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Comptroller of Customs v Smith [2010] NZEmpC 114 (30 August 2010)

Employment Court of New Zealand

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Comptroller of Customs v Smith [2010] NZEmpC 114 (30 August 2010)

Last Updated: 7 September 2010

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2010\] NZEMPC 114](#)

CRC 38/10

IN THE MATTER OF a de novo challenge to a determination of the Employment Relations Authority

AND

IN THE MATTER OF an application for a stay of proceedings

BETWEEN COMPTROLLER OF CUSTOMS Plaintiff

AND JOHN SMITH First Defendant

AND GLENN RANKIN Second Defendant

Hearing: 30 August 2010

(Heard at Christchurch)

Appearances: Neil McPhail, advocate for the plaintiff

Andrew McKenzie, counsel for the defendants

Judgment: 30 August 2010

ORAL JUDGMENT OF JUDGE A A COUCH

[1] The defendants were employed by the plaintiff at Christchurch International Airport. Mr Smith held the rank of customs officer. Mr Rankin was an assistant chief customs officer. On 22 March 2010, both were summarily dismissed for serious misconduct related to the disclosure of confidential information about

another customs officer to "The Press" newspaper.

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[2] Both defendants pursued personal grievances. In a determination dated 10

August 2010^[1] the Employment Relations Authority concluded that both had been unjustifiably dismissed. The remedies awarded were reimbursement of lost income and reinstatement to their former positions on 31 August 2010. The Authority found that both defendants had contributed to the situation giving rise to their dismissals and reflected this by making no award of compensation.

[3] By a statement of claim dated 25 August 2010 the plaintiff has challenged the whole of the Authority's determination and sought a hearing de novo. Until that challenge is decided the plaintiff seeks a stay of the Authority's orders. This judgment addresses that application for stay.

[4] At the outset, the parties jointly sought a continuation of the order for non-publication which was made by the Authority. I acceded to that request. There will therefore be a further interim order prohibiting publication of any information likely to identify Officer X or Officer Z. There will also be an order prohibiting publication of the evidence of Mr Good and Mr Lake. Those orders are to remain in effect until further order of this Court.

[5] I was advised through counsel that the second defendant Mr Rankin consents to the stay of reinstatement sought. That is because he and the plaintiff have been in discussions about an overall settlement of their differences and are close to reaching agreement. In the event that agreement is not reached, leave is reserved for Mr Rankin to apply to rescind the stay.

[6] The position of Mr Smith is different. He actively opposes the application. It is therefore necessary to decide the application in relation to him.

[7] At an early stage of the hearing Mr McPhail, on behalf of the plaintiff, amended the application to a partial stay, rather than the full stay originally sought. The plaintiff now accepts the resumption of the employment relationship with Mr Smith. It also accepts the obligation to pay his salary and that the other benefits of

employment should accrue to him. It seeks only to be relieved in the meantime of the obligation to allow Mr Smith to resume work.

[8] Mr McPhail also raised on behalf of the plaintiff a possible alternative that Mr Smith be reinstated to a different position within the customs service on the same conditions of employment.

[9] In support of the application, four affidavits were filed. Although I now summarise the content of those affidavits relatively briefly, I confirm that I have read them fully and that I have taken into account all that is said in them.

[10] Mr Chitty expresses concern about the attitude of Mr Smith to management during the investigation process. He cites passages from the transcript of an interview in December 2009 in which Mr Smith openly criticised his superiors and showed a lack of respect for them. Mr Chitty says that, notwithstanding conciliatory views expressed by Mr Smith in the course of the Authority's investigation and recorded in its determination, he continues to lack the necessary trust and confidence in Mr Smith as an employee. Mr Chitty also refers to publicity of the Authority's determination and suggests that this will have compromised Mr Smith's ability to carry out his duties effectively.

[11] Mr Lumsden echoes some of the concerns expressed by Mr Chitty for the same reason, that is the attitude displayed by Mr Smith prior to his dismissal. He suggests that this has also led to a division of opinion about Mr Smith amongst other staff.

[12] Mr Lumsden then expresses his concern about the effect on Officer X if Mr Smith were reinstated. He says that he believes it is not practical to expect Officer X to work with Mr Smith. He then deposes to the impracticability of having Mr Smith and Officer X work in different areas of the airport operation.

[13] The other two affidavits were by Mr Lake and Mr Good, the contents of which I have directed should not be published. For that reason, I do not summarise those affidavits in any detail. Suffice it to say they expressed concern that the reinstatement of Mr Smith might have a detrimental effect on New Zealand

Customs' relationship with agencies of other Governments.

[14] In response, there have been two affidavits filed on behalf of the defendants. Mr Smith says in his affidavit that the experience of going through the disciplinary process and the Authority's investigation has caused him to reflect seriously on the views he has expressed in the past and on the responsibilities he will need to assume if he is reinstated. In particular he accepts that he has inappropriately jumped to conclusions in the past and says he has learned from this experience. Mr Smith says that he has never had any personal conflict with Officer X and that both his personal and working relationships with Mr Lumsden have been good. He refers to expressions of personal support from other staff and believes that his return to work would be trouble free.

[15] In support of these assertions Mr Smith offers a formal undertaking to the

Court and to the plaintiff. That undertaking is in the following terms:

I undertake further to this Court and the Comptroller that I will conduct myself with integrity and professionalism in all of my professional dealings as a Customs Officer.

[16] Mr Smith then says that, after his dismissal, he sought alternative employment and obtained work on 26 May 2010. That was on terms requiring four weeks' notice of termination. On receiving news of the Authority's order for reinstatement, he gave three weeks' notice which his new employer accepted. He is unemployed as of today.

[17] In relation to the stay of execution of the order to reimburse arrears of wages, Mr Smith says he has borrowed money from other people to tide him over and feels a strong obligation to repay them promptly. He deposes to having more than \$200,000 equity in his home which would enable him to repay money if the plaintiff was successful in its challenge.

[18] Mr Smith says that his desire to return to the job is not simply in order to be paid. He says he enjoys the collegiality of working in this job. He believes that it may be difficult to re-establish working relationships if he is kept out of the job for another extended period. He also says that he would find an extended period of employment inactivity demoralising, even if he were paid. Finally he says that he needs to be on the job to maintain and improve his skills, noting the impending introduction by Customs of new technology.

[19] The second affidavit was from Mr Cooney, secretary of the union to which Mr Smith belongs. He expresses his confidence in Mr Smith's ability to successfully return to work but his evidence is mainly concerned with the effect on the union. Mr Smith is a workplace delegate and a national delegate. Mr Cooney says the union has been disadvantaged by Mr Smith's absence from the workplace and will be further disadvantaged if he does not return.

[20] In deciding the matter I adopt the approach that I have taken in previous cases and which was summarised in *Safe Air Ltd v Walker*.^[2] As in that case I also have regard to the discussion of principle in *Hill v New Zealand Rail Ltd*.^[3]

[21] The starting point in considering the application for stay must be s 126 of the Employment Relations Act which provides that an order for reinstatement by the Authority must be observed notwithstanding a challenge "unless the Authority or the court otherwise orders". While this expression apparently confers an unqualified discretion on the Court it must be exercised in a principled way.

[22] The fundamental principle applicable to the exercise of any judicial expression is that there must be material on which to do so. I refer there to *Ratnam v Cumarasamy*.^[4] It follows that the initial onus is on the party seeking a stay to establish good and sufficient reasons why it should be granted.

[23] In considering the material available, the essential issue to be addressed when exercising the discretion is where the overall justice of the matter lies. That largely involves an assessment of the effects on the parties to the proceeding and on third parties of granting or not granting a stay. Another factor to be considered is the

nature of the plaintiff's case in support of its challenge to the Authority's substantive determination.

[24] Applying these principles, the application for stay of the order for reimbursement of lost income is readily decided. The affidavits on behalf of the plaintiff contain nothing to suggest that Mr Smith would be unable or unwilling to repay the sum in question if the plaintiff succeeds in its challenge. There is therefore nothing on which the discretion to order a stay can be exercised. That part of the application relating to Mr Smith is dismissed. The application for stay of the order for reimbursement in relation to Mr Rankin is also dismissed for the same reason.

[25] I turn then to the application for the stay of the order for reinstatement and consider the effect on the parties. I accept that senior management of the plaintiff are expressing their sincerely held views when they say they continue to lack trust and confidence in Mr Smith. In this case, however, the Authority has found that loss of trust and confidence to be unjustified and there is nothing in the affidavits of Mr Chitty or Mr Lumsden in this regard which was not before the Authority.

[26] Mr McPhail submitted that, in finding a measure of contribution by Mr Smith based on the actions which the plaintiff says gave rise to its loss of trust and confidence, the Authority confirmed the validity of that attitude. With respect, that does not take account of the Authority's conclusion that Mr Smith's dismissal was unjustifiable which can only mean that Mr Smith's actions did not disturb trust and confidence to the point where the employment relationship could not be expected to continue. I can place little weight on this factor.

[27] The second concern expressed is that Mr Smith may be unable to work effectively with Officer X. This concern was

raised principally by Mr Lumsden but I note that most of his concerns related to potential difficulties in the workplace between Officer X and Mr Rankin rather than between Officer X and Mr Smith. I note also that the plaintiff apparently had no concern about Officer X returning to work after an investigation into his conduct in 2009. At that stage, Officer X returned to a different role but it was anticipated then that he would move on to work

in the same area as Mr Smith. I find it significant also, as Mr McKenzie pointed out, that there was no evidence on this issue from Officer X or from other officers with whom Mr Smith will work or have contact with on a day to day basis.

[28] The third concern on which the plaintiff relies is that Mr Smith's return to the workplace may affect the attitude of other agencies with whom the plaintiff shares information. Having regard to all that is said in the affidavits of Mr Lake and Mr Good, I am unable to place any significant weight on this factor. It seems to me also that there is some force in Mr McKenzie's submission that the offer by the plaintiff of reinstatement to an alternative position as a customs officer seriously undermines this concern.

[29] If the stay were granted, the effect on Mr Smith would be to deprive him of the opportunity to work. This is a factor which should not be taken lightly. For the purposes of the application, I accept what Mr Smith says in his affidavit that he wants to return to work and that to be prevented from doing so would be a significant detriment. As to the effect on the union raised by Mr Cooney in his affidavit, I accept that if Mr Smith is not back in the workplace the union would continue to be disadvantaged by the loss of an effective delegate. Compared to other factors, however, this is not a matter on which I place great weight.

[30] I turn then to other factors to be taken into account. There is nothing in the evidence before me to suggest that the case the plaintiff wishes to put before the Court on the substantive issues will differ in any respect to that put before the Authority. In particular, it is not suggested that any new evidence is available. Equally, I have not been persuaded that there is any serious defect in the Authority's reasoning on the face of the determination. In effect it appears that at this stage that the plaintiff's challenge relies very largely on the hope that a Judge of the Court will assess the evidence differently to the manner in which a member of the Authority has done.

[31] Another relevant factor is the length of time before a substantive hearing can be held. The parties estimate that six or seven days will be required for a substantive hearing. Given the current state of the Court's commitments the parties are unlikely

to get a substantive hearing before February or March 2011. Given the volume of evidence which appears likely to be presented, it may then take some time to give a decision. That delay is to be regretted but in the present circumstances is unavoidable. This increases the significance of the detriment to Mr Smith if he is kept out of the workplace.

[32] The final factor I have regard to is the undertaking given by Mr Smith. I regard this as important. The undertaking is offered against a background of acceptance by Mr Smith that some of his past conduct was inappropriate and needs to change upon his return to the workplace. I echo the Authority's observation that this is appropriate.

[33] Standing back and having regard to all aspects of the matter, including the particular factors that I have discussed in detail, I find that the overall justice of the matter does not favour the stay sought by the plaintiff. At the same time it seems to me that reinstatement in the interim should be subject to a clear understanding by Mr Smith that his conduct needs to be exemplary. I therefore formally accept the undertaking given by Mr Smith in his affidavit which I have recorded earlier. I also reserve leave to the plaintiff to renew the application for a stay at short notice if there is evidence that Mr Smith has breached that undertaking or has otherwise engaged in significant misconduct.

[34] In summary then the conclusions I have reached and the orders I have made are these:

- a. The application for stay of the orders for reimbursement of lost income are dismissed.
- b. The application for stay of the order for reinstatement of Mr Rankin is granted by consent.
- c. Leave is reserved to Mr Rankin to apply to rescind that stay if settlement with the plaintiff is not achieved.
- d. The application for stay of the order for reinstatement of Mr Smith is dismissed.
- e. Leave is reserved for the plaintiff to renew that application at short notice on the grounds I have discussed earlier.

[35] Costs are reserved.

A A Couch
Judge

Oral judgment delivered at 4.30pm on 30 August 2010.

[1] CA 100A/10.

[2] CC 7/09, 10 July 2009

[3] [1994] 1 ERNZ 113.

[4] [1964] 3 All ER 933 (PC)

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