

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2019] NZERA Wellington 267
3032545

BETWEEN STANLEY JOHNSON
 Applicant

AND NEW ZEALAND DEFENCE
 FORCE
 Respondent

Member of Authority: M B Loftus

Representatives: Emily Hartson-Maea and Viv d'Or, counsel for Applicant
 Channy Mao, counsel for Respondent

Investigation Meeting: 22 November 2018 at Wellington

Submissions Received: 6 December and 9 January 2019 from Applicant
 13 December 2018 from Respondent
 with further correspondence up to 14 January 2019

Determination: 3 May 2019

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant, Stanley Johnson, claims he was unjustifiably disadvantaged by the respondent, the New Zealand Defence Force (NZDF).

[2] NZDF denies Mr Johnson has been disadvantaged, let alone unjustifiably.

Background

[3] Mr Johnson was employed by NZDF as a manager responsible for a team introducing either processes or items of equipment into defence service. The project upon which he was working at the time of these events was causing concern and he was on record as having voiced some of those.

[4] On 29 November 2017 the office of the Right Honourable Winston Peters received an email critical of certain aspects of the project on which Mr Johnson was working. The account from which the email purported to come was Mr Johnson's and it stated it had been sent *on behalf of Stan Johnson*.

[5] Mr Peters' office passed the email to the office of the Minister of Defence, the Honourable Ron Mark. There it was handled by his Chief of Staff, Commodore Smith, who in accordance with his standard processes passed it to the senior officer responsible for a range of areas including that in which Mr Johnson worked.

[6] Commodore Smith forwarded the email for information purposes and there was no request action be taken. It was further distributed to a limited number of senior officers within NZDF who it was thought might either have an interest in, or need to be aware of, what was a potential breach of both security and NZDF protocol.

[7] One of those was Mr Johnson's direct manager, Captain Brown. The copy forwarded to him asked he discuss the matter with his superior. That he did and as a result sought advice from a human resource adviser on 15 December 2017. Specifically he asked about Mr Johnson's rights as a citizen and whether or not there might be a possible breach of NZDF's code of conduct given what was considered sensitive content. Captain Brown closes by saying *...we would like to discuss it with Stan if you recommend that that is appropriate before we go on leave next week*.

[8] The comment about leave refers to the fact NZDF observes a Christmas close down with the majority of staff on leave for a few weeks. That included Mr Johnson who actually went on leave that day, 15 December.

[9] A further complication arose from the fact Captain Brown was vacating his position and replaced by Group Captain Woon as of 18 December. That day Captain Brown told her Mr Johnson *had sent the email to Mr Peters*.

[10] Group Captain Woon accepts that like Commodore Smith she took the email's origin at face value given the originating address and the content. She did not, however, take any overt action at that point as responsibility for addressing the e-mail remained with the Minister's office. That subsequently changed and on 12 January 2018 Group Captain Woon gave Mr Johnson a letter asking he attend a meeting on 19 January.

[11] Mr Johnson takes issue with the letter and its content. He also complains about what he says were comments made by Group Captain Woon when she passed the letter to him. In essence he says he was faced with a situation in which there was an accusation of guilt and placed him in a position where he was required to prove innocence. Mr Johnson also takes offence with the fact the letter advises that if further action is required it might include a formal disciplinary process.

[12] Group Captain Woon has a different view. She emphasises the letter reflects no decisions had been made with, for example, the statement *...before I can determine how I should address this matter, I wish to obtain further information including your responses to the concerns raised.*

[13] She also observes that from her perspective Mr Johnson was not surprised when she gave him the letter. She says he did no more than glance at the email in question and gave the impression that he was well aware of its content. It is agreed Mr Johnson stated he was not the author of the email and voiced a concern his email account may have been spoofed.

[14] Here I note two terms to which the parties frequently referred. Spoofed indicates a situation where an e-mail account secretly impersonates account. Hacked relates to a situation where the named account is used but the operator is not the owner but someone who improperly accessed the account.

[15] Here I also comment that there was no evidence Group Captain Woon did say anything untoward when she handed Mr Johnson the letter. The evidence confirms the comments reflected those in the letter and there is nothing untoward about conveying that information.

[16] The meeting proceeded as scheduled. Group Captain Woon was accompanied by a HR adviser while Mr Johnson was assisted by a lawyer and an acquaintance. The evidence would suggest Group Captain Woon took a fairly inactive part in the meeting with her main interest being to hear what Mr Johnson had to say and gather information which might inform future action. Mr Johnson spoke to pre-prepared notes and a report prepared by a friend, IT specialist Simon Howard, was discussed. In essence Mr Johnson denied being the author of the email and took the position his email account had been either hacked or spoofed. Mr Johnson again complained he

felt he was already deemed guilty though Group Captain Woon denies commenting on that one way or the other.

[17] The result was Group Captain Woon considered further inquiries were necessary with a key element being a professional assessment of the original email. That was subsequently performed by Defence's Network Information and Assurance Team (NIAT).

[18] Around this time Mr Johnson made a Privacy Act request to which a response was sent on 9 February. The day before NIAT had completed its assessment. It concluded the email was not spoofed and Group Captain Woon was advised that day. She decided the assessment meant Mr Johnson should have an opportunity to provide further comment and advised him accordingly. Efforts to schedule a further meeting were then delayed by Mr Johnson's absence for medical reasons between 14 and 26 February.

[19] The parties eventually met on 15 March 2018. Again Mr Johnson spoke to pre-prepared notes and there was a supplementary report from Mr Howard. A key finding there-in was that the e-mail had been sent from a i-phone4S and there were comments as to how it was possible the traffic could be seen to have been sent by Mr Johnson when that was not actually the case.

[20] Mr Johnson again reiterated his innocence and commented on the why it was not plausible he had sent the email with a key assertion being he had never owned a i-phone 4S. Mr Johnson also suggested another member of the team may have been responsible for the email and should be investigated. In essence the position taken by Mr Howard was that while Mr Johnson's email address was not spoofed (and that was now accepted) there were multiple factors that suggested it may have been hacked.

[21] Group Captain Woon chose to make further inquiries with NIAT. Their assessment was while hacking was a possibility it remained *very likely* Mr Johnson had sent the email.

[22] Notwithstanding that Group Captain Woon decided, for various reasons, enough was enough and she was not going to proceed further. Notwithstanding the *very likely* assessment by NIAT and a personal belief driven by the content of the email that Mr Johnson was most likely, on the balance of probability, the author she

concluded pursuing the matter was simply no longer worth the effort. She knew she would never be able to prove the allegation to the standard she considered necessary (almost a criminal standard) and decided that even if she could the likely consequence would not include dismissal. She felt the projects significance to NZDF along with Mr Johnson's importance to its success strongly suggested she should let the issue lie and get on with ensuring the team work together to produce the desired outcome. While she was the decision-maker Group Captain Woon sought her manager's confirmation he did not object to her proposed course of action and received it on 21 March.

[23] There is content in those exchanges with which Mr Johnson takes issue. For example Group Captain Woon wrote:

I suspect this incident has given Stan a shock and cause for consideration. I would be surprised if he tried to claim the legal/IT expenses especially when he most likely sent the email. Hopefully he will learn from this experience. The final letter to Stan will be reviewed by Legal and carefully worded to minimise any response/further action from him. More importantly this action strikes at the NZDF core values of trust which will be hard for him to regain now.

[24] The approval was followed by an email Group Captain Woon sent to HR asking they prepare a letter advising Mr Johnson of the outcome. Included therein is the phrase:

I have no doubt that you will be able to cleverly articulate Defence believes he is guilty of sending the email without actually saying it.

[25] The resulting letter was prepared and sent on 22 March. It refers to the fact both NIAT and the Director of Defence Security had concluded it was very likely Mr Johnson had sent the email but goes on to say:

... however I am prepared to give you the benefit of the doubt on this occasion. No formal disciplinary processes will be pursued in this instance.

[26] The letter also included a requirement that Mr Johnson attend a security refresher with a Personnel Security Adviser from Director of Defence Security. It is stated:

This briefing will be to ensure you understand Security principles ... I trust this will be a reminder that you need to be able to maintain your

security clearance for your role and that I wish to support you with appropriate knowledge for you to be equipped to do so.

Should an incident of a similar nature or breach of security occur in the future it may result in a disciplinary process.

[27] As events transpired 22 March was also Mr Johnson's last at work. Notwithstanding the fact he remains an employee of NZDF his medical situation had deteriorated to a point where he is unlikely to return without surgery that is yet to occur.

