

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 243/09  
5144956**

BETWEEN      LEIGHTON WHITE  
                         Applicant

AND              CHIEF EXECUTIVE OF THE  
                         DEPARTMENT OF CORRECTIONS  
                         Respondent

Member of Authority:      Leon Robinson

Representatives:          Tony Snell, Counsel for Applicant  
   Megan Richards, Counsel for Respondent

Investigation Meeting:      27 & 28 May 2009

Submissions Received:      8 June 2009

Determination:              21 July 2009

---

**DETERMINATION OF THE AUTHORITY**

---

**The problem**

[1]    The applicant Mr Leighton White (“Mr White”) claims he was unjustifiably dismissed from his employment with the Chief Executive of the Department of Corrections (“the Chief Executive”). He asks the Authority to make formal orders for his permanent reinstatement, reimbursement and compensation. The Chief Executive says Mr White was justifiably dismissed.

[2]    The Chief Executive has applied for an order that the names of persons I have referred to in this determination as "the unit manager" and "the detective" not be published. The application is not opposed. I think it right the order should be made in the interests of justice. **I therefore order that the names of "the unit manager" and "the detective" may not be published. I further order that the Authority's file may not be inspected by any person without order of the Authority.**

## The facts

[3] Mr White was employed by the Chief Executive as a corrections officer at Waikeria Prison. He commenced that employment on 8 August 2005.

[4] The terms of Mr White's employment were those set out in various prevailing collective employment agreements.

[5] Mr White was issued with a written warning dated 22 March 2007 for "*[failing] to comply with any of the Department's procedures, operating instructions or rules*" and which was said to constitute serious misconduct. Mr White had been found to have used his own personal handcuffs and not those issued by the Chief Executive. The written warning was expressed as effective for "the standard 12 months". Mr White did not challenge the issue of that written warning

[6] Mr White was issued with a further written warning dated 24 April 2007 again for "*[failing] to comply with any of the Department's procedures, operating instructions or rules*". Mr White had been found to have two prisoner fashioned weapons in his locker. The written warning was expressed to be a final warning and again, was effective for "the standard 12 months". Mr White did not challenge the issue of this written warning.

[7] In or about August 2007 Mr White asked his friend, a detective constable with the New Zealand Police, to confirm the criminal history of a particular unit manager also employed at Waikeria prison. These parties have no doubt as to the identities of both the detective constable and the unit manager, and I consider it both unnecessary and undesirable to particularly identify them in this public document. Accordingly, I shall refer to the detective as "the detective" and the unit manager as "the unit manager". I find that the detective confirmed the unit manager's police and criminal history to Mr White.

[8] The detective gave Mr White a police photograph<sup>1</sup> commonly known as a “mug shot” of the unit manager printed on 30 August 2007. I shall refer to this photograph as “the police photograph”. I shall refer to the police photograph and the details of the unit manager's police and criminal history together as "the information".

[9] Mr White engaged in a dialogue about the unit manager with the president of his union who is also a senior corrections officer employed by the Chief Executive ("the union president"). On 14 April 2008, Mr White transmitted the police photograph<sup>2</sup> by facsimile to the union president. I find that Mr White also communicated the unit manager's police and criminal history to the union president.

[10] The union president intending to transmit the police photograph to the union's lawyer, inadvertently misdirected the facsimile transmission of the police photograph to a medical practitioner's rooms.

[11] On 22 April 2008, the medical practitioner informed the manager of Waikeria prison of the misdirected facsimile transmission. The Chief Executive's Central Region Regional Manager Ms Leanne Field (“Ms Field”) became aware of the situation. Ms Field referred the matter to the Chief Executive's Professional Standards Unit (“PSU”) for investigation. The New Zealand Police were also informed.

[12] On 4 May 2008 a Sunday newspaper published an article in relation to an unidentified unit manager with alleged criminal convictions. It is accepted by the parties that the subject of the article is the unit manager.

[13] The PSU provided a report to Ms Field dated 30 June 2008 which contained a communication from the New Zealand Police summarising the outcome of the New Zealand Police enquiries. The PSU report recommended a formal investigation be undertaken. Ms Field directed the PSU to conduct a formal investigation and issued terms of reference.

---

<sup>1</sup> the photograph was taken on 15 June 2002

<sup>2</sup> together with a use of force register report

[14] Ms Field wrote to Mr White by letter dated 11 July 2008 advising that she had directed an employment investigation be commenced into allegations against him. The terms of reference for the investigation were enclosed.

[15] Mr Reg Christiansen (Site operations manager corrections inmate employment) ("Mr Christiansen") wrote to Mr White by letter dated 16 July 2008 advising that he had commenced an investigation into allegations of possible serious misconduct by Mr White. The allegations of serious misconduct were specified.

[16] Mr White was interviewed by the PSU at a meeting held on 25 July 2008.

[17] The PSU provided an investigation report by Mr Christiansen dated 27 August 2008 and entitled "*Employment Investigation into allegations that a photograph of a Corrections manager was inappropriately obtained from Police and circulated by Corrections Officer Leighton White*" ("the report") to Ms Field on 28 August 2008.

[18] Ms Field wrote to Mr White by letter dated 3 September 2008. That letter advised that the report had been completed and enclosed a copy of it. Ms Field advised she accepted the findings of the report. Mr White was invited to make submissions on the report by 19 September 2008. A request for an extension to 15 October 2008 was granted.

[19] On 15 October 2008 Mr White and his representative Mr Ken Johnson (Mr Johnson) attended a meeting with Ms Field and the acting human resource manager Ms Maree Chetwin ("Ms Chetwin"). Mr Johnson made oral submissions on Mr White's behalf.

[20] Ms Field wrote to Mr White by letter dated 3 November 2008. She materially advised:-

*Having considered the employment investigation and your submissions I have reached a decision. In actively seeking out information about another Department employee, obtaining the information because of your personal*

*relationship with [the detective], retaining the information until such time that you considered it would be of use, then passing it on to your union representative, I consider that you have breached the Department's Code of Conduct. The first and second principles of the Code require employees to fulfil their lawful obligations with professionalism and integrity, to respect the rights of the public, colleagues and offenders and to refrain from conduct that might lead to conflicts of interest or their integrity being compromised.*

*I have serious concerns about the integrity of a staff member who would seek information about another Department employee under the guise of concerns about corruption and then hold onto the information for several months, before faxing it to his union representative. Your actions bring into question whether the Department can continue to have trust and confidence in you. I consider that your actions amount to serious misconduct.*

*The latest examples of serious misconduct, coupled with the previous matters, means that I can no longer have trust and confidence in your ability to act appropriately in the role of Corrections Officer.*

*Accordingly, my preliminary view is that the appropriate sanction for your conduct is dismissal. Before I make a final decision I would like to hear your submissions on why you should not be dismissed. Please provide any submissions in writing by 12 November 2008.*

[21] Mr Johnson made submissions on Mr White's behalf in a letter dated 7 November 2008. Mr Johnson made request for a further extension of time so that Mr White could take legal advice. Ms Field acceded to that request and granted an extension for further submissions to 17 November 2008.

[22] Mr White's legal representative wrote by letter dated 12 November 2008 to Ms Field. The representative asked that matters including these present issues be referred to mediation.

[23] Ms Field wrote to Mr White by letter dated 18 November 2008 advising his employment was terminated with one month's notice.

## The merits

[24] Mr White seeks orders from the Authority consequent upon a finding that his dismissal is unjustifiable. There is a test of justification prescribed at Section 103A of the *Employment Relations Act 2000* ("the Act"). That test is this:-

### *103A. Test of justification*

*For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering 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 or action occurred.*

[25] The allegation against Mr White in the letter of 11 July 2008 was that he had *"requested and received the police photograph and that on 14 April 2008 [he] faxed the police photograph ... to the [union president]"*.

[26] The letter of 16 July 2008 stated the broad allegation as accessing and subsequent distribution of a police photograph but detailed the specified allegations as relating to the **disclosure** of the information:-

- *Disclosed information about another employee without authority and in doing so, breached the first and second principles requiring an employee to fulfil their lawful obligations with professionalism and integrity, to respect the rights of the public, colleagues and offenders and to refrain from conduct that might lead to conflicts of interest or their integrity being compromised.*
- *Serious breach of a colleague's right to privacy through unauthorised disclosure of personal information.*
- *Misuse of Department property or funds.*

(emphasis added)

[27] The "misuse of department property" allegation was not seriously pursued and I need not deal with it.

[28] The letter of 3 September 2008 stated that *"an allegation of this kind, if proven, is a serious **breach of a colleague's privacy** and has the potential to seriously undermine the trust and confidence essential to the employment relationship between you and the Department of Corrections"* (emphasis added). Ms Field wrote that she accepted the facts and findings of the report. But Mr White was invited to respond.

[29] Oddly, Ms Field's emphasis of the allegation on breach of privacy is inconsistent with the report itself, which expressly stated this as its finding on the privacy issue:-

65. *For the purposes of this investigation, the Police photograph of [the unit manager] was obtained and distributed by an individual (Leighton White)*

*acting alone, and as such, the particular provisions of the Privacy Act are not directly relevant. It is not possible, therefore, to say that Leighton White has breached the provisions of the Privacy Act 1993 by interfering with the privacy of an individual.*

(emphasis added)

[30] The breach of privacy allegation was not maintained. As communicated in the letter dated 3 November 2008, Ms Field in essence found that Mr White had "*actively [sought] out information*" about the unit manager from a personal acquaintance, the detective. She further found that Mr White had retained the information until he considered it of use, then passed it on to the union president. These findings I determine were factually correct. They do not proceed on the basis of a breach of privacy. I assess now whether the conclusions from the factual findings were justifiable.

[31] I agree that an employee's communications with his union is really not the employer's business at all. There is nothing inherently wrongful or improper in an employee passing on information about a colleague's alleged wrongdoing to his union. I think an employer would generally welcome information from one employee of alleged wrongdoing by another employee. But the Chief Executive through Ms Field, did not view Mr White's actions in any kind way. Quite the contrary, the Chief Executive condemned his actions. How is it that the Chief Executive could take such a dim view? Why didn't the Chief Executive welcome the information Mr White had been dealing with?

[32] I immediately note that the Department did in fact already know of the information Mr White was in possession of concerning the unit manager. Apparently, the information had been made public in 2002. I understand that the *Criminal Records (Clean Slate) Act 2004* applied in respect of the unit manager. The Department had in fact previously formally dealt with the situation. I do not know whether Mr White knew that. The Chief Executive made no findings about that.

[33] So Mr White was not in possession of information his employer didn't already know. But that was not the reason the Department did not welcome the information I suggest it ordinarily would. Ms Field formed a view that Mr White's dealings with the information he had obtained from his detective friend were improper. Ms Field ultimately concluded that Mr White's actions were in breach of the Department's Code of Conduct which required *"employees to fulfil their lawful obligations with professionalism and integrity, to respect the rights of the public, colleagues and offenders and to refrain from conduct that might lead to conflicts of interest or their integrity being compromised"*.

[34] What are the lawful obligations Mr White is fulfilling when he seeks information from his detective friend or when he is communicating with his union so that standards of professionalism and integrity can be applied by the Chief Executive? I consider that "lawful obligations" refers generally to duties as a corrections officer. If that is so, then I cannot agree that when Mr White obtains information from his friend or when he corresponds with his union about that information, that he is carrying out his duties as a corrections officer. In order to apply qualifications of professionalism and integrity to the Mr White's established activities, it is necessary to adopt the broadest possible view of "lawful obligations" and not confine its meaning to simply tasks or duties of a corrections officer. I adopt a very broad interpretation of "lawful obligations" and accept that faithful service to the Chief Executive is the obligation on Mr White at all times such that standards of professionalism and integrity apply to Mr White's established actions in dealing with the information.

[35] If the concern about privacy was abandoned, then there can be no criticism of Mr White's correspondence with his union including providing the information to it. Mr White's correspondence with his union is not his employer's concern. If I am correct in that view, my analysis can now concentrate on the principal activity in Mr White's obtaining of the information from his detective friend and then retaining it for an extended period.

[36] I accept that generally, an employee in possession of information evidencing wrongdoing by another employer and **genuinely** concerned about that wrongdoing,

would pass that information on to the employer or their union or the Authorities, in a timely fashion commensurate with the level of seriousness involved.

[37] Ms Field's interpretation of Mr White's actions were that he was not worthy of approval because his actions were not altruistic or out of any genuine concern. In this regard, I note that Mr White did not pass on the information he had been given, to his employer. He had indicated his concern was about corruption. Despite that stated concern, he held the information for, I find, at least seven months. And then he did not pass the information to his employer. When interviewed on 25 July 2008 he said he did not pass the information to his employer because he feared there would be a conflict of interest. In the same interview he also said he was reluctant to do so because he was under investigation at the time, and when it was pointed out to him that at the time he obtained the information from the detective he was not in fact under investigation, he then said it was his right to go to his union with his concerns. These various responses were inconsistent and unsatisfactory. Mr White was not believed that he had dealt with the information out of concern for corruption.

[38] Ms Field was very sceptical indeed of Mr White's actions. She said she did not believe that a person could attend on a constable at any given Police station, make allegations about a work colleague and then be presented by the Police with that work colleague's photograph and police and criminal history. I find that most implausible too and I agree with Ms Field. If that is unlikely, then I agree that Mr White's statements to his employer that he had referred concerns he had about the unit manager to a police acquaintance by way of formal complaint, were not plausible either. I find Ms Field did not believe Mr White that he had engaged with the detective in any formal way. I agree that the Department was entitled to conclude that Mr White had not made any formal complaint to the New Zealand Police through his personal friend the detective. I find there was no formal investigation undertaken by the detective or the New Zealand Police.

[39] The finding that Mr White had not been dealt with by the detective as an informant was factually correct. From that point, Ms Field considered it was only because of his close personal friendship with the detective that he was in a position to

obtain the information which would otherwise be inaccessible, and that he had done so.

[40] Additionally, Ms Field did not believe that Mr White had not taken action in relation to the information provided to him because he was waiting for the New Zealand Police through his detective friend to investigate or to revert to him with its further advice. There were many months from the time Mr White received the information from his detective friend until it was eventually passed to the union. Because Ms Field did not believe his explanation, she concluded that Mr White had in fact deliberately retained the information.

[41] Ms Field did not believe Mr White's various responses. He was not believed about having concerns for corruption or that he had been dealt with by the detective, who was in fact his friend, as an informant. He was also not believed that he had been waiting for the New Zealand Police to investigate or revert to him with its further advice or his friend to advise him of developments.

[42] It is my finding that Mr White was not honest with his employer in very material respects. But while that is my finding, and although I find his employer did not believe him either, no allegations of dishonesty were formally pursued with Mr White for him to answer. He was not dismissed because he had been dishonest.

[43] I find that Mr White was made aware of the Department's mechanisms and processes for dealing with allegations of serious wrongdoing. Mr White did not pursue those avenues. I find that was a further reason why his employer doubted his *bona fides*.

[44] I agree that once it is accepted that Mr White was not genuinely motivated about concern for corruption, his motives could be called into question. From there it is reasonable to have concerns about why he would particularly have taken such deliberate steps to seek out information, not otherwise accessible, from his detective friend about an employee manager of the Chief Executive. If he had no reason to take advantage of his personal situation to cause very intrusive enquiries of a very sensitive

and highly confidential nature to made about another employee and a manager of the Chief Executive, his conduct in doing so was properly a concern of the Chief Executive and properly considered inappropriate. That factor, weighed also with the other matters on which Mr White was not believed, justified the Chief Executive reaching a point where he could properly draw an inference that Mr White had acted for his own unidentified purposes, and in acting for his own purposes, he was not acting in his employer's interests.

[45] For the reasons outlined, I agree that once it is accepted that Mr White had acted improperly and for his own purposes and not in his employer's interests, the finding that he had failed to fulfil his duties, or serve his employer faithfully, with professionalism and integrity was correct. I find Ms Field's conclusion that she had serious concerns about Mr White's integrity to be sustainable. Ms Field considered Mr White's actions brought into question whether the Department could continue to have trust and confidence in him and constituted serious misconduct.

