

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 100A/10
5300880

BETWEEN	JOHN SMITH First Applicant
A N D	GLENN RANKIN Second Applicant
A N D	COMPTROLLER OF CUSTOMS Respondent

Member of Authority: Helen Doyle

Representatives: Andrew McKenzie, Counsel for First and Second
Applicant
Peter Zwart, Advocate for Respondent

Investigation Meeting: 16, 17 and 23 June 2010 at Christchurch

Submissions Received: 23 June 2010

Further information: 7 July 2010 from Applicants
25 and 30 June 2010 from Respondent

Determination: 10 August 2010

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] I prohibit from publication under clause 10(1) of the Second Schedule to the Employment Relations Act 2000 the name and any details that may identify the customs officer about whom information was released to the *Christchurch Press*. He shall be referred to in this determination as Officer X.

[2] I also prohibit from publication the name of the manager currently on leave who I shall refer to hereafter as Officer Z.

[3] I also prohibit from publication the contents of the affidavits of Bruce Good and Robert Lake.

Employment relationship problem

[4] New Zealand Customs Service (Customs) concluded that on or before 6 November 2009 there had been a leak of confidential and personal information to *The Christchurch Press* relating to Officer X. Customs concluded that *The Press* was in receipt of at least two documents: a graph showing the number of personal searches (category B searches) undertaken by Officer X as compared with other unnamed officers, and a statement in the nature of a complaint about the behaviour of Officer X prepared by another employee at Customs, Jennifer. Both documents were sensitive and confidential.

[5] There was an investigation undertaken by Customs into who had released information to *The Press*, and who had knowledge of the release of that information.

[6] On 22 March 2010, John Smith was summarily dismissed from his position with Customs for reasons contained in a letter from the Group Manager Airport, Philip Chitty, who was the decision-maker in terms of the disciplinary outcome. Mr Chitty accepted the findings contained in a final investigation report and concluded that Mr Smith had had involvement in the unauthorised release of information to the media and, that in doing so, he had irreparably damaged the trust and confidence that Customs had in him as an employee.

[7] Mr Smith, who had previously been employed by the New Zealand Police for 24 years, commenced his employment with Customs in March 2002 as a Variable Hours Officer. In 2004, he was appointed to a full time Customs Officer position and assessed with 100% competence in 2006. In 2007, Mr Smith attended training towards a Senior Customs Officer role and in that same year was elected national delegate of the National Union of Public Employees (NUPE) and participated in bargaining for a multi-Union collective employment agreement in 2009. He was a representative of NUPE members at Customs' forum management meetings from August 2007.

[8] Mr Smith says that his dismissal was unjustified and he seeks reinstatement to his former position, reimbursement of wages and benefits lost, less any money received since dismissal, and compensation.

[9] On 22 March 2010, Glenn Rankin was summarily dismissed from his position with Customs for reasons contained in a letter from Mr Chitty. Mr Chitty accepted the findings in a final investigation report that Mr Rankin committed a breach of the Customs Service's Code of Conduct, in that he had knowledge of the involvement of another Customs employee in the unauthorised release of information to the media and did not bring this to the attention of the Customs. Mr Chitty concluded that this breach had irreparably damaged the trust and confidence that Customs had in him as an employee.

[10] Mr Rankin commenced his employment with Customs in January 1986 when he was almost 17 years of age. Aside from a brief period between October 1986 and August 1987 when Mr Rankin was transferred to the Inland Revenue Department, he has worked continuously at Customs. In 2007, Mr Rankin was promoted to the role of Assistant Chief Customs Officer.

[11] Mr Rankin says that his dismissal was unjustified and he seeks reinstatement to his position with Customs, reimbursement of lost wages and benefits, less any money received since dismissal, and compensation.

[12] Customs say that both dismissals were procedurally and substantively justified, and that there should be no remedies awarded to Mr Smith and Mr Rankin that in any event reinstatement is not practicable.

The test in s.103A of the Employment Relations Act 2000

[13] In determining the question of whether a dismissal was justifiable, the Authority is required to apply the test of justification in s.103A of the Employment Relations Act 2000. The test requires the Authority to determine, on an objective basis, whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[14] It was recognised by Mr McKenzie and Mr Zwart that notwithstanding the two personal grievances being investigated together, as agreed, there may be different outcomes for Mr Smith and Mr Rankin.

The issues

[15] The issues for the Authority to determine are as follows:

- Was there a full and fair investigation undertaken by Customs at the conclusion of which it would be found by a fair and reasonable employer that serious misconduct was disclosed on the part of John Smith and Glenn Rankin;
- Was the decision of Customs to summarily dismiss John Smith and Glenn Rankin what a fair and reasonable employer would have done in all the circumstances;
- If dismissal was unjustified for both or either applicant, what remedies should be awarded; is reinstatement practicable and are there issues of contribution or mitigation?

Was there a full and fair investigation at the conclusion of which it would be found by a fair and reasonable employer that serious misconduct was disclosed on the part of John Smith and Glenn Rankin?

The reasons for the dismissal

[16] I accept that the reasons for dismissal were those set out in the letters from Mr Chitty dated 22 March 2010 to Mr Smith and Mr Rankin.

The conduct alleged

[17] Mr McKenzie accepted in final submissions that leaking information to the media is a breach of the Customs Code of Conduct and is capable of constituting serious misconduct justifying summary dismissal. The Code of Conduct also requires the reporting of wrongdoing by another officer.

[18] A fair and reasonable employer would regard the leaking of information in this matter as serious. There was mention of specific Customs officers and, as Mr Chitty said in his evidence, it had the potential to seriously damage Customs' reputation and

public confidence in the Customs Service. What had been disclosed to *The Press* potentially implied that Officer X had been misusing his authority for sexual gratification. Officer X had been the subject of some earlier allegations by other Customs officers about a variety of matters, and there had been exploratory interviews undertaken by investigators, Marilyn Walter, Operations Manager Christchurch Airport, and Greg Ward, Acting Port Manager, Trade and Marine Christchurch, to determine if a possible breach of the Code of Conduct by Officer X had occurred.

[19] In the Walter/Ward report that was provided to the Manager, Central and Southern Airports, Stuart Lumsden, it was stated that there were no allegations received of inappropriate behaviour on the part of Officer X during personal searches and that the complaints were in relation to comments pre- and post-personal searches.

[20] With regards to any public confidence issues, I record there are clear policies and procedures governing Customs officers exercising the powers under the Customs and Excise Act 1996 to detain and search persons and the rights of the person detained for a personal search. The Code of Conduct also requires reporting by an officer of any wrongdoing of other officers.

[21] Mr Chitty acknowledged in his evidence that the process adopted by Customs in investigating the actions of Mr Smith and Mr Rankin was somewhat different from that normally undertaken, because of the fact that the investigation was initiated by way of general inquiry and that private information was withheld from Mr Smith and Mr Rankin. Other than that, Customs maintain that it appropriately followed its own procedural requirements and at all times investigated and made decisions in a fair manner.

