

[3] Ms Holden's response on behalf of the Department was that the employer will abide the decision of the Authority on the application, noting in addition that the preference was to have the problem resolved in a low cost way that could be achieved in the normal course of the procedures operated by the Authority.

Background

[4] Commencing in July 2004 Mr Zhou was employed as a compliance officer in the Department's Workforce Group (Border Security). The workforce group incorporates the New Zealand Immigration Service. The position description for the compliance officer position included a requirement for the role holder to obtain and retain a suitable Government Security Clearance (GSC). The Department says an objective of its security vetting policy is to minimise the risk to it and to the Government by ensuring any person employed on work involving access to classified material is granted a security clearance of the appropriate level.

[5] In September 2004 Mr Zhou obtained a GSC to confidential level. The clearance was current to July 2009.

[6] Mr Zhou believes that in 2007 certain concerns were raised about him with the Department, but the concerns were not raised with him. He also believes that, in August 2008, the New Zealand Security Intelligence Service (NZSIS) recommended to the Department that his GSC not be renewed. This was not raised with him.

[7] On 18 December 2008 the NZSIS made a formal adverse recommendation that Mr Zhou's confidential GSC be revoked. Some exchanges between the Department and the NZSIS followed regarding what information could be released to Mr Zhou in this respect.

[8] By letter dated 2 July 2009 Mr Zhou was informed of the adverse recommendation, and that the recommendation was made 'because in the course of your work for the Department you have been in unauthorised contact with representatives of a foreign government.' The letter advised Mr Zhou that, based on this recommendation, the Department had to decide whether to revoke the GSC. It also advised that if the GSC was revoked, Mr Zhou's employment may be at risk as

the ability to retain the GSC was a requirement of the role. A meeting was sought to discuss the revocation of the GSC. The meeting went ahead on 6 July.

[9] Mr Zhou commenced a period of special leave.

[10] In a letter dated 15 July 2009 Mr Zhou's representative sought information under the Official Information Act 1982 and the Privacy Act 1993 about the basis for the adverse recommendation. Some information was subsequently released, while other information was withheld for reasons which included a concern about prejudice to the security or defence of New Zealand or the international relations of its government.

[11] At the same time Mr Zhou sought a review by the Inspector-General of Intelligence and Security (IGIS) of the adverse NZSIS recommendation. The review took longer than expected.

[12] Meanwhile by message dated 11 November 2009 Mr Zhou's representative advised that Mr Zhou was no longer willing to remain on voluntary leave, and remained concerned about the lack of detail of allegations made against him. By reply dated 15 December 2009 the Department advised that, until the outcome of the review by the IGIS was known, any attempt by Mr Zhou to return to work would result in the Department suspending him.

[13] By letter dated 15 March 2010 the IGIS advised that he had recommended a reassessment by the NZSIS of its recommendation. The NZSIS commenced a reassessment.

[14] By message dated 25 March 2010 Mr Zhou's representative again sought Mr Zhou's return to work. The response was that any decision would await the outcome of the reassessment.

[15] In April 2010 Mr Zhou lodged a statement of problem in the Authority in respect of his disadvantage grievances, and the problem was directed to mediation.

[16] In or about May 2010 the NZSIS again recommended against the grant of a GSC for Mr Zhou. It appears this was again on the ground of Mr Zhou's unauthorised contact with representatives of a foreign government. The IGIS was again asked to review the recommendation.

[17] By letter dated 11 June 2010 the Department advised Mr Zhou of its preliminary decisions that:

- (a) the GSC would be revoked; and
- (b) his employment would be terminated as he was not able to comply with a core requirement of his position, namely holding a GSC to an appropriate level.

[18] There was a teleconference between the Authority and the parties on 15 June 2010. The call was largely concerned with access to the information that had been withheld from Mr Zhou. As I understand it certain information was made available to the Department, but not to Mr Zhou, and the information was relevant to the decisions the Department made about Mr Zhou's employment. The Department believes it is not free to provide that information to Mr Zhou. The call was adjourned while the parties considered their position on the provision of withheld information, and pending the outcome of the second review by the IGIS.

