

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 100/10
5300880

BETWEEN

JOHN SMITH
First Applicant

GLENN RANKIN
Second Applicant

A N D

COMPTROLLER
CUSTOMS
Respondent

OF

Member of Authority: Helen Doyle

Representatives: Andrew McKenzie, Counsel for Applicants
Peter Zwart, Advocate for Respondent

Investigation Meeting: 23 April 2010 at Christchurch

Determination: 28 April 2010

DETERMINATION OF THE AUTHORITY

Prohibition from Publication

[1] I prohibit from publication under clause 10(1) of the Second Schedule of the Employment Relations Act 2000 the name of the employee referred to in the material the respondent concludes was provided to the *Christchurch Press* and the name of one of the Managers. I shall where necessary refer to the employee as “X” in this determination and the Manager as “Y”.

[2] I also prohibit from publication the nature of sensitive information both national and international that is supplied from time to time to the New Zealand Customs Service. That is information referred to in the affidavits of Robert Lake, Deputy Comptroller, Operations and Bruce Good who is a constable holding the rank of Detective Inspector in the New Zealand Police stationed at Auckland.

[3] This order will remain in place until the substantive investigation when it will either be continued, varied or discharged.

Employment Relationship Problem

[4] I shall refer to the respondent from hereon as the Customs Service. John Smith and Glenn Rankin were summarily dismissed from their respective positions as Customs Officer and Assistant Chief Customs Officer following separate meetings with the Group Manager Airports, New Zealand Customs Service, Philip Chitty on 22 March 2010. Both Mr Smith and Mr Rankin are members of the National Union of Public Employees (NUPE) and since 2007 Mr Smith has been the National Delegate for NUPE.

[5] Mr Smith has been employed with the Customs Service from 11 March 2002 and Mr Rankin, aside from a short period with Inland Revenue Department has been employed continuously since 1986. Mr Smith and Mr Rankin seek interim reinstatement to the Customs Service until the Authority is able to finally determine their personal grievances that they were unjustifiably dismissed from the Customs Services.

[6] The investigation meeting in respect of their application for interim reinstatement proceeded on the basis of untested affirmation/affidavit evidence. Mr Smith provided a primary affidavit in support of his application for interim reinstatement and an affidavit in reply. Mr Rankin provided a primary affirmation in support of his application for interim reinstatement and an affirmation in reply. They both provided undertakings as to damages. A third affidavit was provided in support of the application for interim reinstatement from the Union Secretary of NUPE Martin Cooney. Mr Cooney also provided an affidavit in reply.

[7] There were five affidavits provided on behalf of the Customs Service from Mr Lake, Mr Chitty, Mr Good, Mr Lumsden and employee "X".

[8] The parties have attended mediation but the matter did not resolve.

The issues

[9] An injunction requires the exercise of a discretion and the answer to an interim injunction is not in the rigid application of the formula. There are two broad inquiries.

The first is whether there is a serious issue or issues to be tried and the second is where the balance of convenience lies. The final question requires the Authority to stand back and ascertain where the overall justice lies – *Klissers Farmhouse Bakeries Ltd v. Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA).

[10] I set out below the relevant facts from the untested affidavit and affirmation evidence and documents that provide the necessary background in this case against which the Authority is required to exercise its discretion whether or not to grant interim injunction.

[11] I am mindful that although Mr Smith and Mr Rankin’s applications for interim reinstatement are being dealt with together they require separate consideration.

The facts

[12] On or about 6 November 2009 the Customs Service became aware that *Christchurch Press* was in possession of personal and confidential information relating to Customs Officer “X”. The information was related to earlier employment investigations into Mr Rankin and “X”. Mr Chitty authorised an employment investigation be undertaken into the matter to commence no later than 16 November 2009 with a preliminary report to be furnished by 27 November 2009 and a final report by 4 December 2009. An extension was able to be sought if required.

[13] Two investigators were appointed by Mr Chitty. They were Simon Williamson from Auckland and John Anderson from Christchurch. Mr Williamson and Mr Anderson were asked to investigate and make objective recommendations on a number of matters including:

- Whether any employee of the Customs Service was involved in the release of information to the *Christchurch Press* or any other media organisation ...
- Whether any employee of the Customs Service was aware of any other Customs employee being involved in the release of information to the *Christchurch Press* or any other media organisation ...
- The scope and nature of the employee’s actions in this matter;

- Whether or not the employees' actions in these matters are inconsistent with or breach the Service's Code of Conduct; and if so, whether the behaviour is considered to fall under the category of misconduct or serious misconduct;
- Whether or not the employees' actions in these matters could be considered to irreparably damage the trust and confidence the Customs Service has in the employee....

