As to that last mentioned request, Pacific Blue's position is that it has provided all of the information it has concerning its engagement with Ms Collins and that it does not have a copy of any statement she may have made to Police.

[8] As to the more general issue of the email traffic between Pacific Blue and Police, A is in the difficult position of trying to piece together what may be in the concealed parts of the emails traffic and in those circumstances, the risk is that a party in A's position may effectively start at shadows. For the Authority's part, counsel for Pacific Blue indicates that the editing of the relevant emails is for proper purposes and I am inclined to accept that assurance at face value.

[9] However, for the avoidance of doubt, I propose to order Pacific Blue to disclose the subject emails to me without editing and to do this as a matter of urgency so that I can peruse them and hopefully reassure A that there is nothing relevant in the edited-out material.

#### **Should A's Police file be disclosed?**

[10] A claims that Pacific Blue is simply try to have another bite of the same cherry in that it has already applied for disclosure of the Police file and the Authority has already turned that application down. It is the position that Pacific Blue made application on 6 July 2010 for the disclosure of the Police file held on A. That application was made by Pacific Blue in anticipation of the upcoming urgent interim reinstatement hearing in the Authority.

[11] The Authority declined the request then, on the basis that the Authority's responsibility was to consider what the employer did in reaching its conclusion to dismiss A for misconduct and a Police file which had been closed literally months before would not assist the Authority in its task. Put more succinctly, the Authority's view then was that the Police report had no probative value. A invites me to reach a similar conclusion again and, in so doing, is impliedly critical of Pacific Blue for raising again a matter which the Authority has already disposed of.

[12] I have carefully considered the submissions proffered on behalf of Pacific Blue, especially to establish if there is anything fresh in those submissions which would encourage me to change the view that I formed earlier and which I communicated by the notice of direction dated 9 July 2010. I am satisfied that the

Police file is not relevant to Pacific Blue's decision to dismiss for misconduct. That conclusion is, of course, consistent with my earlier decision of 9 July 2010.

[13] However, it seems to me that A's Police file is highly relevant to the Authority's investigation, especially in respect of remedies. I accept Pacific Blue's submission on that point is well founded. After all, the Authority's obligation has changed since July 2010 where the Authority was concerned only with the decision of Pacific Blue to dismiss and the application A made for interim reinstatement pending the disposal of his substantive grievance. Now that the Authority is required to consider the wider issue of remedies, and that may include reliance on the dictum in *Salt v. Fell* [2008] ERNZ 155.

[14] Because I think that the utility of the Police report (if any) goes to the question of remedies, I am not persuaded that the Police file ought to be provided to the respondent. If the Police file has any relevance at all, it is, I am satisfied, relevance which the Authority itself is able to discern and take into account when reaching conclusions about remedies, should that point be reached. Plainly, in order for the issue of remedies to be in play, A must have been successful in his substantive personal grievance and only at that point would the Police file have any relevance in my judgment.

[15] It follows that I require the Police file to be disclosed to the Authority but not until issues of liability have been determined. In a practical sense, what will happen is that once the substantive hearing of the employment relationship problem has been completed, the Authority will first address liability and before considering remedies will notify the parties' counsel of the decision on liability. If the decision is favourable to A, then the Police file will be required to be disclosed, but only to the Authority. If A is not successful in the substantive matter, then no further steps need to be taken.

**Should the correspondence between A and the Civil Aviation Authority be disclosed?**

[16] Pacific Blue argues that communications between and the Civil Aviation Authority (CAA) is highly relevant to the Authority's investigation and particularly, again, to the question of remedies, assuming A is successful.

[17] Pacific Blue argues persuasively that it is important for it to understand the reasoning process used by the CAA in eventually concluding that A was fit to fly. This is particularly so when the draft s.15A report from the CAA contained material which was *adverse to A's fit and proper person status*. Having been advised of that circumstance on 23 September 2010, it is perfectly reasonable that Pacific Blue would want to understand how the final decision made by the Director of the CAA on 11 November 2010, resulted in a clearance to fly. Some of that material has been disclosed by A to Pacific Blue but not all of it. I think it is appropriate that it is all disclosed and disclosed not just to the Authority but also to Pacific Blue.

[18] This is because Pacific Blue, as much as the Authority in its decision-making role, must understand how the CAA came to conclude what it did conclude and must be able to satisfy itself that such a decision is sufficiently robust if, for instance, the Authority is minded to permanently reinstate A. In that circumstance, it is not just the Authority that will need to be satisfied that permanent reinstatement is an achievable remedy, but also Pacific Blue itself. Without Pacific Blue's at worst tacit acceptance of that possibility, arguably any reinstatement would be an impossibility.

[19] In submissions for A, Mr McGinn eloquently urges on the Authority the need to constrain any demand for full disclosure on the basis, amongst other things, that it would compromise the integrity of the CAA's process. Amongst other things, it is suggested that the Official Information Act request for such information filed by Pacific Blue is likely to be turned down on such a ground. It is suggested that if the Authority is minded to require disclosure, then it should be limited to the matters relevant to the employer's own investigation as previously defined in the email of 22 April 2010.

[20] I think the correct way to approach this issue is to indicate that as a matter of principle the Authority wishes to have further disclosure, both to itself and to Pacific Blue, of the CAA material. It is suggested there may be a number of ways in which that material could be treated sensitively. One way obviously is to limit its availability but the difficulty with that arrangement is that the Authority's firm view is that Pacific Blue should have access to the material as well as the Authority itself. Another way may be to limit the extent of the material, but either way the Authority will direct counsel to engage with a view to coming up with a formula that meets the parties' needs but also satisfies the Authority's requirement.

**Determination**

[21] The Authority makes the following orders:

- (a) Pacific Blue is to make available to the Authority as soon as practicable a complete and unexpurgated set of the emails between itself and Police relating to A;
- (b) The Authority will endeavour to give urgency to the perusal of that material and will then provide to the parties its view of the portions that have been edited out and their relevance, if any;
- (c) Should further orders need to issue in relation to that particular aspect of disclosure between the parties, a proper opportunity for counsel to be heard will be provided before any definitive orders or directions are made;
- (d) If A is successful in proving his personal grievance and is thus entitled to have the Authority consider how to remedy that personal grievance, A will provide to the Authority alone a copy of his Police file which the Authority will be able to refer to in the context of considering issues of remedy;
- (e) Once the Authority's determination issues, the file will be returned to A;
- (f) No copy of the Police file will be made nor will it be provided to any other party, including Pacific Blue;
- (g) Counsel for the parties are to engage with a view to establishing how best to fulfil the Authority's direction that the communications between A and the CAA be fully disclosed, both to Pacific Blue and to the Authority;
- (h) Such conferring between counsel is to be undertaken as soon as practicable and the Authority advised of the conclusion of such discussions;
- (i) Leave is reserved for either party to seek further orders.

**Costs**

[22] Costs are reserved.

Member of the Employment Relations Authority