[19] On 18 June 2010 the parties went ahead with a meeting to discuss the matters raised by the 11 June letter. Both of the preliminary decisions were confirmed by letter dated 25 June 2010.

[20] The dismissal was effective from 29 June 2010, and Mr Zhou was to receive one month's pay in lieu of notice. Further to the reason for the dismissal, the Department says it relied on the adverse recommendation as well as a concern that the matters which led to the adverse recommendation called into question its trust and confidence in Mr Zhou.

[21] Both of the decisions were the subject of personal grievances set out in a letter dated 6 September 2010.

[22] According to the amended statement of problem filed subsequently, Mr Zhou also has a personal grievance in that his employment was affected to his disadvantage by the unjustified actions of his employer in:

- (a) receiving and holding or acting on information adverse to Mr Zhou in the period June 2007 – 2 July 2009 without making it available to him or advising of it at the time, and subsequently failing to provide adequate details of information received by the NZSIS and associated concerns held by the employer; and
- (b) effectively suspending Mr Zhou between 11 November 2009 and 25 June 2010.

Whether important question of law arises other than incidentally

[23] Dr Harrison formulated questions of law which I summarise as follows:

- (a) did Mr Zhou's terms and conditions of employment extend to a requirement that he hold a GSC in order to continue his employment, and if so what reciprocal duties did this impose on the Department?
- (b) what duty of fairness and disclosure did the Department owe Mr Zhou in respect of:
 - . information received from an informant,
 - . allegedly classified information received from the NZSIS, and
 - . the content of an adverse GSC recommendation made by the NZSIS?
- (c) regarding the matters giving rise to Mr Zhou's grievances was it sufficient for the Department to rely on the fact of the adverse GSC recommendation, or was it obliged to look further into the facts or grounds underlying that recommendation?
- (d) what are the parameters of an employee's duty (if any) to refrain from acting so as to damage his employer's trust and confidence when the trigger for concern is either:
 - . an adverse GSC recommendation which the employer will not (or cannot) disclose to the employee,
 - . adverse information (whatever the source) which the employer will not (or cannot) disclose to the employee?

- (e) what are the Department's disclosure obligations in the course of the personal grievance proceedings in respect of documents or information supplied by the NZSIS relating to Mr Zhou or the pursuit of his grievance, considered in terms of public interest immunity principles or other relevant legal constraints on disclosure?
- (f) in the context of the personal grievance proceedings, if legal constraints prevent full disclosure what is the court's or the Authority's role regarding the provision of adequate particulars or redacted documents, can or should it view information to which the employee is not privy, and if so can or should a 'special advocate' procedure be followed?

[24] Dr Harrison says the overarching complicating factor in this problem is the employer's possession and use against Mr Zhou of what is or may be confidential information, and Mr Zhou's access to that information. I agree. With that in mind, and with reference to the nature of the information with which this employment relationship problem is concerned, two themes underlie the questions. They are:

- . the extent to which the employer's duty of good faith means it can accept and act on information received and not disclosed to an employee in decisions it makes about that employee's employment, including in particular whether the employment is to continue; and
- . whether some or all of the information available to the Department but withheld from Mr Zhou should be made available in his personal grievance proceedings, and if so to whom, in what form and following what procedure.

[25] The special nature of the information in question means I accept important questions of law arise in respect of questions (b) – (d) in particular, and in the context of the Department's obligations to Mr Zhou as his employer. These lie at the heart of the employment relationship problem, and are not incidental.

[26] Further to questions (e) and (f), I accept that important questions arise in respect of the obligation to disclose the withheld information, and the procedure to be followed.

Whether in the Authority's opinion the Court should determine the matter

[27] I am of the opinion that in all of the circumstances the Employment Court should determine this matter, for reasons indicated by the above.

Order for removal

[28] Accordingly I order that the entire matter be removed to the Court.

Costs

[29] Costs are reserved. If either party seeks an order for costs, the party seeking the order shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority