

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 169/09
5161725

BETWEEN GARY SMITH
 Applicant

AND THE COMMISSIONER OF
 POLICE
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Paul McBride and Tanya Kennedy, counsel for
 Applicant
 Peter Churchman, counsel for Respondent
 Sharee Maclean, junior counsel for Respondent

Investigation Meeting: 22 May 2009

Determination: 27 May 2009

DETERMINATION OF THE AUTHORITY

Application for interim injunction

[1] The applicant Mr Gary Smith lodged a statement of problem in the Authority on 12 May 2009 seeking a determination of claims brought against his employer, the respondent Commissioner of Police. The claims are in respect of a disadvantage personal grievance, breaches of good faith, breaches of the parties' employment agreement, and a fourth claim;

Seeking permanent cessation of the review of the Applicant's last seven years of employment by the Respondent – announced on 23 April 2009.

[2] Mediation of the claims has been arranged for 12 June 2009.

[3] On 21 May 2009, after a telephone conference by the Authority with counsel Mr McBride and Ms Kennedy for the applicant and Mr Churchman for the respondent

Commissioner, a further application was made on Mr Smith's behalf, seeking the following orders:

- (a) *..... an interim injunction restraining the Respondent from continuing or taking any further steps to continue a "review" into the applicant's employment, pending the determination of these proceedings or earlier order of the Authority; and*
- (b) *Costs of and incidental to this application.*

[4] Mr Smith is a Superintendent of Police and has been the District Commander of the Bay of Plenty region since June 2001. He reports to Mr Rob Pope the Deputy Commissioner: Operations, whose name is on the cover page of the individual employment agreement as the Controlling Officer of Mr Smith.

[5] The applications lodged on 12 and 21 May arise from advice Mr Pope gave Mr Smith by letter dated 21 April 2009, which began:

On 14 April 2009 I instructed Mr Peter Cullen to undertake a review of the Bay of Plenty District Commander's (your) management practices and processes.

[6] Mr Smith was also advised of the Terms of Reference for the review and of its planned completion by 31 May 2009.

[7] In furtherance of his appointment as the independent reviewer Mr Cullen, an employment lawyer in private legal practice, wrote to Mr Smith on 30 April 2009 advising of the process he intended to follow in carrying out the review for the Commissioner. Mr Cullen also advised of the information he had received in relation to it and, in some detail, he requested information from Mr Smith about his management practices and processes. Some of the information required goes back five years before the review and other information two years.

[8] Mr Smith is required to be interviewed as part of the review. He has been expressly advised that he may have a support person or representation throughout.

[9] The Commissioner has opposed the application for an interim injunction stopping the review. To determine the application the Authority received affidavit evidence from Mr Smith, the National Secretary/CEO of the Police Association and a manager in Police HR.

[10] An investigation meeting was held on 22 May, at which Mr McBride and Mr Churchman addressed in comprehensive submissions the tests to be applied when considering an application for interim injunction.

Is there an arguable case?

[11] I am satisfied that there is an arguable case, bearing in mind that it is a relatively low threshold to be met under this particular test.

[12] There is an arguable case I find that the review initiated by Mr Pope in April 2009 of Mr Smith's management practices and processes, is a "*Performance Review*" within the meaning and scope of Clause 8 of the parties' individual employment agreement. Under Clause 8, as Controlling Officer, Mr Pope is expressly given responsibility for reviewing, either generally or in respect of any particular matter, Mr Smith's performance in carrying out the duties and responsibilities of his position.

[13] For the Commissioner in evidence it has been represented that the review is not, and does not purport to be, a performance review of Mr Smith as required to be conducted annually under Clause 8, and it is not a disciplinary investigation.

[14] Without the Commissioner wishing to speculate what the outcome of the review might be, one possibility he raises is that Mr Smith is found to need education and training to assist him with aligning his management processes and practices with legal and organisational requirements. A good employer is of course expected to provide such education and training.

[15] To the level of an arguable case and for the purposes of this test, the review could conceivably be regarded as coming within Clause 8.5 which allows the Commissioner wide scope to;

..... review the performance of the appointee [Mr Smith] in respect of any particular matter in such manner as the Controlling Officer deems appropriate.

[16] Clause 8.5 is expressly not subject to the preceding sub-clauses which provide for reviews to take place at least annually, and after consultation about the process, and after a Performance Agreement has been settled between the parties, and other requirements have been observed. As those features of a performance review are not

required under clause 8.5, arguably in substance the review Mr Smith is seeking to stop is a Clause 8.5 review, whether labelled a performance review or not.

[17] Under the circumstances outlined in his affidavit, it is reasonable for Mr Smith to feel apprehensive and even fearful about the review and the purpose for it. Although some time ago in November 2007, Mr Pope expressed interest in a change of direction for Mr Smith in his Police career progression.

[18] Commencement of the review was simply announced to Mr Smith without any prior consultation and he is not aware of any other District Commander being subjected to similar processes. He has advised Mr Pope that he is unclear of the need seen by his employer for the review, but the response he has been given is in broad terms only and without detailed explanation. The motives Mr Pope has for commencing the review have not so far been explained to Mr Smith. Neither has he been told why the review is directed at him and not apparently at any other officer holding his position or seniority.

[19] Mr Churchman submitted that the review is not a “performance review.” Mr McBride reasonably contends the contrary, pointing to the evidence, and clearly an argument exists as to the correct position. There is also a dispute about the application and/or operation of Clause 8. If in substance the review is within the contemplation of Clause 8 of the employment agreement, the Commissioner is bound to follow the procedure for such reviews. He concedes that he is not doing so.

[20] There may also be an argument as to whether and to what extent Mr Pope can delegate to an independent reviewer his responsibilities under clause 8, if they are intended as it may seem from the provision’s wording to be personal to him as the named Controlling Officer in the agreement

Availability of adequate alternative remedies/Balance of convenience

[21] I find the balance of convenience favours the Commissioner. Whatever might develop from the review once it has been completed, at this stage it comprises in essence a structured or systematic enquiry by Mr Smith’s employer into the way he has been carrying out his role with regard to a specific aspect of performance.

[22] As a general principle, any employer is entitled at any time to ascertain facts directly from an employee, or gather intelligence. It is not suggested that there is a

particular privilege (such as that against self incrimination) applying to the circumstances and able to be invoked by Mr Smith to release him from the general requirement to communicate with his employer as and when requested.

[23] Under s 4(1A) of the Employment Relations Act 2000, both Mr Smith and the Commissioner are required to be active and constructive in maintaining a productive employment relationship in which they are, amongst other things, responsive and communicative. In my view therefore the Commissioner is fully entitled to find out from Mr Smith directly what he did or may have done in his employment on any particular past occasion or occasions.

[24] It is significant that a stage has not been reached at which Mr Smith has been asked to explain any actions of his. He is simply required to describe what it was he did when implementing “*practices and processes*” as a manager.

[25] If the information the Commissioner is seeking from Mr Smith leads to disciplinary consequences or the possibility of such, Mr Smith is protected by the procedures for conducting those contained in his employment agreement and also by the remedies available under the Employment Relations Act. They include the personal grievance remedy and compliance, which he may seek if the Commissioner acts unlawfully or without justification and to his disadvantage in his employment or any terms or conditions thereof.

[26] Mr Smith’s fears about what will occur are based largely on a combination of circumstances and his reading of what they all add up to. Although the Police have given little to Mr Smith by way of explanation for the review, there are clearly explanations for it other than the one put forward by Mr Smith, that he is being undermined deliberately to oust him from his employment.

[27] While I accept that Mr Smith is genuinely fearful of the outcome of the review, there is nothing in the affidavit evidence to show that anything unlawful, unfair or unreasonable has occurred, at least to this point or, that if it has, remedies other than an interim injunction will not be sufficient to provide redress for the wrong.

Overall justice of the case

[28] Standing back and looking globally at the situation as presented in evidence and submissions, the Authority finds that the overall justice of the case favours the

Commissioner. No basis for granting an interim injunction has I find been established. Although an arguable case is present, it is not by itself one of such weight or strength as to influence the overall justice to the point where an interim injunction should be granted.

[29] I agree with Mr Churchman for the Commissioner that at best Mr Smith's case is built out of apprehension and fear that the review will have adverse consequences to him and to his employment in a number of ways. No actual disadvantage has yet arisen, on the evidence. It is clear that a compliance order could not be granted in that situation, were it accepted that a breach of the employment agreement, or the requirements of good faith and other matters under the Employment Relations Act, is threatened in the future.

[30] I accept that *quia timet* injunctions require a high standard to be met. As made clear by the Court of Appeal case Mr Churchman referred to, merely expressing a fear of threatened harm is not sufficient for a *quia timet* injunction to be made. What must be shown is;

.....a strong probability that the defendant's conduct will be the cause of injury, and the threat of injury must be immediate and substantial"

See; *Todd Petroleum and Mining Company Limited v Shell (Petroleum Mining) Company Limited* CS 155/05, 23 September 2005, with quotation from *Laws of New Zealand: Injunctions* at 11.

[31] In complying with the review commenced by the Commissioner, Mr Smith or his representative may wish to seek clarification as to some of the information required by Mr Cullen, if unclear about that. Also, he may ask Mr Pope to consider and approve of plans he proposes to re-assign priorities for work planned before the review was announced. For the Commissioner it has been confirmed that Mr Smith is not expected to attend to the review requirements in his own time or at his own expense.

[32] Similarly, he and Mr Pope may wish to discuss and agree upon how Mr Smith should inform any of his staff about the review and his involvement in it, to avoid the spread of rumour and speculation.

Determination

[33] For the above reasons the application for an interim injunction is declined.

Non-publication order

[34] I decline to make an order as requested under clause 10 of Schedule 2 of the Act, preventing from publication Mr Smith's name and any identifying details of his case. I do not consider there is anything about this case compelling the making of such order in the interests of justice. I note that Mr Smith is a senior public official employed in a department that must expect close scrutiny by a public entitled to have high levels of confidence maintained in it. Also, the substantive hearing of the injunction application is likely to take place in conjunction with the grievance claim and the other claims for remedies, about which there is nothing out of the ordinary from most grievances which are brought across the wide spectrum of employment relationships. There is nothing exceptional about Mr Smith's employment relationship being with the Police and at a very senior level. A direction is now given that this determination is not to be published or issued, except to the parties, until after the 12 June mediation or any further direction of the Authority.

Determination of all substantive claims

[35] If mediation in just a few days on 12 June does not resolve the claims, further directions will then be given by the Authority for holding an investigation meeting to consider all outstanding claims, including the application for a permanent injunction and any damages sought in relation to that.

Commissioner's undertaking

[36] I record the undertaking given on behalf of the Commissioner not to conclude his review of Mr Smith's management practices and processes, until the injunction application has been disposed of.

Costs

[37] Costs are reserved.

A Dumbleton

Member of the Employment Relations Authority