[14] Mr Rankin was interviewed by Mr Williamson and Mr Anderson on 18 November 2009 at his home. Mr Rankin was at that time on sick leave. He was represented at the meeting by NUPE Union Organiser, Les Bryce. Mr Rankin's wife Bronwyn was also present at the interview. Mr Rankin accepted that he had prepared one of the documents that the investigators advised him the *Press* had a copy of but he denied that he had sent it to *Press* or contacted the *Press* in relation to the matters that were of concern.

[15] Mr Smith was on holiday at the time the investigation commenced and on 19 November 2009 he left at the Christchurch Custom house a written statement denying his involvement in the release of information. Shortly thereafter he departed to the North Island on holiday.

[16] A preliminary report was prepared and provided to Mr Chitty on 27 November 2009 by the investigators. This was subsequently provided to Mr Smith and Mr Rankin. Parts of the preliminary report were blanked out where reference was made to individuals other than those to whom the report was provided to.

[17] Mr Smith subsequently attended an interview at Custom house in Tauranga with the investigators on 1 December 2009. During the interview Mr Smith denied leaking the information to the *Christchurch Press* but accepted that he was possession of both documents which the investigators said were in the possession of the *Press* having been provided with the documents by Mr Bryce.

[18] A final report was being prepared by the investigators on 4 December 2009 and copies were provided to Mr Smith and Mr Rankin under cover of a letter from Mr Chitty dated 14 December 2009. Again parts of the report were blanked out. There was particularly heavy censorship of the chronological series of events table at

the back of the report. The letter from Mr Chitty to both Mr Smith and Mr Rankin gave them until 22 December 2009 to make any comment on the report. The letter also advised that disciplinary action could result if misconduct or serious misconduct was determined up to and including dismissal.

[19] With respect to Mr Smith the report concluded for a variety of reasons that the investigators were satisfied that *there are sufficient grounds, as previously detailed, that indicate that the principle involved party in the unauthorised release of information to The Press Newspaper in Christchurch is, more likely than not, John Smith.* The report further concluded in terms of Mr Smith that this action is a serious breach on his part of the New Zealand Customs Code of Conduct, namely serious misconduct and that it is considered that Mr Smith's irreparably damaged the trust and confidence the Customs Service had in him.

[20] With respect to Mr Rankin the report concluded that he had knowledge of the involvement of another Customs employee who had that involvement, namely Mr Smith in the unauthorised release of confidential and private information to the Media and did not bring that breach to Customs attention as required under the Code of Conduct. The report concluded that this breach has irreparably damaged the trust and confidence the Customs Service has in Mr Rankin.

[21] NUPE then on behalf of Mr Smith and Mr Rankin requested the release of the entire report without deletion in order that Mr Smith and Mr Rankin could meaningfully reply to it. An extension once that had occurred was then requested, bearing in mind the time of year and other commitments that Mr Cooney had at that time.

[22] Mr Chitty responded to Mr Cooney and considered the request as one made under the Official Information Act 1982 in a letter of 23 December 2009. Whilst Mr Chitty agreed to extend the time for submissions to Friday 22 January 2010 he did not consider it desirable to release information about other individuals to Mr Cooney on behalf of Mr Rankin and Mr Smith.

[23] NUPE then referred the matter to the Ombudsman and subsequently Mr Chitty reviewed documents in the investigation to date that had been censored in terms of individuals other than those directly involved and in mid February 2010 he enclosed fresh copies of these documents with fewer deletions to Mr Smith and Mr Rankin.

Some further notebook entries, copies of emails and requests for telephone records were also provided by Mr Chitty under cover of letter dated 11 March 2010. Mr Cooney in his affidavit deposed to not having received this additional information before Mr Smith and Mr Rankin and NUPE provided final submissions with respect to the investigation report dated 4 December 2009.

[24] After those final submissions had been provided to the Customs Service, meetings were held on 22 March 2010 with Mr Chitty and separately, Mr Smith and Mr Rankin. The meetings took place in the early part of the day and then the meetings reconvened at 4pm. Both Mr Rankin and Mr Smith were summarily dismissed. The dismissals were confirmed in a letter of the same date.

Arguable case

[25] Mr McKenzie put forward four matters as criticisms of the actions of the Customs Service in dismissing Mr Smith and Mr Rankin. These four matters were referred to by Mr Cooney in his primary affidavit.

[26] I accept that Mr Smith and Mr Rankin have arguable cases in terms of the following matters.

[27] It is arguable whether the information received by Mr Smith and Mr Rankin during the investigation process into the release of information to the *Christchurch Press* enabled them to properly and fairly respond to it.

[28] There is an issue as to whether the good faith requirements in s.4(1A)(c) of the Employment Relations Act 2000 were complied with and an issue as to whether the failure to provide Mr Smith and Mr Rankin with copies of interviews with others as part of the investigation process was unfair.

[29] There is an arguable case that the failure to provide all information received by the investigators during the investigation process was not in accordance with the Customs Service's own disciplinary procedures. Mr Chitty in his affidavit deposed that it was unusual to withhold information in such an investigation and he explained that part of his thinking in this was the reason for the original leak and that he was keen to restrict the amount of personal information available to any individual.

[30] In particular, there is an arguable case as to whether the allegation Mr Rankin was facing was put to him in a specific enough way to enable him to respond in a meaningful way, and whether that was done so in accordance with Customs Services own procedures. There is an arguable case as to whether the final submissions of Mr Rankin and Mr Smith were properly considered by Mr Chitty.

[31] In terms of substantive basis for the dismissal Mr McKenzie submits there is an arguable case on the basis of a lack of *cogent evidence to link the applicants to the leak of information*. He submits that in relation to Mr Rankin with his long employment history the evidence against him needed to be particularly persuasive.

[32] Mr Zwart submits there is not an arguable case available to either Mr Smith or Mr Rankin that permanent reinstatement would be ultimately successful even if the dismissal was found to be unjustified for procedural reasons. He submits that Mr Smith and Mr Rankin's affidavits do not challenge the reasonableness of the Custom Services belief that they had committed the breaches.

[33] There is still some information that has not been disclosed to Mr Smith and Mr Rankin but was arguably considered as part of the investigative process. It is difficult for the Authority at this interim stage on untested affidavit/affirmation evidence to assess whether it is arguable there is an overlap between procedural matters and the substantive justification for the dismissals.

[34] At this stage I do conclude it is arguable, in the sense of there being a tenable arguable case, for both Mr Smith and Mr Rankin for permanent reinstatement.

[35] I conclude assessing the issues that there are serious and arguable issues to be investigated between Mr Smith and Mr Rankin and Customs Service.

Balance of convenience

[36] The Authority is required to look at the relevant detriment or injury that the parties will incur as a result of the interim injunction being granted or not when considering the balance of convenience.

[37] Initially I indicated to the parties a date for a substantive meeting in July. It was anticipated that two days would be required. I have, since the investigation meeting with respect to the interim matter reconsidered with a support officer, my

availability. With some juggling I am in a position to provide the dates of 31 May and 1 June for an investigation meeting. I have also been able set aside some time for writing the determination which means that a determination would be available to the parties by the end of June 2010.

[38] Mr Smith and Mr Rankin primarily rely in their affidavits on economic factors and provide details of their outgoings in their respective affidavits.

[39] Mr Rankin was paid \$11,631.67 gross on termination. I accept that that amount will in all probability be on the basis of the outgoings provided be if not exhausted, certainly diminished, before the Authority has had an opportunity to finally determine his personal grievance.

[40] Mr Smith on termination of his employment received \$10,550.74 gross. In terms of his outgoings I accept that that sum will in all probability be exhausted or diminished before the Authority has had an opportunity to finally determine his personal grievance.

[41] I do not however see this as a situation where either Mr Rankin or Mr Smith would necessarily suffer significant financial difficulties if the Authority deals with it on the dates it now offers the parties and determines it before the end of June.

[42] In terms of the adequacy of other remedies I have considered the submissions that the skills of Mr Smith and Mr Rankin are not readily transferrable outside of Customs Service, the negative impact on their respective careers if they are not reinstated on an interim basis and the fact that they genuinely wish to remain as employees.

[43] Customs Service would be in a position if grievances are established to meet any monetary compensation to cover any losses. If the Authority did get to the point of considering permanent reinstatement as a remedy then I do not find that the impact on Mr Rankin and Mr Smith's careers as Customs Officers for the period until the grievances can be finally determined is such that it is likely to be significantly negative in that respect.

[44] Against the financial and other hardships that I accept face Mr Smith and Mr Rankin I need to weigh the concern to the Customs Service that if reinstated both men would have unlimited access to information on the Customs Service computer system.

This is in circumstances where the Service has concluded that it has no trust and confidence in Mr Smith and Mr Rankin because it says they were involved in the release of information.

[45] Reinstatement of Mr Smith and Mr Rankin on an interim basis Mr Zwart submits, in reliance on the affidavit evidence of Mr Lake and Mr Good, could potentially impact on national security because some agencies could on the basis that the information may not be safe withhold sensitive information. Further Customs Service may have no idea that such information is being withheld.

[46] Mr Rankin and Mr Smith depose in their respective affirmation and affidavit that they continued, after the investigation commenced into the release of the information to the *Press*, to have unrestricted access to sensitive material and Mr Smith was also involved in a sensitive operation. Mr Rankin deposes in his affirmation in reply that *the information apparently released to the media was not sensitive* and Mr Smith that *it was not sensitive in an operational sense and did not originate from the Customs intelligence database*.

[47] I do weigh in terms of this matter that Mr Rankin and Mr Smith were not suspended and continued to access information in the normal way until their dismissal. The reasons however for dismissal for both Mr Smith and Mr Rankin are the foundation for the concern about trust and access to the information for the Customs Service.

[48] I have also considered that the potential impact of interim reinstatement on "X". "X" deposes to a belief that Mr Smith and Mr Rankin have gone to the extent of publicly naming him in documents provided to the newspaper and that they have made it impossible for him to work with them. In this respect he deposes to this being particularly so because Mr Rankin is a senior ranking officer. Although I have balanced this concern with the fact that "X" is in all probability able to rostered away from Mr Rankin and Mr Smith I find that this is nevertheless a significant concern in terms of how this matter could be managed if either Mr Smith or Mr Rankin were to be reinstated in the interim. It would cause hardship both to "X" and the Customs Service.

[49] Mr Smith also expressed in one of his interviews during the investigation that he does not have trust in the managers at the Christchurch airport including some

strong comments about “Y”. Mr Smith deposes in his affidavit in reply to these comments having been made when he was upset at his holiday being interrupted. Mr Smith says regardless of his views of people he prides himself in being able to nevertheless act appropriately. He did not otherwise resile from the comments he made during that interview in his affidavits.

[50] Mr Rankin was part of the management team. Mr Lumsden deposes in his affidavit to it being apparent to him during the investigation into the leak of information when Mr Rankin’s emails were recovered and perused that Mr Rankin does not trust the management team. Mr Rankin deposes in his affirmation to having worked within the management team and attended meetings throughout this investigation.

[51] I have carefully considered all matters in terms of where the balance of convenience lies. On one hand the timeframe until the final determination of these applications is a factor that may favour interim relief. On the other hand there is a significant hardship to the respondents in terms of trust and confidence in this case where both Mr Smith and Mr Rankin would have unlimited access to information in their operational roles in the circumstances of this matter. There is the further factor in this case of employee “X” to consider and the obligations the Custom Services have to him. There is further some concern I accept on the part of Customs Service about Mr Smith’s lack of trust in the management team and Mr Rankin working in the interim with the management team.

[52] On final analysis I find that the balance of convenience favours the Customs Service.

Overall justice

[53] I now stand back and consider the overall justice of the case. I have found that there are arguable and serious issues to be investigated.

[54] I am aware that both Mr Smith and Mr Rankin’s cases are to proceed further. In assessing the relative strengths and weaknesses of the parties case I only intend at this interim stage to say that without having the full information that the investigators had in front of them I am not able to say Mr Smith and Mr Rankin do not have an arguable case for permanent reinstatement, but I equally am unable to conclude that it is a strong arguable case.

[55] I have considered the concerns with respect to continued working relationships in the interim and I am not satisfied that these matters can be dealt with without considerable hardship. I have found that the balance of convenience favours the Customs Service.

[56] I have taken into account that an investigation can be undertaken on 31 May 2010 and 1 June 2010 with determination by the end of June 2010.

[57] I am satisfied that when I stand back and consider the overall justice is best done by a full investigation and careful assessment of the evidence relating to the process and substance of the dismissals of Mr Smith and Mr Rankin.

[58] I decline both applications for interim reinstatement.

[59] I shall ask a Support Officer to arrange with Mr McKenzie and Mr Zwart for a telephone conference so that timetabling orders for further evidence can be organised and arrangements made for disclosure of information not provided.

Costs

[60] I reserve the issue of costs and these can be dealt with following the determination of the substantive matters.

Helen Doyle
Member of the Employment Relations Authority