[46] I now address procedural matters as submitted by Mr White's counsel. The Department has a *Managing Misconduct and Poor Performance* document. I accept that Mr White was not invited to have input before Mr Christiansen reached his findings. I accept there has been a procedural failure. It is substantial fairness that is relevant however. The notes of interviews Mr Christiansen carried out were provided to Mr White. Mr White was interviewed twice and was provided with all the information the employer relied on. Mr White had every opportunity to respond and in fact did do so with representatives. He was interviewed by Ms Field before she made her decision. He was also heard by submissions from his representatives. While there has been a procedural failure, I am not persuaded there is any unfairness arising out of it.

[47] Another criticism made is that Ms Field in her letter of 3 September 2008 made findings and Mr Christiansen had made findings in the report annexed to the letter, it being the first occasion Mr White was provided with the evidence and he having no input before the findings were made. As I have said above, Mr White should have been provided with the information before Mr Christiansen made his findings. I agree

that only then should Ms Field have been in a position to express any level of confidence in the investigator's findings. In substance however, I am satisfied that Mr White was not prejudiced by this procedural failing. I find it is without consequence because Mr White was in fact heard by Ms Field both personally and by representative to address, respond and explain the allegations against him.

[48] I agree that Ms Field ought to have explicitly stated in her advice of 18 November 2008 at least as a matter of courtesy to counsel and certainly out of fairness to Mr White, that the Department was not prepared to refer matters to mediation and further, that final submissions had not been received. There ought also to have been a clear signal that if submissions were not received a decision would still be made.

[49] I having heard from Ms Field, suspect that the Department suspects that Mr White had some connection with the 4 May 2008 *Sunday News* article apparently about the unit manager but which did not identify him. The timing of that publicity justifies the suspicion. But there was no evidence establishing any involvement by Mr White.

[50] I do not have to assess whether the conduct did constitute serious misconduct because Ms Field decided the appropriate disciplinary response in relation to it would be a final written warning and Mr White was not summarily dismissed solely in relation to it.

[51] But it was when the two prior warnings that Mr White had received were taken into account that the decision to dismiss was made. The first warning was in March 2007 because Mr White had used his own handcuffs, not department issue, to restrain a prisoner. The second was a final written warning in April 2007 because Mr White had weapons seized from prisoners in his locker. These warnings were not challenged by Mr White. Another written warning of February 2008 for inappropriate use of force has been challenged but Ms Field expressly discounted consideration of this warning in her final decision.

[52] I regard the warnings of March 2007 and April 2007 operative at the time of Mr White's improper conduct. I fix the time of that conduct as occurring between sometime in August 2007<sup>3</sup> when he had conversations with his detective friend to obtain the information from the New Zealand Police computer system until sometime in October 2007 when Mr White says he received the information. During this period Mr White solicited the information from the detective friend. This conduct occurred during the year that the March 2007 and April 2007 warnings were in effect. I therefore find that the Chief Executive was properly able to have regard to these warnings in deciding the response to Mr White's established conduct.

[53] Ms Field tells the Authority that when she weighs Mr White's latest conduct with his previous warnings, he appears to her to be a person who has shown himself as someone not prepared to follow the rules. She says she will not have a "cowboy" working in one of her prisons.

[54] I accept that having been warned previously at least twice and one of which was a final warning, the Chief Executive was justified in having serious concerns about whether he could repose the necessary degree of confidence and trust in Mr White. I accept that while Mr White's latter conduct was not sufficient to justify termination on its own, there was a clear continuing pattern of failure by Mr White to comply with the Chief Executive's rules. The Chief Executive was therefore justified in concluding that he could no longer continue to have trust and confidence in Mr White to serve him faithfully.

### The determination

[55] For the reasons outlined above, I find that the Chief Executive's actions and how the Chief Executive acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. **I find that Mr White does not have a personal grievance for unjustifiable dismissal. There will be no formal orders.**

---

<sup>3</sup> The printout date of the police photograph

## The costs

[56] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Richards is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Snell is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application or submission lodged outside that timeframe without leave.

Leon Robinson  
**Member of Employment Relations Authority**