Initiation of a formal investigation

[22] Mr Chitty initiated a formal investigation into the release of information on 10 November 2009 under the Customs Code of Conduct and the Disciplinary Policies and Procedures (clause 7.7 of the Disciplinary Policy). He appointed two senior and experienced managers to run the investigation; Simon Williamson from Auckland, Manager Northern Ports, Trade and Marine, and John Anderson from Christchurch, Manager Intelligence, Planning and Coordination. Mr Chitty said in his written evidence that given the Christchurch background to the release of information, he

specifically chose Simon Williamson who, from Auckland, would have little or no knowledge of this.

[23] The investigators were required to investigate and make objective recommendations on seven specific matters. In summary, they were required to determine whether or not any employee of Customs was involved in the release of the information, or was aware of any other Customs officer being involved in the release of information to *The Christchurch Press* and, if so, whether their conduct amounted to misconduct or serious misconduct.

[24] The terms of reference did not refer to specific employees but identified all Customs staff at the port of Christchurch as a starting point for investigation. After the initiation of the investigation, Mr Chitty and another colleague, Paul Campbell, held nine staff and management meetings in Christchurch over 11 and 12 November 2009 to advise about the unauthorised release of material to *The Christchurch Press* and the investigation. The evidence supports that staff would have been left in no doubt about the seriousness with which Customs regarded the release of the information to *The Press*. There was some emphasis on staff cooperating with the investigators.

[25] On 16 November 2009 (documents VVV), Mr Smith and Mr Rankin were written to and asked to attend a meeting with Mr Williamson and Mr Anderson as part of their investigation. They were advised in their respective letters that following a review of background information and initial inquiries, it had been identified that they may have some knowledge of or involvement in the release of confidential information to *The Christchurch Press*. They were advised that they were entitled to have a representative present at the meeting and that they would have the opportunity to provide an explanation.

Mr Smith's first explanation (in writing to the investigators)

[26] Mr Smith was on annual leave at the time the letter was sent to him and had been since late October 2009. During part of his annual leave, he was away from Christchurch, but he did return to Christchurch for a short period before travelling to the North Island and he received the letter dated 16 November 2009.

[27] Mr Smith delivered a written statement to the investigators and, amongst other matters, said:

I personally gave no information to the Press, nor do I know anyone who did.

Mr Rankin's explanation to the investigators

[28] Mr Rankin was on sick leave at the time of his scheduled meeting with the investigators on 18 November 2009. A meeting was held at his home. Mr Williamson and Mr Anderson were present and Mr Rankin was represented by Les Bryce, a union organiser with NUPE. Mr Rankin's wife, Bronwyn Rankin, was also present as a support person.

[29] Typed notes were produced of the meeting and I accept they properly reflect what was said. Mr Rankin confirmed during the meeting that he had been telephoned by *The Christchurch Press* on 7 November 2009 and that Officer X's name had been mentioned. Mr Rankin said that he was told by *The Press* reporter that his name had been given as someone who may be able to provide information. Mr Rankin advised the reporter that he would not be commenting and the call then terminated. Mr Rankin advised Ms Walters, the Operations Manager, that he had received a call from the newspaper.

[30] During this meeting, Mr Rankin confirmed that the graph he was shown by Mr Williamson and Mr Anderson was one that he had prepared and had given to NUPE and Mr Smith about personal searches. Mr Rankin denied sending information to *The Press* or having any knowledge of who did.

Preliminary report of the investigators

[31] On 27 November 2009, in accordance with the timeframe under the terms of reference, the preliminary report was provided to Mr Chitty.

[32] Five other Customs employees in addition to Mr Smith and Mr Rankin had been written to and interviewed. Mr Bryce was also spoken to and denied being the leak or having knowledge of who was responsible. It was noted in the preliminary report that Officer X was to be spoken to as were two other Customs employees. Jennifer was also to be re-interviewed.

[33] The investigators concluded that *The Press* was in receipt of Jennifer's first statement that she had provided with respect to a complaint against Officer X. The basis for this conclusion was that Jennifer advised the investigators that her statement

was read verbatim to her when she was contacted by a *Press* reporter on 9 November 2009.

[34] The investigators also concluded, on the basis of specific questions sent to the Communications Officer at Customs, Rowan McArthur, on 6 November 2009, that *The Press* was in receipt of a graph prepared by Mr Rankin headed up *personal searches undertaken (performed or witnessed 25/03/08 to 10/04/09)*.

[35] In the preliminary report the investigators noted the importance of the persons who had access to Jennifer's statement and the graph.

[36] The investigators explored three possibilities of who had leaked the information and set these out as an aggrieved employee or group of employees within Customs, a former employee or close affiliate outside of Customs or Officer X himself or a sympathiser seeking a compensation payment.

[37] The preliminary report also set out some background for concluding that there was a group of aggrieved Customs employees at Christchurch Airport openly frustrated with the outcome of an employment investigation conducted in August/September 2009 into the conduct of Officer X. The investigators concluded that matters came to a head with what was described as a trigger when Mr Lumsden advised employees, including Mr Smith and Mr Rankin, that Officer X was returning to work on or about 22 October 2009

[38] The preliminary report requested leave to extend the inquiry to allow for further interviews and to review relevant Customs Service emails and telephone communications.

[39] In between the preliminary report and the issuing of the final report, Mr Smith was requested to and did attend a meeting in Tauranga where he was interviewed by Mr Williamson and Mr Anderson. At this meeting Mr Smith was represented by Trevor Gleave from the Customs Officers Association.

Mr Smith's explanation from his interview on 1 December 2009

[40] During the meeting on 1 December 2009, Mr Smith said he did not release the statement or graph to *The Press* and that he did not relay information or documents to any third party for referral to the media. When questioned as to whether he had

received a call from a *Press* reporter Mr Smith advised that he was un-contactable at the time, being in the Queenstown/Wanaka area. Mr Smith authorised the investigators to access his mobile call records and landline records for November 2009.

Final investigation report

[41] The final investigation report was completed on 4 December 2009. It concluded that it was more than likely that Mr Smith had been involved in the unauthorised release of information and that Mr Rankin had knowledge of the release and had not told Customs about this.

[42] The investigators set out in their report what they describe as *the lead up* to the release. I set that out below and have expanded on some matters given the evidence I heard which is not in dispute.

The lead-up

[43] In late 2008, Mr Rankin wanted the Legal Section of Customs to deal with an issue as to whether a passenger could refuse to be searched by a homosexual Customs officer. I received as part of my investigation relevant documents from around this time, including some email communication and the Legal response. For reasons that I do not need to set out, the legal response had not previously been given to Mr Rankin, but I do accept, as set out in an email dated 17 November 2008, Officer Z (a manager) sent Mr Rankin the Customs' position on the searches which was, in essence, a summary of the Legal response.

[44] Personal search issues continued to remain of concern for Mr Rankin, notwithstanding those above him in the Customs hierarchy encouraging him to move on.

[45] On 3 April 2009, Officer X lodged a sexual harassment and discrimination complaint against Mr Rankin. There were two allegations. The first was that Mr Rankin had told other employees that he would not undertake a personal search with Officer X because of his sexual orientation, and the second was that he did not accept Customs' view as communicated to him by Officer Z that officers should not be discriminated against on the basis of their sexual orientation.

[46] The two complaints were investigated by an independent employment lawyer, Linda Ryder. In a report from Ms Ryder dated 22 June 2009, the complaints against Mr Rankin were not upheld.

[47] On or about 28 April 2009 Mr Rankin prepared the graph, which the investigators concluded *The Press* had a copy of, showing Officer X undertaking more personal searches between 25 March 2008 and 10 April 2009 than other officers.

[48] The investigators then concluded that after the release of the Ryder Report, there was a campaign to galvanise statements about inappropriate behaviour by Officer X. Nine individuals came forward with allegations against Officer X. Mr Rankin and Mr Smith were not amongst the complainants, however the investigators concluded that there was some collusion between the complainants and NUPE union representatives including Mr Smith.

[49] The investigators said it was now evident that, by the end of April 2009, there was a *game plan* devised between Mr Rankin, Mr Bryce and Mr Smith *presumably to discredit and oust Officer X*. Emphasis was placed on an email dated 28 April 2009 obtained as part of the investigators' search of internal emails from Mr Rankin to Mr Bryce which was copied to Mr Smith. Part of the email relied on provides:

So here's what we have got if we need to use it:

- *Officer X says publicly ...*
- *Officer X confirms to me ...*
- *Officer X has done more personal searches than any other male officer in the past 13 or so months. Without making accusations I wonder what conclusions the public would make of that?! The Service doesn't know what a can of worms they are opening and Officer X should learn that "those in glass houses ...". There will be major embarrassment if this goes public, and may be it should?*

If the Service signals they're coming after me (and the terms of reference would be a good indicator) then we need to have a re-think on our game-plan.

[50] The investigators then concluded that the finding of the second inquiry into the allegation against Officer X clearly staggered a number of the original complainants, including Mr Bryce and Mr Smith and after organising a failed

campaign to oust Officer X, one or more Customs officers decided to take matters into their own hands.

[51] In terms of the outcome of the inquiry into Officer X, Mr Chitty advised the Authority that this was a confidential matter and the outcome could not be disclosed. I accept that.

[52] The investigators concluded the unauthorised release of information to the media that was to follow was *exactly the course of action that was being suggested amongst a number of NUPE union members in late April*.

What was leaked?

[53] The investigators concluded that from the written questions posed by *The Press* to Customs' Communication Unit it was clear that the newspaper was in possession of at least two documents, one of those being the graph prepared by Mr Rankin showing the number of personal searches performed or witnessed by Customs Officers at Christchurch Airport for the period 25/03/08 to 10/04/09. The only name that appears on the graph was that of Officer X alongside an arrow pointing to 19 searches, with the next officer on the graph at 14 searches.

[54] The importance of that finding in the report is emphasised by the investigators' other conclusion that, of the 11 formal interviews undertaken during the investigation, only two persons aside from Customs management had access and possession of both the Jennifer statement and the graph. Copies of both of these documents were handed to Ms Walter on 6 May 2009 during a meeting requested by Mr Bryce and Mr Smith.

[55] The investigators concluded that the authors of those original documents, being Mr Rankin and Jennifer, had prepared updated versions. Mr Rankin had in June 2009 prepared a second graph for an extended period that had Officer X still out in front on searches and Jennifer had prepared a second more *damning* statement about Officer X. The investigators concluded that had either Jennifer or Mr Rankin leaked the material, they would have sent the second generation document.

Case against John Smith

[56] As to the allegations themselves, the investigators concluded the following with respect to the case against John Smith:

- Mr Smith expressed during the interview on 1 December 2009 openly scathing views on the character of Officer X, Officer Z and Mr Lumsden. *The Press* reporter, in an email to Customs on 6 November 2009, had asked if Customs had confidence in those three employees.
- Mr Smith had a motive for the leak when he stated he was *flabbergasted* on being told that Officer X was returning to the airport. He stated in his interview that he could not believe how Customs had done such a *piss poor job* in investigating. He denied he was angry but said he found it unbelievable.
- When Jennifer was read her first statement by *The Press* reporter on 9 November 2009, she stated she attempted to contact those people who she believed would know how the reporter had come into possession of her statement. She telephoned Mr Rankin, another officer Bill, and Mr Smith. She was unable to get hold of Bill and Mr Smith. The investigators concluded that Jennifer thought that Bill and/or Mr Smith knew how the information came to be in the hands of the media.
- Mr Smith was self-righteous in his view that had the investigation into the allegations against Officer X been conducted properly, stating there would not be a leak.
- Mr Smith displayed a clear and distinct dislike for Customs management in his interview. He was seen as openly venomous in his views and wanted the inquiry into Officer X reopened.
- Mr Smith referred to an earlier leak of information involving Customs' manning levels at Christchurch Airport and it was evident to the investigators that Mr Smith appeared sympathetic to that matter being leaked to the media at that time.

- Mr Bryce had told Mr Smith and Mr Rankin that he did not want to see the information about Officer X end up in the media and that it defied logic that Mr Bryce would simply come out with such a statement unless he suspected there was an intention to go to the media if the Officer X allegations were not acted on. The investigators were satisfied that Mr Bryce was not the leak.
- Mr Smith initially denied Mr Bryce gave him this advice and then confirmed that Mr Bryce had told him and Mr Rankin about 6 May 2009 that he did not want to see the material end up in the hands of the material.
- The timing of the 28 April email was considered highly relevant in terms of Mr Bryce warning about not going to the media.
- Mr Smith denied he had the second graph prepared by Mr Rankin but a search of his emails confirmed that he did forward the second graph on to Mr Bryce after receiving it from Mr Rankin.
- Out of 10 Customs employees and one union official formally interviewed in the investigation, Mr Smith was the only one to mention *I believe that the entire inquiry into Glenn Rankin had to be finalised prior to any other inquiry being initiated. It must have been coincidence with the Cat B regulation coming out around that time.* That was considered significant because there was a specific question on Customs policies on strip searches and changes made in the last three months by *The Press* reporter to Rowan McArthur in an email sent on 6 November 2009.

[57] The investigators concluded that despite no admissions being obtained from anyone during the extensive interviews, they were satisfied that there were sufficient grounds to indicate the principal involved in the unauthorised release of material to *The Press* was more likely than not John Smith and that he had breached the Code of Conduct and irreparably damaged the trust and confidence Customs had in him.

Case against Mr Rankin

[58] The investigators concluded the following with respect to Mr Rankin:

- That there were strong suspicions held that indicate Mr Smith did not alone have involvement but had discussed the intended course of action with Mr Rankin and another officer. Mr Rankin's absence from work due to anxiety is believed to be evidence of him knowing more than he let on.
- The email of 28 April 2009 and what Mr Rankin was suggesting in late April was what occurred in early November.
- The investigators relied on Mr Bryce warning Mr Rankin and Mr Smith not to go to the media and Jennifer attempting to contact him.

[59] The investigators concluded that Mr Rankin had knowledge of the involvement of Mr Smith in the unauthorised release of confidential and private information to the media, that he did not bring this to Customs' attention as required under the Code of Conduct and that this breach had irreparably damaged the trust and confidence that Customs had in him.

[60] The investigators recognised that their conclusions about Mr Smith and Mr Rankin were based on circumstantial evidence. It is clear they relied on certain actions such as earlier emails, concerns about Category B searches, motives in terms of the states of mind of Mr Smith and Mr Rankin because of their reaction to Officer X returning to work, the fact that both Mr Smith and Mr Rankin had material they believed had been leaked to *The Press* and the telephone calls made by Jennifer to draw inferences in terms of the background.

[61] A decision was made not to contact *The Press* newspaper for two main reasons. The first was that it could signal to the media that the original information did have veracity and the second was that journalistic privilege would also likely *stonewall* the inquiry. Attempts were made by Mr Smith's and Mr Rankin's representative, Martin Cooney, Secretary of NUPE, before the final disciplinary meeting on 22 March 2010, to have the press at least exclude Mr Smith and Mr Rankin as persons who had provided information. *The Press* was not prepared to provide this information as requested by Mr Cooney. I am not satisfied that a fair and

reasonable employer, in these circumstances, would nevertheless have made inquiries of *The Press*. I accept that, with no direct evidence, no admissions and no information from *The Press*, the investigators' role was difficult.

[62] I shall assess the process that then followed before dismissal, but put succinctly, Mr Chitty received written submissions from Mr Smith and Mr Rankin and their representative Mr Cooney on 15 March 2010. There were then meetings held on 22 March 2010 and Mr Smith and Mr Rankin were summarily dismissed by Mr Chitty. In doing so he relied on the investigators findings except to the extent that he did not place reliance on the fact that Mr Rankin was unwell at or about the time of the release of information to the Press.

Procedural and Substantive Fairness and Reasonableness

[63] After the report was released on 4 December 2009, Mr Chitty concluded that the recommendations by the investigators were serious enough to justify a continued investigation under the Disciplinary Policy and Procedures. Mr Chitty wrote to four Customs Officers, including Mr Rankin and Mr Smith, by letter dated 14 December 2009 and enclosed copies of the investigators' report giving both applicants an opportunity to make comments by 22 December 2009. Following advice from the Customs Legal section, Mr Chitty had blanked out references in the investigation report to those other than the recipient of the report and in the chronological series of events, attached to the report as an appendix, information about those other than the recipient was also blanked out.

[64] There were considerable delays to the matter between 4 December 2009 and 22 March 2010 because of attempts by NUPE to have Customs provide an uncensored copy of the investigation report and the chronology. There were also requests made by NUPE for the provision of other documents relevant to, relied upon or prepared during the investigation, including transcripts of interviews of other employees. Some further information was provided under letter from Customs dated 11 March 2010 with deletions for privacy reasons, such as telephone records, investigators' notes, emails recovered particularly in respect of Mr Rankin, and correspondence between *The Press* reporter and Customs. These were received after the 15 March submissions had been prepared but before the 22 March 2010 meeting. The transcripts of interviews with other employees referred to in the investigation report were not

provided until after dismissal for the purposes of the Authority's substantive investigation meeting.

[65] The Ombudsman and the Privacy Commissioner were involved during the disciplinary process. I do not propose to set out all the correspondence between Mr Cooney and Mr Chitty. The position taken by Customs in terms of the investigation report and interviews was upheld by the Privacy Commissioner though Customs did adopt a recommendation by the Ombudsman that all information in the investigation report and the chronology, as it applied to NUPE members, be provided in an uncensored form which made easier reading of the report and chronology.

[66] The fairness of the process and the withholding of information needs to be assessed against the collective employment agreement, Disciplinary Policy and Procedures and the Code of Conduct. The good faith requirements in the Employment Relations Act 2000 are also relevant in terms of the requirement that the parties be responsive and communicative, that the employer provide all information relevant to the continuation of the employee's employment and that there be an opportunity to comment on that information, before a decision is made.

[67] At a late stage in my investigation, I was advised that the Code of Conduct provided in the bundle of documents had been updated. I was provided with a new Code of Conduct. The new Code of Conduct does not refer to any specific process to be adopted in relation to a disciplinary investigation. The new Code of Conduct's only reference to process is with respect to the Disciplinary Policy and Procedure applying in terms of behaviour that is inconsistent with the Code. Mr Smith signed an acknowledgment that he had received a copy of that Code of Conduct on 27 October 2009 and Mr Rankin on 1 November 2009. In doing so they both agreed to comply with the standards of integrity and conduct in the Code and recognised that behaviour inconsistent with the Code was not acceptable and may result in disciplinary action.

[68] The New Zealand Customs Service collective employment agreement from 1 July 2008 to 30 June 2010 between the Customs Service, Customs Officers Association, Public Service Association, NUPE and the New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc that covered the work of Mr Smith and Mr Rankin as members of NUPE is silent with respect to a disciplinary process but sets out the workplace policies and procedures that apply to employees covered by the agreement.

[69] The Disciplinary Policy and Procedures were not amongst those set out so whilst it is clear that the Code of Conduct forms part of the employment agreement, the Disciplinary Policy and Procedures do not. Given, however, that the specific reference to the Disciplinary Policy and Procedure applying in terms of behaviour alleged to be inconsistent with the Code of Conduct then I find that a fair and reasonable employer would apply its own disciplinary policy in terms of allegations under the Code as these were.

[70] In *Stimpson v. Auckland Healthcare Services Ltd (t/a Auckland Healthcare)* [1993] 2 ERNZ, it was held that where an employer has published a formal disciplinary policy, an employee is contractually entitled to expect that an employer would follow that policy. This issue was recently considered by Travis J in *Phillip Willis v. Fonterra Cooperative Group Ltd* (unreported, (2010) NZEMPC 80) in terms of the test in s.103A. At para.[41] of that judgment, Travis J stated:

I agree with Mr Rooney that s.103A has increased the flexibility the Authority or Court may apply when considering an employer's actions where it is alleged there has been a failure to follow its own policy, because the test is not whether or not the employer has properly followed every requirement of a promulgated policy, but whether in all the circumstances at the time the dismissal occurred, the employer's actions were what a fair and reasonable employer would have done ...

[71] This statement, in my view, is in line with Mr Zwart's submissions as to the approach the Authority should take when assessing the process and in particular whether there was a failure by Customs to follow the Disciplinary Policy and Procedures. The focus is to be on what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. I accept pedantic scrutiny of the process is not appropriate.

[72] The process adopted by Customs to investigate the leak of information to *The Press* did not fit neatly into the process set out in its Disciplinary Policy. That is because the investigation stage is normally undertaken after the receipt of an allegation against an employee – clause 7.4 and consideration by a manager as to that allegation or information in clause 7.5. This involves the employee being advised of the specific allegation or information causing concern and then being given an opportunity to review and consider the information or allegation and any supporting evidence before responding. If after a meeting with the employee the manager believes there are reasonable grounds to support that the alleged behaviour may have

occurred or where the employee disputes the substance of an allegation, an investigation is then undertaken. That investigation undertaken in this matter under clause 7.7 was that starting point of the process.

[73] After the final investigation report was provided, Mr Cooney, on more than one occasion, asked Mr Chitty for specific allegations to be put for both Mr Smith and Mr Rankin before the matter proceeded to a disciplinary meeting. On 22 January 2010, Mr Cooney wrote to Mr Chitty and, amongst other matters, asked for the background interviews, notes/transcripts and advised that the absence of any specific disciplinary allegations made any meaningful reply problematic.

[74] On 26 January 2010, Mr Chitty responded to Mr Cooney in writing regarding specific disciplinary allegations and advised that he was providing his members with an opportunity to comment on the content and findings of the investigators' report. He said in his letter that this was in accordance with the Disciplinary Policy and Procedures and that before he took any disciplinary action the employees affected would be given further opportunity to comment and/or meet with him in relation to his proposed course of action.

[75] Again, in February 2010, Mr Cooney asked for a letters of allegation for both Mr Smith and Mr Rankin. Mr Chitty, in an email dated 22 February 2010, said the next stage of the process was that he would form a preliminary view taking into account the investigators' report and any submissions. He saw this as being the *allegation stage* - document Z.

[76] In the absence of any response from Mr Cooney, Mr Chitty proceeded to release his preliminary findings to Mr Smith and Mr Rankin in letters dated 3 March 2010. Both of these letters, in essence, advised that the findings of the investigators were accepted and that Mr Chitty concluded Mr Smith and Mr Rankin's actions amounted to serious misconduct and summary dismissal appeared to be the appropriate outcome. Mr Smith and Mr Rankin were given an opportunity in terms of the preliminary view to provide written submissions by the close of business on 15 March 2010 and were then given an opportunity to meet with their representative for further explanation and so the final decisions could be conveyed on 22 March 2010.

[77] If the preliminary view is therefore to be taken as an allegation, the allegation Mr Smith was facing was that he had involvement in the unauthorised release of information to the media, and Mr Rankin had knowledge of the involvement of another Customs officer into the unauthorised release of information to the media and did not bring that knowledge to the attention of the Service.

[78] Mr Zwart submits that the lack of specificity in terms of allegations does not significantly affect the culpability of the two applicants. He acknowledges that it was impossible to determine who exactly did what and that the employer reasonably believed that Mr Smith was involved in the release, although he may or may not have handed information over and may or may not have spoken to the media and/or passed the information to a *patsy*. Mr Zwart submits that Mr Rankin may have known of and been involved in planning to release the information or he may have found out about it after the event, but either way he was obliged to tell his employer and failed.

[79] The provision of specific allegations to an employee was required as part of the Customs Disciplinary Policy but it is also a general requirement of a fair process. Part of that fairness is about the employee knowing what to respond to and the employer having a specific allegation to assess the facts and the appropriate disciplinary outcome against. I do not find Mr Chitty's approach in terms of his preliminary view and letter of 3 March 2010 satisfies the requirements for a specific allegation as set out in the Disciplinary Policy.

[80] I accept that, in the absence of specific allegations, there was some difficulty for Mr Smith and Mr Rankin to meaningfully answer the concerns. Mr Cooney, for example, said that he thought Mr Rankin was answering an allegation at the final disciplinary meeting that he had knowledge of Mr Smith's involvement in releasing the information, because that was how it was expressed in the final investigation report. That conduct concluded on the part of Mr Rankin by Mr Chitty was knowledge of another Customs Officer not specifically Mr Smith. In conclusion the allegations Mr Smith and Mr Rankin were required to answer were too broad and that was unfair.

[81] I now turn to the provision and withholding of the information ascertained from the investigation. Had Mr Chitty considered and provided specific allegations, then that may well have dealt with the concern about censorship of the investigation report. I accept that a fair and reasonable employer would not usually provide

recommendations and findings about an employee to other employees. With a specific allegation Mr Chitty could have provided the supporting evidence as it concerned each of the employees and overcome any unfairness in terms of the censorship of the investigation report. A fair and reasonable employer would have provided the chronology without censorship, because it did not attract the need for confidentiality as the recommendations and findings about others in the investigation report did.

[82] Transcripts of the interviews undertaken with other employees as part of the investigation were not provided to Mr Smith and Mr Rankin. The investigators, in their preliminary report, recorded in clause 2.5 that for those employees interviewed, *confidence was assured*. The investigators, in the final investigation report recommended that Mr Chitty *carefully scrutinised the supporting records of interview and chronological series of events tabled in consideration of the contents of this report and the findings made*.

[83] I find that the failure to provide the transcripts of those interviews or even the parts that the decision-maker fairly considered should be put to Mr Smith and Mr Rankin for comment, put them in an inferior position where they were not able to comment on matters that Mr Chitty had in front of him as the decision-maker. For example, some of those interviewed by the investigators said they thought Mr Rankin and Mr Smith were involved in the release of the material. Only one person was able to say categorically that he or she knew who had released the information and they named someone other than Mr Smith and Mr Rankin. Others interviewed mentioned names other than Mr Smith and Mr Rankin.

[84] In circumstances where there has been an assurance of confidence and/or there are concerns that there could be further leaks, a fair and reasonable employer would have talked to Mr Cooney about an appropriate way to disclose the information as good faith requires and still provide adequate protection. The disciplinary policy required disclosure be made to an employee of evidence in support of an allegation.

[85] After the preliminary views of Mr Chitty had been received, Mr Smith and Mr Rankin provided submissions as required by 15 March 2010. Mr Cooney also provided submissions on behalf of Mr Smith and Mr Rankin. In their respective submissions, Mr Smith and Mr Rankin dealt with every inference drawn by the investigators about their conduct and provided an explanation to each one. These

submissions required some careful thought in considering the facts that had been ascertained regarding the conduct of both Mr Smith and Mr Rankin, and whether there was sufficient evidence to establish a reasonable belief that this conduct had occurred.

[86] Mr McKenzie submits that the decision to dismiss was predetermined and/or that Mr Chitty closed his mind to the explanations provided by Mr Smith and Mr Rankin.

[87] There was information provided that supported the drafting by Mr Chitty but not the finalisation of the dismissal letters had taken place before 22 March 2010. There was a further criticism that there was little time taken by Mr Chitty to consider matters before dismissal, and that there was minimal questioning of Mr Smith and Mr Rankin during the only meeting they each had with him about this matter on 22 March 2010.

[88] Mr Chitty as a witness appeared considered and careful. He denied any predetermination and said that he considered the explanations but did not find that the explanations changed his view of the investigators' conclusions.

[89] The issue of predetermination should be considered with Mr McKenzie's final complaint as to whether there was sufficient evidence to enable Mr Chitty to reach a reasonable belief that the alleged misconduct on the part of Mr Smith and Mr Rankin had occurred.

[90] Mr Chitty said that he relied on the background (the lead up), motive and the capacity by Mr Smith and Mr Rankin to release information, because they had the documents. Capacity was less relevant to Mr Rankin because it is not alleged he was involved in the release and, if he had been involved, following the investigator's logic he would have provided the second generation figures about searches. That logic could also extend to knowledge. There was evidence of a background to this matter involving Mr Rankin and Mr Smith that could suggest a motive for release although there was evidence available to Mr Chitty that other employees also had motive in terms of allegations against, and disappointment about, Officer X returning to work.

[91] A conclusion was available to the investigators that Jennifer's first statement was in the possession of the Press. I accept Mr McKenzie's submission that such a firm conclusion was not as clear concerning the graph. The only information about

that was that the Press had the two numbers on that graph and there was no reference to the time span of searches as set out on the graph. There was a possibility that *The Press* was not actually in receipt of the graph but rather the two figures from it only. This therefore may have widened the ambit of those who could possibly have known about those two figures, though may not have seen the graph itself (document XXX). The reference in that email provided to the investigators suggest that the figures were read from a letter. The investigators proceeded in their investigation on the basis that it was clear that the Press had had both documents from an early stage. I am not satisfied however that such a strong conclusion was available on material before them and Mr Chitty.

[92] As a result of the investigation being on the basis that the Press had two documents, there was no questioning as to who knew about the number of searches undertaken by Officer X simply as a result of talk/gossip. Mr Rankin and Mr Smith, in their explanations and submissions, did not refer to this because they were answering on the basis that the Press had the graph. Mr Rankin said in explanation that he kept the graph in his pigeon hole and it could have been copied. It also seemed to me unclear whether all the emails in document XXX had been disclosed as part of the documents received by NUPE after 15 March 2010. I did not see it in that bundle of documents.

[93] Aside from emails sent several months earlier by Mr Rankin about going public and negative views about Officer X, there seemed to be no further facts ascertained from the investigation in terms of what knowledge Mr Rankin had about a leak, who he was suspected of having knowledge about and when he had the knowledge of that leak. There was no specific allegation about the emails themselves. The investigators refer in their report to strong suspicions that Mr Smith did not alone have involvement, and the basis for a belief that Mr Rankin was involved seems to be the email of 28 April 2009, the call from Jennifer and the earlier advice from Mr Bryce not to go to the media.

[94] Mr Rankin was contacted by a *Press* reporter after the material was leaked and it was therefore accepted by the investigators that it was unlikely to have been Mr Rankin who leaked the material. It has been held in *NZ (with exceptions) Shipwrights etc Union v Honda NZ Ltd* [1989] 3 NZILR 82 at 85 that where a serious

charge is the basis of justification then the evidence in support of it must be as convincing as the charge is grave.

[95] I find that for a serious allegation a fair and reasonable employer would conclude there was insufficient evidence about Mr Rankin having knowledge of the leak to the Christchurch Press. Customs belief and conclusions that Mr Rankin did have knowledge of the leak and failed to advise of that knowledge were therefore neither fair nor reasonable.

[96] In terms of Mr Smith I accept that inferences were capable of being drawn in terms of some of his conduct. He dealt with every inference in his submission. For example he actually had the second graph in his possession although did not realise he did. If there was an intention to release material then, as he explained in his submission to Mr Chitty, that applying the logic of the investigators he would have released the second graph.

[97] Mr Smith was specifically asked by the investigators about Officer Z and Mr Lumsden. He did not realise at the time he gave his submissions and met with Mr Chitty on 22 March 2010, that he was the only person who had been asked about those two managers. This was because he had not been provided with copies of the interviews and did not see them until just before the Authority meeting.

[98] Mr Smith had motive by way of background involvement and his views in the Category B searches issue and allegations against Officer X, but he was not the only one. He was also a delegate so was privy to information from other employees without sharing their views. He put forward in his submission that Jennifer could have telephoned him in his delegate role after she had spoken to the Press reporter.

[99] Considerable emphasis was placed on Mr Bryce telling Mr Rankin and Mr Smith not to release information to the media on or about 6 May 2010. Mr Cooney, in his submission supplied to Mr Chitty on 15 March 2010, said that he could verify as NUPE Union Secretary that the comments are a generic advisory given by organisers in such circumstances. Mr Smith said in his submission that he took that instruction seriously but had never contemplated doing so in advance of it.

[100] Reliance was placed on Mr Smith being the only one interviewed to mention a change to regulation/policy with respect to searching. This was important because there was mention of a change of policy within the last three months by the Press

reporter. Mr Chitty explained and I accept that in fact there was not a change of policy, but simply procedure, and for reasons unrelated to this matter and Officer X. I accept however that this created suspicion regarding Mr Smith's involvement.

[101] Mr Smith put forward that he may not have been telephoned by the Press, not because he was the leak, but because the person releasing the information may not have suggested the reporter should talk to him.

[102] I have stood back and considered the investigators report and the explanations. This was a grave allegation. I accept there is enough to create a suspicion that Mr Smith was involved in the release. Against that there was no evidence of Mr Smith having telephoned or having been telephoned by the Press as per his telephone records. No one interviewed said that they had heard him talking about releasing information after being advised that Officer X was returning to work. Importantly there was material available to Mr Chitty and the investigators to suggest that the conclusion in terms of the graph being in the possession of the Press was not as strong as the statement. This may have increased the ambit of who could have been involved. There was no conclusion able to be reached by Mr Chitty about how Mr Smith had leaked the information to the Press. No-one saw him talking to a third party or overheard a conversation with a reporter, for example. A fair and reasonable employer would not have concluded that he was the only officer with motive.

[103] Whilst I can fully appreciate the desire on the part of Customs to find and discipline the person who leaked this material, this was a very serious allegation. There was no direct evidence of involvement of Mr Smith in leaking the information to the Press and the circumstantial evidence that was available would be regarded by a fair and reasonable employer as insufficient in these circumstances.

[104] I find there was insufficient evidence about Mr Smith being involved in the release of material to the Press. Customs belief and conclusions that Mr Smith did have involvement in the leak were therefore neither fair nor reasonable.

[105] I conclude that Customs' investigation into the conduct of Mr Smith and Mr Rankin was not what a fair and reasonable employer would have done. There were no specific allegations provided and some information relevant to the allegations was withheld in breach of the disciplinary policy and in breach of good faith. This did not afford Mr Smith and Mr Rankin a real opportunity to explain. Further a fair and

reasonable employer would not have decided, in all the circumstances at the time the dismissal occurred, that there had been serious misconduct on the part of Mr Rankin and Mr Smith.

Was the decision of Customs to summarily dismiss John Smith and Glenn Rankin what a fair and reasonable employer would have done?

[106] I have not found that there was a full and fair investigation following which a fair and reasonable employer would have concluded there was serious misconduct on the part of Mr Smith and Mr Rankin. Given that finding, I do not find that a fair and reasonable employer would have summarily dismissed Mr Smith and Mr Rankin in all the circumstances.

[107] Mr Smith and Mr Rankin have personal grievances that they were unjustifiably dismissed from their employment with Customs and they are entitled to remedies.

[108] Section 124 of the Employment Relations Act 2000 requires the Authority when it determines that an employee has a personal grievance in deciding the nature and extent of the remedies, to consider the extent to which the actions of the employer contributed towards the situation that gave rise to the grievance and if required reduce the remedies that would otherwise be awarded.

Remedies

Mr Smith

Contribution

[109] Mr Zwart submits that contribution should be set at 100% for both applicants and further that reinstatement is not practicable.

[110] I have not found that there was sufficient evidence that a fair and reasonable employer would conclude there was serious misconduct in terms of involvement in the leaking of information to the Press.

[111] I am not therefore satisfied on the balance of probabilities that Mr Smith released the information to the Press either directly or through a third party or talked to the Press. That said I do find that there was blameworthy conduct on the part of Mr Smith during Customs' investigation in terms of his manner and attitude during interview, even allowing for the inconvenience of being questioned whilst on holiday and feelings of pressure. I find that that did contribute toward the circumstance that gave rise to the grievance. Mr Smith was critical of managers and unduly focused on the Officer X outcome.

[112] The evidence gathered by the investigators was circumstantial and I consider some of the inferences drawn by the investigators were so drawn because of Mr Smith's attitude. A difference in approach would probably have caused the investigators to focus less on behaviour and more on whether the evidence they had gathered was sufficient to reach the findings they did

[113] I have considered the nature and the extent of the remedies in terms of this finding of contribution.

Reinstatement

[114] The main remedy Mr Smith is seeking is reinstatement, a primary remedy – s125 Employment Relations Act 2000. There is strong opposition on the part of Mr Chitty and Mr Lumsden to an order reinstating Mr Smith.

[115] One of the reasons advanced in opposition to reinstatement is that Mr Smith would have to work with Officer X and it is to that matter I shall firstly turn. Officer X is the one who potentially has suffered the most in this matter because he had private and sensitive information released to the Christchurch Press about him. I imagine he feels a strong sense of betrayal about that and would have been understandably very anxious that his name could have appeared in an article.

[116] The evidence about Officer X's future intentions seemed a little uncertain. Currently he is placed away from the airport in another area, but Mr Lumsden says

that this cannot continue long term and he will return to airport duties. As I understand the evidence, being away from his usual role disadvantages him financially. I have approached this on the basis that notwithstanding there was some evidence that Officer X may not want to return to work at the airport it is likely to be an outcome. On that basis I would need to be satisfied that reinstatement would not be an impediment to that return if it happens in that Officer X would be able to work safely and appropriately with Mr Smith and without direct supervision. Mr Smith says that he could work with Officer X and would act with professionalism and integrity.

[117] Mr Smith did not accept that there was a campaign as such about allegations against Officer X. Customs was already aware of that suggestion before dismissal - see the Walter/Ward report appendix "C". That likelihood of a campaign or collusion involving Mr Smith was not seen as an impediment to Officer X returning to work where he would presumably have to interact with Mr Smith at that point.

[118] One of the matters that did give me concern was whether Mr Smith could move on from the outcome from allegations against Officer X, the outcome not being one that he expected. Mr McKenzie in his submissions says that Mr Smith should be given a chance to work hard to ensure a successful reinstatement. He refers to undertakings about appropriate behaviour and demonstrating integrity by Mr Smith. Mr Smith must recognise that Officer X is surely entitled to that same opportunity and chance when he returns to the airport. In terms of the personal search issue the policy about that is clear. There is a legal response. Mr Smith needs to move on from that. I think he can do that.

[119] I am not satisfied that it would not be practicable for Mr Smith to be reinstated because of concerns in his working relationship with Officer X. He has undertaken in his second affidavit para 3 that should he be reinstated he will conduct himself professionally in relation to any interactions with Officer X. Customs are entitled to hold him to that undertaking.

[120] Mr Smith was honest about his views about management even though he recognised to be so may impact on reinstatement as a remedy. The Authority is

almost inevitably faced with very strong opposition from an employer to reinstatement and that honesty gave me a good basis to assess the practicality of reinstatement. The reality is that employees hold views about people they work with and some of them may be negative but not everyone is as forthright about them as Mr Smith. Mr Smith's harshest criticism was with respect to Officer Z who is currently on unpaid leave from Customs and has been for a considerable period. It is not known when or whether he will return so I do not see difficulty in that relationship as one going to the practicality of reinstatement.

[121] In terms of Mr Lumsden I am not persuaded from carefully assessing the evidence that there is no respect for Mr Lumsden at all. I am not satisfied that Mr Smith cannot be taken at his word that he would conduct himself if reinstated with integrity and, notwithstanding his personal views, act appropriately. Mr Lumsden said that Mr Smith did his job adequately as a Customs Officer, has passion and believes in the job. He did however also say that Mr Smith could be difficult and always thought he was right. He was concerned about the situation from a management perspective where there was a lot of work ahead for Customs and less ability to supervise if Mr Smith was reinstated. I found Mr Lumsden's evidence as a manager very helpful and considered about reinstatement and the practical difficulties.

[122] Mr Smith is inclined to jump to an incorrect conclusion without the full facts. The change in view in light of the Walters/Ward report and the fact, as now disclosed, that there was a legal response to the personal search issue as a result of Officer Z forwarding Mr Rankin's questions on are examples. Mr Smith needs to accept management at Customs usually have more facts than he does when they make their decisions and that he is not always right. I think he is capable of reflecting on this and making some changes to his behaviour.

[123] I am not satisfied that given my findings, there are issues of national security and trust as raised in evidence by Mr Chitty, making reinstatement not practicable. Mr Smith was asked in his interview by Mr Williamson whether he agreed with the release of the material to the media and he responded that he did not. In his submissions to Mr Chitty and his evidence he acknowledged that any release of material to the media of this nature amounted to serious misconduct.

[124] Looking at the contribution and the nature and extent of remedies I find that Mr Smith should be reinstated to his former position as a Customs Officer but, that to recognise contribution, there should be no award of compensation for hurt and humiliation although there should be an order with respect to lost wages.

[125] I order John Smith be reinstated to his former position of Customs Officer. This order is to take effect on Monday 31 August 2010 to enable a period of three weeks for Mr Smith to give notice to his current employer and for Customs to make the necessary arrangements for his return.

Lost Wages

[126] Mr Smith is entitled to be reimbursed for lost remuneration between the date of dismissal to the date of this determination less earnings received from his current position. Mr Smith said that he had applied for about six roles following his dismissal before he secured another position as a communicator and dispatcher on 26 May 2010. I am satisfied that adequate attempts were made to mitigate loss in the circumstances that included there being in the intervening period an application by Mr Smith for interim reinstatement .

[127] Mr McKenzie provided details of lost wages up to 16 June 2010 that took into account wages received since dismissal. I accept that the averaging of six fortnights of Customs pay was appropriate to arrive at an average fortnightly net pay of \$1,554.91. Mr Smith has provided a total of net lost wages in the sum of \$8,143.94. I am sure that Mr McKenzie and Mr Zwart can agree on the figure until the date of this determination. If not leave is reserved for either party to return to the Authority.

Mr Rankin

Contribution

[128] I have not found that there was sufficient evidence a fair and reasonable employer would conclude there was serious misconduct in terms of knowledge as to who leaked information to the Press. I do not therefore find on the balance of probabilities that Mr Rankin had this knowledge.

[129] Considerable reliance was placed by Mr Chitty in making his decision on the email Mr Rankin sent to his union about Officer X and going public. Mr Rankin gave as his explanation that going public was about the possibility of a hearing at the Authority or Court. I am not in a position to properly conclude what was in his mind at that time. I find though that the tone of the emails and the suggestions therein fell well short of what would be expected from someone in a leadership position referring to a lower ranked officer. They are the sorts of email that ordinarily would not be expected to be copied to a lower ranked officer, Mr Smith, albeit that he was a delegate.

[130] These emails were relied on by Mr Chitty to form a view about Mr Rankin in terms of motivation and a previous intention and I find some blameworthy conduct on behalf of Mr Rankin in that respect. It showed a lack of judgement.

[131] I have considered the nature and extent of remedies in terms of this finding of contribution.

Reinstatement

[132] Like Mr Smith, Mr Rankin seeks as his main remedy reinstatement to his previous position with Customs. There is strong opposition to reinstatement.

[133] Mr Rankin has been with Customs nearly the whole of his working life, twenty four years.

[134] Customs knew before Mr Rankin was dismissed that he had prepared graphs about Officer X's searches and in the Walter/Ward report issues regarding his

motivation in doing so were specifically recorded and referred to. Mr Lumsden, after advising Mr Rankin that Officer X was returning to work, reminded him that in future he needed permission to access personal search figures and there was discussion about the need for him to move on. Mr Chitty was also aware of Mr Rankin's difficulties in moving on from the personal search policy issue and there had been talk of a warning although that did not eventuate.

[135] There were concerns expressed by Mr Lumsden about trust with Mr Rankin continuing to be part of the management team. Other emails recovered were critical of management and in his affidavit Mr Lumsden deposed to management emails and conversations being reported back to the Union.

[136] In final submission Mr McKenzie suggested that Mr Rankin provide an undertaking that if reinstated and called upon to resign his position he do so for a Senior Customs Officer position that is not part of the management team, but that would carry the same salary. The parties were aware that the Authority only has the power to reinstate an employee to a former position or one no less advantageous. An undertaking was subsequently provided.

[137] Mr Chitty and Mr Lumsden were given an opportunity to make submissions on that undertaking. Mr Lumsden said it was not the role that was important but the attitudes and behaviours that Mr Rankin demonstrated that in his opinion exclude him from being capable of undertaking a role with Customs. Mr Lumsden said that he still believed his actions were right and justified and he has not resiled from that. He questioned whether Mr Rankin could, as required in a Senior Customs Role, provide the necessary role model behaviour.

[138] Mr Chitty submitted that issues of trust and confidence remain, and Mr Rankin would, he envisaged, be difficult to manage and that he would continue to undermine the management team. He submits that Mr Rankin remains an opponent to the policy relating to strip searching and that in a law enforcement environment such as Customs the personal opinions of individuals are irrelevant because the role is to put into operation government policies and regulations. He submits that his views and

concerns on national security remain and are not affected by Mr Rankin's rank. He suggested Mr Rankin displayed self righteousness and arrogance that could reasonably be expected to continue if he returned to work.

[139] Mr Rankin has said that he would work alongside any officer including Officer X and believes that he has the professionalism to make reinstatement a success. That view is not shared by management. I see however that Mr Rankin's undertaking is a sign that he recognises that he may not have been in the right, and some things that he wrote, on closer analysis, do not sit at all well with his leadership role. I was concerned that he may have not been able to move on in terms of Officer X and the personal search issue. Difficulties about both these issues were known to Customs before his dismissal though, and Mr Rankin has said that he would act professionally if reinstated. There is no question that he must put those matters behind him and he is aware that if he does not then there would be a swift response from Customs.

[140] I do not find that the issue of national security and trust renders reinstatement impracticable given my findings.

[141] I am satisfied that reinstatement is practicable.

[142] Looking at contribution and the nature and extent of remedies I find that Mr Rankin should be reinstated to his former position as Assistant Chief Customs Officer on the understanding that he will then act in terms of his undertaking to the Authority. To recognise contribution on his part, there should be no award of compensation for hurt and humiliation although there should be an order with respect to lost wages.

[143] I order Glenn Rankin be reinstated to his former position of Assistant Chief Customs Office on the understanding that he will then act in terms of his undertaking to the Authority in consultation with Customs. This order is to take effect on Monday 31 August 2010 to enable a period of three weeks for Mr Rankin to give notice to his current employer and for Customs to make the necessary arrangements for his return.

[144] Mr McKenzie submitted that both applicants are willing to attend mediation so that is an option within that period if considered helpful.

Lost Wages

[145] Mr Rankin is entitled to be reimbursed for lost remuneration between the date of dismissal to the date of this determination less earnings received from his current position. Mr Rankin applied for 40 roles following his dismissal before he secured another position. I am satisfied that adequate attempts were made to mitigate loss in the circumstances, that including in the intervening period an application by Mr Rankin for interim reinstatement .

[146] Mr McKenzie provided details of lost earnings up to 16 June 2010 less earnings from current employment. I accept that the averaging of six fortnights of Customs pay was an appropriate calculation to arrive at an average fortnightly net pay of \$2000.63. Mr Rankin has set out that after earnings are taken into account he has lost earnings to 16 June 2010 of \$9,938.04. I am sure that Mr McKenzie and Mr Zwart can agree on the figure until the date of this determination. If not leave is reserved for either party to return to the Authority.

Costs

[152] I reserve the issue of costs. Mr McKenzie has until 31 August 2010 to lodge and serve submissions as to costs and Mr Zwart has until 14 September to lodge and serve submissions in reply.

Summary of findings and Orders

- I have found Mr Smith and Mr Rankin unjustifiably dismissed.
- I have found contribution and have taken it into account in assessing the nature and extent of remedies.

- I have ordered Mr Smith be reinstated to his former position as Customs Officer on 31 August 2010.
- I have not awarded compensation.
- I have awarded reimbursement of lost wages to the date of this determination. Whilst figures less earnings are available to 16 June, I have left it to the parties to calculate further loss with leave reserved to return to the Authority if required.
- I have ordered Mr Rankin be reinstated to his position as Assistant Chief Customs Officer from 31 August 2010, in accordance with his undertaking with respect to a Senior Customs Officer position.
- I have not awarded compensation
- I have awarded reimbursement of lost wages to the date of this determination. Whilst figures less earnings are available to 16 June, I have left it to the parties to calculate further loss with leave reserved to return to the Authority if required.
- I have reserved the issue of costs and have made directions regarding the timetabling of submissions.

Helen Doyle
Member of the Employment Relations Authority