

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 305/10  
5163963

BETWEEN                      DOUGLAS ALO  
   Applicant  
  
AND                                NEW ZEALAND CUSTOMS  
   SERVICE  
   Respondent

Member of Authority:        Marija Urlich  
  
Representatives:              Kathryn Beck and Kate Hoyle, Counsel for Applicant  
   Andrew Scott-Howman and Maria Berryman, Counsel  
   for Respondent  
  
Investigation Meeting:        29, 30, 31 March and 1 April 2010  
  
Submissions Received:        16 and 20 April 2010  
  
Determination:                29 June 2010

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**DETERMINATION OF THE AUTHORITY**

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[1] Douglas Alo was employed by New Zealand Customs for 22 years. His employment ended on 22 July 2008 when he was dismissed from his position as Customs Liaison Officer, South East Asia, an attaché role attached to the New Zealand Embassy in Bangkok.

[2] During his employment Mr Alo had risen steadily through the Customs ranks. The position he held at the time of his dismissal reflected the high degree of skill and expertise he had developed during his employment and the regard with which he was held by the organisation.

[3] During his posting Mr Alo developed a major depressive condition, post traumatic stress disorder and alcohol abuse. He says these disorders developed after his deployment to the January 2006 post tsunami relief effort where he was exposed

to traumatic scenes and experiences. He says the events which gave rise to the disciplinary investigation resulting in his dismissal would not have occurred if Customs had provided appropriate and necessary support after this deployment.

[4] Customs does not dispute Mr Alo's diagnosis of post traumatic stress disorder, major depressive condition or alcohol abuse. However, it does dispute any causative link between its actions (or lack thereof) and the ill health Mr Alo continues to suffer. It says Mr Alo received all the necessary and appropriate support during and subsequent to his posting in Bangkok and that he was treated fairly and reasonably during the disciplinary investigation which ultimately resulted in his dismissal.

### **Issues**

[5] To determine this employment relationship problem the Authority must consider:

- (i) Whether Mr Alo's dismissal was fair and reasonable in all the circumstances; and
- (ii) Whether Customs provided a safe and healthy workplace for Mr Alo and if not whether he suffered any harm consequent.

### **The dismissal**

#### **(i) the events leading up to Mr Alo's dismissal**

[6] On 21 October 2007 Mr Alo finished his Bangkok posting and returned to New Zealand with his family. Shortly before his return Mr Alo was charged with conducting a hand over to the incoming post holder. The events around the hand over caused the incoming post holder such serious concerns that he wrote a detailed report to Mr Alo's manager, Richard Bargh, Customs Manager International Relations. The report sets out concerns about Mr Alo's behaviour and the impact of this behaviour on the reputation of Customs and the New Zealand Embassy in Bangkok. The report is dated 16 November 2007.

[7] Satisfied the concerns merited further investigation Mr Bargh instructed Kristy McDonald QC on 17 December 2007 to undertake a formal investigation into these concerns. The relevant sections of the terms of reference provide:

Please investigate Mr Alo's conduct while he was in Bangkok to determine whether his conduct:

- (a) amounts to serious misconduct under the New Zealand Custom's Service Code of Conduct; or
- (b) is prima facie criminal.

[8] Mr Bargh telephoned and spoke with Mr Alo on 24 January 2008. During the conversation Mr Bargh advised he would be writing to Mr Alo to advise that concerns about financial and reputational issues in Bangkok would be investigated, that the terms of reference of the investigation would be included in the letter, that Ms McDonald would contact him to discuss the investigation, that he had the right to be represented and would be on annual leave until further notice. A letter to this effect under Mr Bargh's name was sent to Mr Alo's Auckland address the following day.

[9] By early February Ms McDonald had been unable to contact Mr Alo. Mr Bargh left messages on the cell phone number Mr Alo had provided. The messages were not returned. Concurrently Customs staff were unsuccessfully attempting to contact Mr Alo concerning evidence he was required to give in an upcoming court case. Customs contacted Mr Alo's wife, from whom he was separated, to ask her to ask Mr Alo to contact Mr Bargh. Mr Alo telephoned Mr Bargh on 21 February and confirmed his contact details.

[10] Ms McDonald completed her investigation report on 4 June 2008. The report is extensive and concludes that many of the aspects of Mr Alo's conduct under investigation amount to serious misconduct warranting dismissal. Ms McDonald was unable to put any of these issues to Mr Alo to comment on. Accordingly the report sets out the mitigating factors for the decision maker to consider:

**Mitigating factors**

2.29 During my investigation a number of matters which potentially mitigated the seriousness of aspects of Mr Alo's conduct came to my attention. These were Mr Alo's personal circumstances (both matrimonial issues and trauma associated with his involvement in the aftermath of the tsunami) and failures by management in New Zealand to ensure that internal policies and procedures were effectively applied to Mr Alo during the term of his

positing and/or that his compliance with relevant policies and procedures was monitored or adequately monitored).

2.30 Having considered these matters to the extent I was able on the basis of the information made available to me, I am not satisfied they sufficiently mitigate against or excuse the seriousness of Mr Alo's conduct. They do not cause me to alter the findings as set out above.

2.31 On 30 May 2008, Mr Alo, through his counsel Mr Haigh QC, requested that this Report be drafted in the first instance to enable Mr Alo to obtain a medical report relating to his current state of health. In my view in order to discharge its natural justice obligations, Customs should have regard to any medical report that is furnished in this regard. It is entirely a matter for Customs as to what weight, if any, ought to be placed on the contents of any such report.

[11] Ms McDonald refers to contact from Mr Alo's counsel Mr Haigh QC on 27 May and subsequent letter of 30 May. The letter sets out a clear picture of Mr Alo's situation as at 30 May:

Dear Ms McDonald

**Douglas Alo – NZ Customs Service – Investigation**

Further to my telephone conversation with you on the 27<sup>th</sup> of May 2008, I advise as follows:

1. On that date I met Mr Alo for the first time. He provided me at that meeting, with your letter dated 13<sup>th</sup> May and draft report.
2. From my meeting with Mr Alo it was obvious, even to a lay person, that he was suffering from a severe clinical depressive illness.
3. Whilst he was aware that he had problems, he had been unable to address obtaining medical assistance to overcome this acute problem.
4. The history of the onset of this problem seems to relate to a period of around six months prior to his leaving Bangkok, which is consistent with the deterioration in his work ability and to some extent his conduct.
5. He is presently embroiled in a very difficult matrimonial break up with his partner. The two of them are still living under the same roof but are effectively separated and disputing custody of his daughter.
6. As you are aware, he also suffered significantly by his involvement with the aftermath of the Indonesian tsunami. You will know that he had to deal with deceased victims of the tsunami and, again without any medical back-up, it would seem to me there is an element of post traumatic stress disorder present at the present time.
7. He is not capable of reading the draft report and has not done so. His medical condition would also explain his failure to reply to your correspondence.
8. It would seem from your draft report, that notwithstanding an apparently exemplary career for some 22 years, he has acted, (on the face of it) in a manner which is entirely inconsistent with his previous work performance.
9. It is apparent to me that he needed medical assistance, I rang (in his presence) several psychologists. The earliest appointment I could obtain, from someone properly qualified to deal with his problems is 10.30am on the 11<sup>th</sup> of June 2008. In the interim I am trying

to locate for him a General Practitioner (he doesn't have one) who may be able to deal with the immediate problem.

My request is that you refrain from forwarding the draft report to your client until I have had the opportunity to receive a medical report, and if possible go through the draft report with Mr Alo at that juncture. It is obvious that whatever the outcome, his health during the relevant period must surely have an impact on both your report and any actions taken by New Zealand Customs.

You suggested on the phone as an alternative, that you send to your client the draft report, with a copy of this letter and a suggestion (I accept that this is in no way binding) that the New Zealand Customs might await the medical report and any subsequent report that I might prepare, before it acts on the report.

I would prefer the first course of action, but accept that the second may be appropriate in the circumstances.

I would be grateful if you could take up these issues with your client. I have no doubt that Mr Alo as stated is suffering from a very real illness and would ask that this be taken into account as referred to above.

Yours faithfully

...

[12] On 17 June Dr Andrew Jack, Customs General Manager Legal, wrote to Mr Haigh asking if Mr Alo had yet consulted a doctor and when his comment on the draft report would be provided.

[13] On 18 June Dr Ian Goodwin, Consultant Psychiatrist, wrote to Mr Haigh with a psychiatric opinion as to firstly Mr Alo's current mental state and treatment requirements and secondly whether a formal psychiatric report as to the possible impact of Mr Alo's mental state on the events outlined in Ms McDonald's report. Dr Goodwin had seen Mr Alo on 11 June.

[14] In relation to current mental state Dr Goodwin wrote:

To cut a long story short it is apparent that Mr Alo does current[ly] (sic) suffer from a Major Depressive Episode (as per DSM-IV TR). He has not had any treatment to date and does not currently have a general practitioner. He has no prior history of psychiatric disorder though it appears he has had reasonably depressive symptoms since early 2007.

In addition, he clearly had a very negative psychological impact due to his involvement in coordinating disaster victim identification processes in Phuket, Thailand following the Boxing Day Tsunami Disaster of 2005.

While he currently does not fulfil diagnostic criteria for PTSD it is clear that his experience as part of his job in Thailand had a very significant psychological impact on him and this combined with other factors that I will make more apparent in my comprehensive report (to follow) have all resulted in him developing a Major Depressive Episode.

[15] Dr Goodwin's report concludes with advice that he has commenced Mr Alo on antidepressant medication and arranged a follow up appointment after which a more comprehensive report would be provided *to address the issue of his mental state at the time of his alleged misconduct.*

[16] Mr Haigh wrote to Dr Jack on 1 July advising Dr Goodwin had examined Mr Alo and confirmed that he was suffering from a major depressive illness, that he had sent a one page report and would provide a full report after his further examination of Mr Alo scheduled that day, that Mr Alo had not yet been able to consider Ms McDonald's report, that he expected Dr Goodwin's further report the following week and would communicate further with Customs and ends with a request for forbearance until the full report was received.

[17] Dr Jack telephoned Mr Haigh on 3 July and advised a draft decision as to Mr Alo's conduct would be forwarded. That document was duly sent to Mr Haigh on 7 July.

[18] The draft decision was made by John Secker, the Deputy Comptroller. It considered Ms McDonald's report findings, accepts them on the whole and concludes Mr Alo had *engaged in a series of activities that breached Customs and MFAT codes of conduct amounting to many examples of misconduct and several examples of serious misconduct* and that dismissal without notice was warranted.

[19] In the draft decision document Mr Secker set out and considered Mr Alo's failure to engage with the disciplinary process:

I have carefully considered the analysis and findings in the report and have developed a preliminary view on those findings. In developing my preliminary view I have also taken into account the information regarding Mr Alo's health provided by his representative Mr Haigh QC.

It is important to state at the outset that I am particularly concerned at the lack of co-operation from Mr Alo with the investigation itself, and the absence of comment from Mr Alo on the investigator's report. I am aware that Mr Alo has been provided with the draft report, and has been accorded ample opportunity to comment.

I note the advice from Mr Haigh dated 30 May 2008, that in his opinion Mr Alo was too depressed to read the report or respond to its contents. I note also that Mr Alo saw a medical specialist on 11 June 2008 (Dr Ian Goodwin). I have considered the letter from Dr Goodwin to Mr John Haigh QC dated 18 June 2008. Customs remains committed to assisting Mr Alo as an employee, with respect to any health issues that he has to the degree appropriate as his employer.

It is of course necessary for me to reach final conclusions on the findings of the report and I believe I can reasonably do so, with or without the co-operation of, or contribution from Mr Alo. To help ensure balance it is in Mr Alo's best interests to be able to put his side of the story and to test the evidence put forward by others. If Mr Alo is unable or unwilling to respond, however, I will reach a final conclusion regarding his conduct taking into account all that is known to me of the personal issues faced by Mr Alo, and giving him the benefit of the doubt regarding the investigator's findings on his conduct wherever it is equitable to do so.

[20] On 17 July Mr Haigh wrote to Dr Jack that he had been unable to obtain further instructions from Mr Alo, that he suspected this was because of his current medical condition and could take the matter no further in the absence of instructions.

[21] On 22 July Dr Jack wrote to Mr Haigh advising Mr Secker had made his decision in respect of the disciplinary allegations against Mr Alo, copy attached, that information about Employee Assistance Services was also included and that given Mr Haigh's lack of instructions a copy of the decision had been sent to Mr Alo directly by hand.

[22] Mr Secker's decision was that Mr Alo's conduct while he was Customs liaison officer in Bangkok had irreparably damaged the trust on which the employment relationship was based to such a degree that dismissal was warranted. The mitigating issues considered by Mr Secker caused him to temper the draft decision to dismiss without notice to dismissal on notice.

**(ii) Was Mr Alo's dismissal justified?**

[23] In assessing whether a dismissal is justified the Authority must apply the test set out at section 103A of the Act - a dismissal is justified if, on an objective basis, dismissal was a decision open to an employer acting fairly and reasonably in all the circumstances of the matter.

[24] The section 103A test must be read against the section 4 obligations which require parties to employment relationships to act in good faith towards one another.

[25] Mr Alo's challenge to the justifiability of his dismissal concerns Customs' failure to consider his ill health and how firstly this may have impacted on his ability to participate in the disciplinary process and secondly how his ill health could have

effected or given rise to the events under investigation and which ultimately resulted in his dismissal.

- **procedural fairness**

[26] It is well established that a justified dismissal is one which is conducted in accordance with the principles of procedural fairness. These principles include the requirement that an allegation should be fairly put to ensure a reasonable opportunity to provide a response.

[27] Mr Haigh advised Customs in his first correspondence with Ms McDonald that ill health was the likely cause of Mr Alo's failure to participate in the investigation and disciplinary process. Dr Goodwin confirmed this with his 18 June diagnosis of Mr Alo as suffering from a major depressive illness.

[28] It is a significant feature of this matter that Mr Secker did not undertake further investigation into this issue. He did not do so because he believed he had sufficient information to make a decision and Mr Alo had had a fair opportunity to participate in the process if he so wished.

[29] I accept as correct the general proposition that an employer may fairly call halt to a disciplinary investigation. When that point is reached is dependant on the particular facts of the matter at hand.

[30] In this situation the factors weighing against calling halt to the investigation on 22 July were Mr Alo's very recent diagnosis of serious mental ill health and implementation of a treatment plan, the advised provision of a comprehensive report from Dr Goodwin addressing Mr Alo's mental state at the time of the alleged misconduct (this document was provided six weeks later), Mr Alo's long service with Customs and until recent unblemished record, Customs knowledge that Mr Alo was psychologically healthy prior to his posting to Bangkok and that his psychological health had deteriorated after his involvement in the tsunami relief effort (refer Ms McDonald's noted concern and Dr Goodwin's conclusions as to cause) and Customs lack of information as to what, if any, responsibility it had in the causes of Mr Alo's ill health.

[31] Customs concerns as to continued payment of Mr Alo could have been addressed through use of contractual sick leave. The concerns as to delay and time involved are weak considering the length of time involved in Ms McDonald's investigation (some 5 months).

[32] Customs cannot show Mr Alo had a fair opportunity to provide a response to the serious allegations he was facing. Moving to dismiss, in all the circumstances of this matter was not the action of a fair and reasonable employer.

- **substantive fairness**

[33] It follows from the above finding that having failed to make reasonable inquiry into all the circumstances relevant to the decision to dismiss, and in particular the impact of Mr Alo's ill health on his ability to participate in the investigation and disciplinary process, that Customs cannot establish that Mr Alo's ill health was not a relevant consideration in its inquiry. This is a question of substantive fairness.

[34] A consideration of substantive fairness looks at the reasoned basis for the decision to dismiss. In this case Mr Secker concluded the report findings disclosed a pattern of behaviour on Mr Alo's part which raised integrity issues for Customs so serious that they amounted to serious misconduct warranting dismissal on notice.

[35] In reaching this decision Mr Secker gave little or no weight to Dr Goodwin's initial diagnosis of a major depressive episode or Dr Goodwin's comments that Mr Alo's condition, combined with other factors, resulted from his experiences during the tsunami relief effort.

[36] There was no reasonable basis upon which this diagnosis and comments as to cause could be marginalised to the degree evident from Mr Secker's decision. Most significantly the diagnosis was not challenged, which remains the case. Also significant is that the concerns about Mr Alo's mental health were before the decision maker in multiple forms; Dr Goodwin's diagnosis and comments as to cause echoed Ms McDonald's expressed natural justice concerns and Customs' staff's comment describing Mr Alo as *a broken man*.

[37] Mr Secker sought no further information to understand how Mr Alo's ill health could have contributed to the events which gave rise to the disciplinary inquiry or how that ill health could have impacted on Mr Alo's ability to participate in the investigation and subsequent disciplinary inquiry. In the absence of even a primary inquiry into the medical explanation the decision to dismiss cannot be said, on an objective basis, to be fair and reasonable.

[38] Customs says any further inquiry into the medical explanation would have made no difference to the out come of the inquiry.

[39] That argument is based on the premise that the disciplinary allegations Mr Alo was facing were so serious that no further information would have altered the decision. I do not accept this as valid. There was sufficient information before Customs prior to dismissal to cause it to pause and give serious consideration to the ill health explanation and make further inquiry. If it had done so then it would have had to confront and consider the impact on Mr Alo of his involvement in the tsunami relief effort.

[40] For these reasons I find the decision to dismiss was not one a fair and reasonable employer would have made having proper regard to all the relevant circumstances.

[41] By way of general comment an employer's approach to and assessment of medical information provided in a disciplinary context must be consistent with the good faith obligations binding parties to employment relationships. If such information is proffered as an explanation for conduct under inquiry then, in the absence of contrary information of equal probative value, then that information should be accepted at face value and given due weight.

### **Safe and healthy workplace**

[42] Mr Alo says Customs unjustifiably disadvantaged him in his employment and/or breached the statutory duty owed under the Health and Safety in Employment Act by:

- (i) failing to provide and maintain a healthy and safe workplace; and
- (ii) in breach of its own policies, failing to adequately and effectively manage him during his posting in Thailand.

[43] Customs say these are the same arguments but, putting that to one side, the area of dispute between the parties concerns the extent of the duty owed to Mr Alo to provide a safe and healthy work place and whether, in all the circumstances, Customs discharged that obligation to a reasonable threshold. I accept that as a correct summary of the area in dispute.

**(i) What duty did Customs owe Mr Alo?**

[44] The Court of Appeal in *AG v Gilbert* [2002] 1 ERNZ 31 discussed the nature of the duty owed to provide a safe and healthy workplace:

*The employer's obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks... The reasonableness of the employer's conduct must therefore be measured against knowledge reasonably obtained by employers mindful of their responsibilities.*

*In some cases a risk may not be apparent without specific information about the vulnerability of a particular employee...but it does not follow that in all cases the risk will need to be matched to the particular employee. If the risk is one which applies generally, the knowledge of specific vulnerability may be irrelevant. If the employer unreasonably failed to take all steps practicable to remove or manage the risk and it is reasonably foreseeable that any employee may suffer harm as a result, then the employer will be in breach of the term of the contract to maintain safe working conditions.*

[45] There is no dispute Customs owed a duty to Mr Alo to provide a safe and healthy workplace and that this duty required Customs to take reasonable steps to safeguard his health at work including his mental health. The reasonableness of steps taken to avoid or minimise risk is to be assessed against what is known of the risk. Some risks are such that any employee would be at risk of harm.

**(ii) Was that duty reasonably discharged?**

[46] Customs response to Mr Alo's involvement in the tsunami relief effort was to offer him a trip home to New Zealand, facilitate a visit to the psychologist New Zealand police had sent to Bangkok for the post tsunami relief effort and to reach a decision that the existing support systems were adequate.

[47] Did this response represent reasonable steps sufficient to minimise the risk of harm to Mr Alo from his involvement in the tsunami relief effort?

[48] The first issue to consider is the reasonable degree of knowledge of risk of harm. It must be inferred from the steps Customs took that it was aware that Mr Alo's deployment in the post tsunami relief effort posed a risk to his psychological health.

[49] The expert evidence received by the Authority confirmed mental harm, including PTSD, was, at the time of the tsunami, a known risk to those involved in natural disaster relief. While involvement in such an event was unusual for Customs staff I note Customs had experience supporting staff exposed to potentially traumatising material during the course of their duties. Given this experience, Customs role as a major public institution and its ready access to relevant resources and information<sup>1</sup> it knew or ought to have known Mr Alo's deployment in the post tsunami relief effort posed a risk to his psychological health and sufficient steps needed to be put in place to minimise that risk.

[50] The next issue is whether the steps taken were sufficient? The support offered to Mr Alo focussed on the period immediately after the tsunami relief effort. The expert evidence was unequivocal that given the nature of the potential psychological harm to at risk individuals they should be psychologically monitored over a long period of time and information provided to the individual and their family about the possible risk of mental harm. The expert evidence was also clear that self reporting was not a reliable assessment tool.

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<sup>1</sup> For example Customs has access to the extensive psychological support plan NZ Police had developed for its staff involved in the post tsunami relief effort.

[51] If Customs had taken steps to ensure Mr Alo had the support provided to New Zealand police involved in the tsunami relief<sup>2</sup> then it might be able to assert it had taken reasonable steps to avoid or minimise the risk to Mr Alo associated with his involvement with the tsunami relief effort. It did not.

[52] Mr Secker's evidence was that a deliberate decision was made that the existing support processes around Mr Alo were adequate. The existing support processes involved intermittent contact with his New Zealand based manager, administrative support from the New Zealand based post liaison officer and the functional relationships within the New Zealand embassy in Bangkok.

[53] This decision was unreasonable. The decision was made without reference to the psychological support plan put in place by New Zealand Police or any other psychological expertise. The existing support processes involved no psychological expertise and there was no evidence they were designed to identify or monitor the kind of risk of mental harm posed by Mr Alo's exposure to the tsunami aftermath.

[54] Despite awareness of the psychological risks of the deployment and access to expert information and programmes Customs failed to put in place the basic steps necessary to minimise or avoid the ongoing risk to Mr Alo's mental health. This was unreasonable and in breach of the duty owed to Mr Alo.

**(iii) Did any failure of duty effect Mr Alo's health?**

[55] I have found there was a risk of serious harm to Mr Alo consequent to his involvement in the tsunami relief effort. I have also found Customs failed to take reasonable steps to minimise or avoid the risk of harm. There is no dispute Mr Alo developed and continues to suffer serious ill health subsequent to his experiences as part of the tsunami disaster relief effort. The next issue considers the question of causation – what effect did Custom's failure have on Mr Alo's health?

[56] Prior to his deployment to the tsunami relief effort Mr Alo was psychologically healthy and had no prior history of mental health issues. After his deployment and during 2006 and 2007 his mental state appears to have steadily

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<sup>2</sup> The support plan referred to above.

deteriorated to the degree that Dr Goodwin concluded Mr Alo's behaviours during this time were *entirely congruent with him suffering from both a Major Depressive Episode and Post-Traumatic Stress Disorder*.

[57] Customs says whether or not the steps taken to minimise the risk of harm from the tsunami deployment were adequate that by 2007 events in Mr Alo's personal life had overtaken any impact of the post tsunami deployment.

[58] There was no evidence presented to the Authority to support this conclusion. The unchallenged expert evidence was that the harm suffered as a consequence of the post tsunami deployment would have had a domino effect on Mr Alo spilling into his personal life and then his working life.

[59] In the alternative Customs says by 2007 the events of the preceding year were so remote that Customs could not reasonably have been expected to be alert to any negative impact on Mr Alo in the absence of some flag from him that he was suffering psychological harm.

[60] I do not accept this argument; a failure of duty with consequent harm cannot be relied on to justify a continued and compounding failure of duty.

[61] With regard to the offers of EAP assistance made by Mr Bargh to Mr Alo in November 2007 and January 2008; Mr Alo's symptomology was so advanced by this stage and Mr Bargh's response to what he understood to be distress arising from a relationship break up so limited that these offers of help were inadequate to meet the need resulting from Customs breach of duty.

[62] For these reasons I find Custom's failure to discharge its duty to Mr Alo to take sufficient steps to minimise or avoid harm to him caused him harm. He has made out his claims for unjustified action causing disadvantage arising from established breaches of duties owed to him under his employment agreement.

## **Conclusion**

[63] For the reasons set out above Mr Alo's dismissal was procedurally and substantively unjustified.

[64] For the reasons set out above Customs failed to provide Mr Alo with a safe and healthy workplace in that it failed to implement adequate monitoring post tsunami to eliminate the risk of mental harm and when he began to exhibit symptoms of mental harm failed to provide adequate support.

## **Remedies**

[65] Mr Alo seeks reimbursement of total lost earnings (including loss of future earnings and benefits from 22 August 2008 to 1 November 2010) of \$164,027.50 gross, calculated on an annual salary of \$74,984 per annum. This claim is based on medical evidence that Mr Alo will not be able to return to full time employment at an appropriate responsibility level until between August and November 2010.

[66] I accept Mr Alo has been too unwell to undertake work subsequent to his dismissal. I have made findings that his ill health has been caused by Customs failure to provide a safe and healthy work place. The claim for lost earnings is allowed.

**[67] New Zealand Customs Service is ordered to reimburse Douglas Alo lost earnings totalling \$164,027.50 (gross) pursuant to sections 123(1)(b) and 123(1)(c)(ii).**

[68] Mr Alo seeks compensation pursuant to section 123(1)(c)(i) totalling \$50,000 for unjustified actions and unjustified dismissal. He says such a high level of compensation is warranted given:

- (i) the break down of his mental health directly resulting from his involvement in the tsunami relief effort and Customs failure to put in place appropriate steps to monitor and support him;
- (ii) the breakdown of his marriage as a direct result;
- (iii) his consequent inability to participate in his daughter's early years;

- (iv) the impact of his dismissal to his reputation and social standing;  
and
- (v) Mr Alo's loss of identity and social network after employment of such long standing.

[69] The circumstances of this case are exceptional. Mr Alo and his ex-wife gave moving evidence of the devastating impact of the events following his deployment in the tsunami relief effort. Mr Alo's colleague, to whom he handed over the Bangkok post, described him as a *broken man*. It is clear Customs' actions in failing to monitor and support Mr Alo adequately and dismissing him have had a profound professional and social effect on Mr Alo.

**[70] New Zealand Customs Service is ordered to compensate Douglas Alo \$40,000 in total for unjustified disadvantage and unjustified dismissal.**

[71] Mr Alo seeks damages arising from breaches of duty including:

- (i) Compensatory damages for medical treatment costs totalling \$21,507.25;
- (ii) General damages of \$30,000.

[72] The claim for medical treatment costs is allowed. The evidence is clear the need for treatment arose from Customs breaches of duty.

**[73] New Zealand Customs Service is ordered to reimburse Douglas Alo medical treatment costs totalling \$21,507.25 under section 162.**

[74] The claim for general damages arises from the breaches of contractual duty which have been made out.

**[75] New Zealand Customs Service is ordered to pay Douglas Alo general damages of \$20,000 under section 162.**

## **Penalties**

[76] Mr Alo requests that a penalty be awarded against Customs for the established breaches of the employment agreement.

[77] I do not believe a penalty is appropriate in the circumstances of this matter. The seriousness of Customs breaches of duty have been outlined above and Mr Alo has been compensated for those breaches.

## **Contribution**

[78] Before the deployment to the tsunami relief effort Mr Alo was psychologically healthy. Within a year he was suffering from severe psychological effects of the trauma to which he was exposed to and experienced. Customs was aware of the risk of this psychological impact, had access to expert preventative assistance and failed, without reasonable excuse, to provide that assistance to Mr Alo.

[79] In its defence Customs has sought to use as intervening causes the demise of Mr Alo's marriage and his alcohol dependency. The expert evidence was clear that these tragic circumstances arose from the traumatic events Mr Alo experienced during the course of his duties.

[80] Customs has further attempted to defend its actions by raising Mr Alo's failure to ask for help. The evidence was clear that Mr Alo was too unwell and too poorly managed for this to be a realistic expectation.

[81] I have no hesitation in finding Mr Alo has not contributed in any way to the events giving rise to his personal grievances.

## **Recommendations**

[82] Customs should develop policies for staff exposed, during the course of their duties, to circumstances or material which has the potential to cause psychological harm. In developing such policies particular regard should be had to the support systems in place for Customs staff and their families posted overseas.

[83] These recommendations are made pursuant to section 123(1)(ca) of the Employment Relations Act.

### **Costs**

[84] Costs are reserved. If the parties are unable to resolve this issue themselves then application may be made for the Authority to set a timetable for the filing of costs memoranda. Such application should be made within 28 days of the date of this determination.

Marija Urlich

Member of the Employment Relations Authority