[28] Some two months later Mr Johnson initiated the commencement of personal grievance proceedings. That has created a further area of angst in that Group Captain Woon was given responsibility for addressing the claim. Mr Johnson is of the view that is inappropriate as she should not be the one to review her own conduct.

Discussion

[29] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow a written determination of findings at a later date.

[30] As already said Mr Johnson claims to have been unjustifiably disadvantaged. When asked during the investigation to describe the alleged disadvantages he stated his prime concern was the fact the employer had failed to clear him and declare he had not sent the e-mail to Mr Peters. That was a theme often repeated during the investigation.

[31] He also stated he is now compromised as his employer, particularly Group Captain Woon, no longer trusts him and had implied he had to rebuilt that trust. Finally he takes issue with the fact Group Captain Woon was tasked with addressing his grievance application.

[32] Mr Johnston complaints miss one crucial point. It has long been established there are two key elements when considering claim of unjustified action. First it falls on the applicant to establish a prima facie case there was an action of the employer that affected the employment to his or her disadvantage. Once that is done it falls to the employer to justify its actions.

[33] Mr Johnson's oral evidence clearly shows his claims are predicated on a view he has been found guilty and punished as a result. That view is not, I conclude, supported by the evidence. Yes, NZDF embarked upon an investigation but there cannot, in the circumstances, be an argument it was not entitled to do so. It is clear sensitive information was transmitted to a potentially public place and the evidence strongly suggests that was done by an NZDF employee in a way that probably contravened their obligations to the employer. While denying responsibility even Mr Johnson accepts that.

[34] That then raises the issue of what was the outcome. The answer is there was no formal disciplinary outcome and there cannot, therefore, be any disadvantage in that respect.

[35] The disadvantage Mr Johnson's is attempting to portray emanates from Group Captain Woon's admission she still believes Mr Johnson was, on the balance of probability, responsible. He says that has disadvantageously affected his employment in that it has predisposed her, his boss, toward not trusting him and that may well spread to others. His problem is he cannot, in my view, provide any evidence to support that contention.

[36] Mr Johnson departed the workplace on the day he was advised no formal action would be taken. He has not returned. It therefore follows there is absolutely no evidence as to how Group Captain Woon's beliefs will play out in terms of her conduct toward, and relationship with, Mr Johnson. Nothing has yet been able to occur and there is no evidence of any impact on Mr Johnson's employment, disadvantageous or otherwise. I do not consider the requirement he do a security refresher comes close to constituting a disadvantage though if it did I would conclude for reasons explained in paragraph [39] that NZDF could justify that decision.

[37] Here, and as an aside, it was suggested his while his departure was primarily attributable to a serious pre-existing medical condition these events may have exacerbated it to such an extent departure occurred when it might not otherwise have. That claim faces a problem as no evidence was offered in support. Indeed comments made by Mr Johnson about his condition suggest otherwise and it now appears so serious it requires major surgery before return can be contemplated.

[38] Turning to the other elements of Mr Johnson's claim. He expresses concern he was never exonerated and asks I conclude he lacks guilt. This shows a lack of appreciation about the claim and the Authority's role. Had Mr Johnson established a disadvantage the focus turns to the employer's justification. It is not the action of the employee which prompted the employer's response I examine but how the employer reached the conclusion it respond in a manner which disadvantaged the employee. I am not being asked to decide whether or not Mr Johnson was guilty of the transgression NZDF investigated.

[39] Even then Mr Johnson has to understand it is a question of probability and NZDF need not establish guilt to the criminal standard even though Group Captain Woon's evidence shows she decided she did in fact have to establish wrongdoing to a high standard verging on the criminal. That was a decision that in my view operated in Mr Johnson's favour and turned out to be anything but disadvantageous. That is because of the evidence and the fact two sources of expert examination concluded it very likely he was responsible. That would, in turn, mean it highly likely I would have concluded NZDF could have justified a response had it chosen to act.

[40] In my view those factors also permitted Group Captain Woon to conclude, as she has, Mr Johnson most likely sent the email. If expressing those views in writing constitutes a disadvantage I would have found it justified.

[41] The final argument is Mr Johnson was disadvantaged by Group Captain Woon being tasked with reviewing his initial grievance. Again I am bereft of any evidence of a disadvantage, let alone one that affected Mr Johnson in his employment.

Conclusion

[42] For these reasons I find Mr Johnson has failed to establish he has been disadvantaged in his employment, let alone unjustifiably. His claims fail accordingly.

[43] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority