IN THE EMPLOYMENT COURT
WELLINGTON

WC 22/07
WRC 26/07

IN THE MATTER OF	proceedings for compliance and other orders removed from the Employment Relations Authority
BETWEEN	RAKAI HOEA TAWHIWHIRANGI Plaintiff
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Defendant

Hearing: 3 and 4 September 2007
(Heard at Wellington)

Appearances: Barbara Buckett, Counsel for Plaintiff
Paul Radich and Emma Warden, Counsel for Defendant

Judgment: 14 September 2007

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The question for decision is whether Rakai Tawhiwhirangi's employer should be prohibited by compliance order from further investigating allegations of misconduct in employment.

Challenge to jurisdiction

[2] I shall deal first with what the defendant says is a jurisdictional bar to the Court granting the relief the plaintiff seeks. The proceeding was removed by the Employment Relations Authority to this Court for hearing at first instance under s178. The Court is empowered to make orders for compliance with specified parts of the Employment Relations Act 2000, with s56 of the State Sector Act 1988 and

with employment agreements: s161(1)(n); s137(1)(a)(i) and (ii). Part 1 of the Act, in respect of which the Court can make a compliance order, includes s4 that sets out statutory obligations of good faith in employment relationships. The Court is empowered to enforce those good faith obligations by compliance order if it is satisfied that a defendant has not acted in good faith. A compliance order may, in an appropriate case, include an order that a party desist from conduct that is in breach of the statutory requirements. That may include, theoretically at least and in an appropriate case, a direction to cease an activity that is in breach of the statute. The same extends to contractual breaches. The relevant collective agreement provides that "*Before any substantive disciplinary action is taken an appropriate investigation is to be undertaken by a manager*." An "*appropriate investigation*" includes one conducted under the employer's own Human Resources Manual. Therefore, if the employer has not followed his own process, that can be the subject of a compliance order.

[3] As developed in argument by his counsel, the defendant's jurisdictional submission was that the form of relief sought amounts in effect to a quia timet injunction that cannot be made against the Crown. The form of relief is, however, a statutory compliance order that the Employment Relations Act affirms can be made against a range of persons including Crown employers. Although it is within the Court's discretion to simply declare the availability of relief and leave it to a Crown employer, such as the defendant in this case, to act honourably in accordance with that role, it is also open to the Authority or the Court to make a statutory compliance order if it considers this is warranted in all the circumstances.

[4] The defendant's statement of defence to the amended statement of claim says simply that he denies that the Court has jurisdiction to grant the orders sought. I do not accept that affirmative defence. Indeed, Mr Radich acknowledged that he could not support an argument of absence of jurisdiction when this was debated. Rather, the matter is more appropriately dealt with by the defendant's fall-back position that the plaintiff is not entitled to the relief sought in all the circumstances.

Background

[5] The background to the present position is as follows. Some time ago, Mr Tawhiwhirangi was dismissed for serious misconduct in his employment as a corrections officer. He succeeded in his personal grievance for unjustified dismissal before the Employment Relations Authority which also ordered his reinstatement. The employer challenged the determination in this Court and extensive evidence was heard by Judge CM Shaw at a hearing conducted between 16 and 25 July last. The Judge reserved her decision that has now just been delivered[1]. Mr Tawhiwhirangi's dismissal has been confirmed to have been unjustified but the question of reinstatement is still to be decided.

Relevant events

[6] For some time the Department of Corrections has been investigating allegations of corrupt conduct by staff at Rimutaka Prison. Its inquiry is known as the Patten inquiry, I assume named after the principal investigator. This is apparently a wide ranging inquiry that, from time to time, throws up allegations of misconduct including corrupt practices by prison staff.

[7] After the end of the hearing before Judge Shaw and probably on or about 9 August, an internal memorandum from the office of the Chief Executive of the Department of Corrections, dated 24 July 2007, came to Mr Tawhiwhirangi's notice. The subject of this memorandum was *"Allegation of Theft"* and named three Rimutaka Prison staff including Mr Tawhiwhirangi. The allegations of theft being investigated concern an item of decommissioned kitchen equipment (a deep fryer) and date back to the year 2003. It appears that the initial departmental investigation focused on another staff member but in the course of inquiries a former contractor to the prison alleged the involvement of Mr Tawhiwhirangi in a theft and these allegations are referred to in the report from the Department's investigator, Don Robertson, to Leanne Field. The report concludes with *"Recommendations"*

[1] *The Chief Executive of the Department of Corrections v Tawhiwhirangi*, unreported, Judge Shaw, 13 September 2007, WC 14A/07

including the possibility that the regional manager for the Department's Prisons Service responsible for Rimutaka Prison (Mrs Field) initiate disciplinary proceedings against Mr Tawhiwhirangi.

[8] By letter dated 8 August 2007 (but not sent until 10 August) and addressed to Mr Tawhiwhirangi at Rimutaka Prison, Mrs Field, the acting regional manager of the Public Prisons Service, advised him formally of the allegations against him. The 24 July Robertson memorandum was enclosed with that letter. Mr Tawhiwhirangi was advised that the allegation was serious and that a formal employment investigation into the circumstances surrounding it would be conducted. Mr Tawhiwhirangi was advised that, if proven, the misconduct would be likely to constitute serious misconduct and could result in disciplinary action including dismissal. The letter continued that Mr Tawhiwhirangi was not to be suspended although, if reinstated by this Court, the Department left open the possibility of then suspending his employment. The letter concluded with advice of the appointment of the manager of Tongariro Prison, Paul Vlaanderen, and Mr Robertson to conduct the investigation and indicated that they would be in touch with Mr Tawhiwhirangi in a short time to arrange a meeting to hear his response to the allegations. Mrs Field indicated that she would be responsible for determining whether misconduct had occurred and what further action might be taken based on the findings of the investigation.

[9] It seems that Mrs Field's letter was sent by courier to Mr Tawhiwhirangi and to his counsel, Barbara Buckett, on Friday 10 August, two days after the date it bears. Mr Tawhiwhirangi's amended statement of claim (para 6) acknowledges his receipt of this letter on 11 August although in another passage (para 7(a)) he asserts this came to his notice on Monday 13 August.

[10] On 13 August Miss Buckett applied to the Employment Relations Authority for an urgent compliance order and for removal of the proceeding to this Court. The Authority directed that the proceeding be removed on the same day and the parties' representatives then appeared before Judge Shaw in Chambers on the following day, 14 August. Because the Judge considered that the case heard by her had dealt with different allegations of misconduct against Mr Tawhiwhirangi and because the parties had closed their cases and judgment was pending, she concluded it would be

preferable for the matter to be heard by another Judge. Judge Shaw gave a timetable of steps to be taken leading to the hearing before me. By consent Judge Shaw made an order that until further order of the Court, no further steps were to be taken by the defendant in his enquiry into allegations against the plaintiff.

Relief claimed

[11] The relief claimed in the amended statement of claim includes a compliance order under ss161(1)(n) and 137 of the Employment Relations Act 2000 ("the Act") *"preventing the defendant from undertaking any further investigative and/or disciplinary procedures against the plaintiff in respect of any matter until further order of the Court."* The statement of claim also seeks *"findings by the Court in respect of the actions and decisions of the defendant concerning its investigative and/or disciplinary procedure in relation to the plaintiff."* Mr Tawhiwhirangi claims compensation *"in the region of $25,000"* for hurt and humiliation *"arising from a false allegation of theft"*. Costs are also sought. Miss Buckett abandoned in closing submissions the claim to compensation, and also the claim to penalties that surfaced for the first time during submissions.

[12] In particular, Mr Tawhiwhirangi alleges that the defendant has:

- breached his obligations to act in good faith towards him;
- undermined trust and confidence in their employment relationship;
- undermined productive employment relations (including, but not limited to, being responsive and communicative);
- acted deceptively in withholding information about the investigation; and
- made an adverse decision that will, or is likely to, have an adverse effect on the continuation of the plaintiff's employment, without having given him access to information relevant to the decision and providing him with an opportunity to comment on the information before the decision was made.

[13] Further particulars of alleged bad faith include that the defendant undertook information gathering for about three weeks before and during a time when the parties were before the Court. This is said to have been an act of bad faith in breach of the employer's obligations under the Act. Next, Mr Tawhiwhirangi asserts that the allegation of misconduct against him has been generated by Andrew Parsons *"who is known to have a strong dislike for the [plaintiff] and to have approached an ex-prisoner, Hane Eshaya, to give false evidence in corroboration of his own, which the [defendant] is aware of through the Patten inquiry"*. Mr Tawhiwhirangi's next complaint is that he has not received all information relevant to the inquiry, including a transcript of an interview with Mr Eshaya on 6 August. That may not, however, have been surprising because on Mr Tawhiwhirangi's application to which the Department consented, Judge Shaw made an order on 14 August 2007 that *"No steps are to be taken by the Department of Corrections in the investigation of Mr Tawhiwhirangi for any matters until further order of the Court."* Taken literally, as I think the defendant is entitled to, that would preclude it from any further progress in the inquiry including furnishing information to Mr Tawhiwhirangi.

[14] Next, Mr Tawhiwhirangi complains that there is no evidence confirming that the decommissioned kitchen equipment (a deep fryer) is in fact missing.

[15] Next, the plaintiff invokes the New Zealand Bill of Rights Act 1990 by saying that the allegations relate to events that occurred four years ago and that the rights under the Bill of Rights and principles of natural justice make it impossible for him to defend himself adequately.

[16] Next, Mr Tawhiwhirangi says that the information provided to him is deficient in that it does not provide particulars or timeframes allowing him to make an adequate answer.

[17] Next, the plaintiff says that the defendant has commenced disciplinary procedures in breach of its own policies and duties of good faith under the Act without informing him adequately or giving him an opportunity to make representations.

[18] Penultimately, Mr Tawhiwhirangi says that in breach of its own policies, the defendant has alleged criminal theft by him but has not referred this matter to the Police for investigation.

[19] Finally, Mr Tawhiwhirangi says *"The defaults of the [defendant] are similar in nature to those already declared to be unlawful by the Employment Relations Authority."*

[20] Mr Tawhiwhirangi alleges improper notice by departmental personnel and says, by inference, that these disciplinary procedures in the investigation have been undertaken to assist the defendant to resist any orders for reinstatement which the Court might make and are consistent with its stance in the litigation before Judge Shaw that he should not be reinstated.

[21] Mr Tawhiwhirangi says that he has suffered loss and damage as a consequence of these wrongs including the threat to the security of his employment, harm to his reputation, and the potential to undermine the remedies the Court might grant him, in particular reinstatement. The plaintiff alleges that the defendant is conducting what he calls a *"witchhunt (sic)"* against him and says that he requires the urgent protection and intervention of the Court to prevent further loss and damage to him.

The Parties' Legal Obligations

[22] The statutory good faith obligations between the parties that may, if not followed, be the subject of a compliance order include, but not exhaustively:

- not to do anything, directly or indirectly, to mislead or deceive, or that is likely to mislead or deceive, the other: s4(1)(b);

- to be responsive and communicative as part of being active and constructive in maintaining a productive employment relationship: s4(1A)(b);

- to give access to information and an opportunity to comment on it before a decision is made where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of an employee's employment: s4(1A)(c).

[23] It is also a requirement of good faith that an employer will adhere to the procedures that it has formulated for itself in the investigation of allegations against staff and that are, in this case, incorporated into the collective agreement governing the plaintiff's employment.

[24] I now turn to the most significant feature of the case at this stage, the relevant provisions of the defendant's Human Resources Manual. Regrettably, the different parts of and steps in this are not numbered or otherwise identified so that it is difficult to follow. As well as I am able to discern, the manual provides for the following relevant considerations and orderly steps.

[25] Allegations of misconduct and serious misconduct are investigated in what is called the employment investigation before disciplinary action is considered. This investigative process is to be "*procedurally fair, in that respondent employee is informed of the seriousness of the situation, the details of allegations and all evidence and recommendations, and has the opportunity to explain or make representations at every stage*".

[26] Under a heading "*Procedures for Managing Misconduct*", the manual provides:

> *After receiving the initial complaint or first discovering the unacceptable behaviour, the manager should consider whether the allegation or complaint, if proven, would amount to misconduct … as defined in the Department's Code of Conduct.*

[27] This process is confirmed by a flow chart that is the first appendix to the manual.

[28] If a manager decides that alleged behaviour could be misconduct or serious misconduct, further questions should then be considered including whether the conduct is criminal, if Police involvement is required, and who should conduct the employment investigation.

[29] As to Police involvement, the manual provides:

> *The manager should involve the Police before commencing any employment investigation, if there are good grounds for believing that criminal behaviour took place.*

[30] The manual provides, under the heading *"Investigating misconduct"* that:

> *The purpose of the investigation is to gather all relevant facts, information and documentary evidence about the allegation.*
>
> ***On receiving a complaint***
>
> *… the manager … should … contact the appropriate service or group human resources manager or adviser for advice on how to proceed (who should investigate, delegations, etc) before any employment investigation begins. The selection of the people to carry out the investigation needs particular care;*

[31] Most significantly, the following are said to be the *"components of an employment investigation"*. These are:

- *advise the respondent employee of the allegations.*
- *gather information.*
- *record the findings of the employment investigation.*
- *determine whether misconduct has occurred.*
- *manage the outcome of the investigation, (eg, disciplinary interview).*

[32] For the purpose of advising the respondent employee of the allegations (the first step in the employment investigation), the manual provides that the manager should organise a preliminary interview with the respondent employee. At this interview the manager should outline the issues causing concern (for example allegations of a complaint), advise that suspension is being considered (if it is) and the reason why, and:

- *inform the respondent employee that an investigation into the events will be conducted and obtain the names of any other people he or she believes should be interviewed;*
- *advise the respondent employee of the seriousness of the matter (ie, that the allegation, if proven, could involve disciplinary action which may result in a warning or dismissal);*
- *advise the respondent employee of his or her right to obtain representation (legal, union or other), before making any statement or comment on the issues, (but that he or she may make a statement if wished); and*
- *advise the respondent employee of further steps in the process, such as consideration of suspension or referral to the Police.*

[33] As to the *"Order for interviews"*, the manual provides:

> *The investigator interviews the following people, generally in this order:*
>
> - *the complainant employee (if there is one);*
> - *the respondent employee (to provide an explanation for the allegations);*
> - *…*
> - *witnesses (employees, clients, etc) about the corroboration and or credibility of the evidence given by the other parties;*
> - *…*

[34] Moving on to *"Reporting on the employment investigation"*, the policy provides:

> *The investigator will then write a report of the employment investigation and include:*
>
> - *introduction and terms of reference*
> - *background to the incident*
> - *a summary of the evidence collected*
> - *any disparities in the evidence*
> - *recommendations on the finding of fact.*

[35] In *"Determining misconduct"* the manual provides:

> *The manager will consider the evidence in the written report and make a judgment as to whether misconduct occurred. If it did the manager needs to decide whether disciplinary action is warranted.*
>
> *If disciplinary action is warranted, the manager will arrange a disciplinary interview. …*

> *Where disciplinary action is contemplated, the manager should arrange a disciplinary interview with the respondent employee.*

[36] Relating the manual to relevant events, the following appears from the evidence to have happened.

[37] In the course of an employment inquiry into alleged misconduct or serious misconduct by another corrections officer, Mr Parsons was interviewed on 24 July 2007. This appears to have taken place after Mr Robertson interviewed a second-hand trader about the same matter. Just how that apparent reversal of logical orders occurred is unexplained so I do no more than note it without further comment.

[38] On the same day, the investigator, Mr Robertson, sent a memo to Mrs Field summarising what Mr Parsons had said about Mr Tawhiwhirangi and proposing recommendations that might be made to institute disciplinary action against the plaintiff.

[39] In early August Mr Parsons visited Mr Eshaya at his workplace about an impending interview of Mr Eshaya by a departmental investigator and attempted to persuade Mr Eshaya what to say in that impending interview.

[40] On 6 August 2007 the defendant's investigator in the Patten enquiry, Mr Crawford, interviewed Mr Eshaya, dealing in the interview on a number of occasions with Mr Tawhiwhirangi in particular, and also dealing with the topic of departmental deep fryers. The evidence also discloses questions by Mr Crawford of Mr Eshaya about other alleged misconducts by Mr Tawhiwhirangi including in relation to cell phones in the prison and also to assaults by the plaintiff on inmates. Some of Mr Crawford's notes of his interview with Mr Eshaya were subsequently provided to the plaintiff and the defendant has promised the plaintiff a copy of the original tape recording of the interview.

[41] On 10 August (but by letter dated two days previously) Mrs Field wrote formally to Mr Tawhiwhirangi setting out the allegations against him, advising him of the appointment of investigators to undertake an employment inquiry, and seeking to arrange an interview with him.

[42] There appear to be a number of departures by the defendant's representatives from the policy process that the defendant bound himself to follow and held out to employees (including the plaintiff) that he would conform to.

[43] Although the first component of the employment investigation was to advise Mr Tawhiwhirangi of the allegations, it appears that the defendant gathered information (the second component of the investigation) before advising Mr Tawhiwhirangi of the allegations. The first step of advising the employee of the allegations involves the organisation by the manager of a preliminary interview with the respondent employee but this was not held before information gathering (the Eshaya interviews) took place.

[44] Similarly, the manual's *"Order for interviews"* appears not to have been followed although I accept that the manual provides that this will be followed *"generally"*. That order of interviews provides that Mr Tawhiwhirangi was to be interviewed before other witnesses, to corroborate or reinforce the credibility of parties.

Decision

[45] I find the present position to be this. In the course of an investigation into other alleged misconduct by another employee or employees, a person has told an investigator of circumstances that would, if true, constitute at least prima facie misconduct by Mr Tawhiwhirangi. The defendant cannot reasonably ignore this allegation. The investigator has, therefore, recommended that it be investigated. The defendant has acted upon that recommendation and has written to Mr Tawhiwhirangi outlining the allegation made against him, advising him of the possible consequences of a finding of this misconduct, recommending that he be represented, and starting arrangements for a meeting at which his answer to, or explanation of, the allegations can be received and then considered. All of that is by and large standard investigative procedure where an allegation of misconduct against an employee has been made.

[46] The evidence tends to suggest that the departmental investigators did not go looking for complaints against Mr Tawhiwhirangi which, if they had, may have been consistent with his witch-hunt allegations. Rather, the allegation of misconduct appears to have arisen from the investigation of another employee for separate misconduct in employment and was made by a contractor to the Department.

[47] When one poses the rhetorical question, what should the Department have done about this serious allegation if it had not begun to investigate it, the absence of a credible and legally compliant answer, speaks volumes. If it had delayed its investigation of these allegations against Mr Tawhiwhirangi, he would no doubt have had an even stronger claim about delay than he presently makes. It could not have ignored the claims completely: to have done so would have been a clear dereliction of duty, both moral and legal. But, in Mr Tawhiwhirangi's favour is the requirement for investigation that was compliant with the manual as well as being prompt.

[48] Although discovery of the investigation and the nature of the allegations against him that Mr Tawhiwhirangi rejects entirely are distressing to him, the best way that these effects can be dealt with is to assist in bringing the Department's inquiry to a prompt conclusion. There is nothing before me to suggest that the defendant is resistant to that course of action. Section 4 of the Employment Relations Act requires Mr Tawhiwhirangi to participate in that inquiry in good faith and to be active and constructive, and responsive and communicative in maintaining a productive employment relationship with the defendant.

[49] I deal with Mr Tawhiwhirangi's complaint that the defendant has not referred the allegations of misconduct to the Police. This is a response not infrequently heard in cases such as this. The defendant says that although that might be an option, at this stage he has elected not to do so but has chosen instead to deal with the allegations as an employment issue.

[50] Unusually, the defendant's policy appears to require it to involve the Police in circumstances such as these. It says: "*The Manager should involve the Police before commencing any employment investigation, if there are grounds for believing that*

criminal behaviour took place". Such a step should be taken before beginning an employment investigation, but it may be difficult for the defendant to come to a belief whether criminal behaviour has taken place in the absence of the necessary preliminary interview with the plaintiff that the defendant has failed to arrange in the sequence. I accept that earlier Police involvement in an employment inquiry into alleged misconduct in a prison may be warranted more than in other workplaces. However, it is notable that the policy does not distinguish between prison-specific misconduct (such as involving inmates) and misconduct of the sort alleged in this case that could occur in any other workplace. But the framers of the investigative policy have not made that distinction and the defendant should be held to what he has stipulated. There is, therefore, force in Miss Buckett's submission that the defendant should have involved the Police before now if he intends to pursue his employment investigation against Mr Tawhiwhirangi.

[51] I take this opportunity to say something generally about the interface between Police investigations and employment investigations where the subject matter of the two is the same.

[52] The role of the Police is to investigate to determine whether a statutory criminal offence may have been committed and, if so, to determine whether and how to prosecute. The tests applied to those decisions are not the same tests as an employer applies to determining an allegation of misconduct or serious misconduct in employment. A decision by the Police not to prosecute may be reached for a variety of reasons ranging from a police officer being satisfied that no criminal offence has been committed, to the anticipated inability to be able to prove beyond a reasonable doubt in a court the commission of an offence that the Police strongly suspect was committed. Nor is an acquittal by a court, even if a prosecution is brought, a determinative test for employment law purposes. So, too, with a decision not to prosecute.

[53] Both employers and employees need to consider very carefully the strategic and legal grounds for a complaint of criminal offending or, even in the case of an employee, an insistence upon the employer making such a complaint. Many employers and employees have a misapprehension of the significance and effect of a

Police complaint in an employment setting. Many in the community read far too much into the facts of a complaint being made, a charge being brought in court, and a conviction or acquittal on a charge, in an employment related matter. The issues in this case, as in other employment cases, are civil, contractual and, to the extent, if any, that there may be issues of criminal liability, beyond the scope of these proceedings.

[54] Although I will not stay permanently the defendant's investigation, there are some aspects of it to date that warrant comment for the parties' assistance. The defendant and his agents conducting the investigation will have to consider carefully the reliability of witnesses including questions of their motivation for making complaints or allegations in statements. As both parties are well aware, allegations against the Department's staff members of or about things happening in a prison environment, and involving sentenced inmates or other persons who might have axes to grind, require especially careful analysis and caution. Allegations of the sort made in this case, if they are without reliable corroboration, are notoriously easy to make and difficult to refute.

[55] I also comment on one aspect of the defendant's intended procedure that it may have to review. At paragraph 26 of her affidavit, Mrs Field, the Acting Regional Manager for the Wellington Region of the Public Prisons Service, whose role it was to determine whether Mr Tawhiwhirangi misconducted or seriously misconducted himself, has said of the role of an investigator, Mike Crawford:

> *… it is the proper role of the investigators to weigh up the evidence gathered. It is not uncommon for there to be conflicting statements given by different witnesses in the course of an employment investigation. One part of the role of an investigator is to identify any conflicts in the evidence. Where conflicts cannot be resolved, it is the investigator's role to address issues of credibility and to make conclusions about what has occurred.*

[56] If it comes to this, it is well established employment law that an employee accused of serious misconduct as Mr Tawhiwhirangi has been, is entitled to be heard by the decision maker. If Mr Tawhiwhirangi's account of an event or events is in conflict with that of another or others, he is entitled to attempt to persuade the decision maker that his account should be accepted or at least that the other account

or accounts should not. If the decision maker's finding whether there was or was not misconduct or serious misconduct turns on such a conflict, the responsibility for making that credibility determination will not be the investigator's but the decision maker's in each case. That principle was established in cases including *Irvines Freightlines Ltd v Cross* [1993] 1 ERNZ 424 and *Ioane v Waitakere City Council* [2003] 1 ERNZ 104.

[57] After an exchange with me and having taken instructions, Mr Radich for the defendant conceded responsibly that the defendant's delegated decision-maker would have to resolve any disputed credibility.

[58] Not unconnected with this first concession, the defendant made another through counsel. He accepts that that as a result of the uncompromising nature of Mrs Field's evidence given recently in this Court against the plaintiff's reinstatement, she could not be, or at least be seen to be, an unbiased decision maker in respect of the present allegations. The defendant has advised the Court that if his investigations go further, another manager of equivalent status to Mrs Field but from elsewhere in New Zealand who has had no previous knowledge of, or involvement with, Mr Tawhiwhirangi will be the defendant's delegated decision maker. Although Miss Buckett's response to this concession was to submit that it was less than satisfactory and that someone not employed by or otherwise associated with the Department of Corrections should fulfil that role, I would not be prepared to make such a direction, at least at this time. If things come to the worst for the plaintiff, the defendant will have to justify the fairness and reasonableness of his decision making including the freedom from preconception or bias of his decision maker. The defendant has made his election to replace Mrs Field in light of that knowledge and it would not be appropriate for the Court to intervene further.

[59] Although the defendant's procedural concessions and changes already noted are both appropriate and no doubt welcome to Mr Tawhiwhirangi, they do not necessarily deal with other prior errors identified by the evidence in the defendant's investigative process.

[60] Because, however, those breaches have occurred but will not be repeated in the investigation that has moved on, it is not appropriate for compliance orders to be made in respect of them. Both parties will simply have to take their chances with the consequences of these breaches. If adverse findings are made against Mr Tawhiwhirangi and sanctions imposed on him, he may take a further personal grievance with the result that the defendant will be called upon to justify his actions as a fair and reasonable employer in all the circumstances. But it may also be that matters will not come to that. The defendant may decide, upon further inquiries, that there has been no misconduct in employment established against Mr Tawhiwhirangi, in which case there will not be a disciplinary inquiry. Alternatively, even if there is a disciplinary inquiry, the defendant may nevertheless conclude that there should still be no consequences for Mr Tawhiwhirangi as a result of this, so that there will not be a need for the defendant to justify his actions including the errors already identified.

[61] As have this Court, the Employment Relations Authority and its predecessors in numerous cases, I too consider that the most just course of action is now to permit the defendant's investigative process to continue and not to order its permanent stay as the plaintiff seeks. I am satisfied that despite errors having been identified by the plaintiff in this proceeding, a compliance order is not warranted to prevent further non-compliance. I am confident that with proper legal advice from experienced counsel, the defendant, the Chief Executive of a major government department, will comply henceforth with the various requirements of the collective agreement, the Department's policies, and employment law. If by chance the defendant does not do so, the plaintiff has ample remedies available to him.

[62] That established approach to such cases is now reinforced by the philosophy of s4 (good faith) of the Employment Relations Act. Employment relationship problems should be solved by following good faith provisions of communication, exchanges of information, and fair dealing for and by both employer and employee. The Act presumes that good ongoing employment relationships will be enhanced by the application of these principles and that philosophy should guide any future dealings between the parties in this case.

[63] Many of Mr Tawhiwhirangi's complaints now made to the Court can and no doubt will be made to his employer's investigators. For example, the plaintiff denies the allegations made against him and offers an explanation why what he says are false allegations may have been made. He says Mr Parsons is motivated by ill will against him, in effect that the allegations are vindictive. The Department's investigators will be bound to examine carefully that counter-allegation and attempt to determine its truth. Likewise, such is the long delay since these events are said to have taken place that Mr Tawhiwhirangi may be unable to establish or prove innocent explanations for events that he might have been able to had they occurred more recently. Conversely, the accuracy of the allegations against Mr Tawhiwhirangi, made so long after the time, will have to be assessed carefully by the Department's investigators because of the difficulties of proof of events that occurred a long time ago.

[64] For the sake of completeness I deal briefly with a number of the plaintiff's allegations that do not avail him, at least at this point. These are set out from paragraphs [12] to [21] of this judgment.

[65] I do not accept that the defendant has breached his obligations to act in good faith towards the plaintiff and, in particular, to not mislead or deceive the plaintiff. Nor do I accept that the defendant has undermined trust and confidence in the employment relationship or has undermined productive employment relations between the parties. The plaintiff has not established that the defendant has acted deceptively by withholding information from Mr Tawhiwhirangi about the investigation. Nor do I accept that the defendant has yet made an adverse decision that will, or is likely to, have an adverse effect on the continuation of the plaintiff's employment. Although wrongly classified by Mr Robertson's report to Mrs Field of 24 July 2007, the defendant has resolved to undertake an employment inquiry and has given the plaintiff access to information relevant to that inquiry and will provide him with an opportunity to comment on that information before any further decisions are made.

[66] Whether the defendant has acted upon a vindictive and baseless complaint by Mr Parsons is a matter for his employment investigation to determine and Mr

Tawhiwhirangi will have an opportunity to attempt to persuade the defendant of this. I do not think it can be said, as Mr Tawhiwhirangi alleges, that there is no evidence that decommissioned kitchen equipment is missing. There may be doubts about the accuracy of the information but there is also information to be investigated that a deep fryer is missing. That does not, of course, mean that Mr Tawhiwhirangi is necessarily responsible for that but it is a necessary ingredient of the allegation against him.

[67] The New Zealand Bill of Rights Act cannot be invoked by Mr Tawhiwhirangi to say that he should not be investigated for events that are alleged to have occurred four years ago. That is to mis-state the application and relevant contents of the Act.

[68] The absence of detail of when the alleged misconduct may have taken place does not preclude the allegation from being pursued but may equally favour Mr Tawhiwhirangi's position if department investigators are unable to specify more precisely than within a three month period when misconduct is alleged to have occurred.

[69] I am satisfied that the defendant's employment inquiry should and will both provide sufficient information to Mr Tawhiwhirangi to enable him to make effective representations to it and that he will be permitted to do so.

[70] I have already dealt with the question of the defendant's breach of his own policy in not referring the allegation to the Police.

[71] It does not avail Mr Tawhiwhirangi's position that the defendant may or may not have fallen into errors that are similar to those that have been found in previous cases involving Mr Tawhiwhirangi.

[72] The question of Mr Tawhiwhirangi's reinstatement is now in the hands of this Court. The Judge dealing with this will not be influenced by the circumstances of the present investigation into alleged misconduct by Mr Tawhiwhirangi. The matters being investigated and that have been before me cannot be grounds to resist Mr Tawhiwhirangi's reinstatement on its merits in those earlier proceedings.

[73] There is one further strong submission made by Miss Buckett with which I should deal. Mr Tawhiwhirangi is concerned that if he is reinstated in employment by this Court (confirming the Employment Relations Authority's order for reinstatement), the defendant will move to suspend him in respect of the Parsons complaint. It is not for me to determine at this stage the justification for something that has not happened and may or may not occur.

[74] It is appropriate, however, to reiterate a number of fundamental principles about suspensions from employment. They are not outcomes of a disciplinary process. A suspension is a temporary status determined by the employer where allegations of misconduct have been made, are being investigated, but have not been established or dismissed. It is the result of a decision by the employer that the usual employment relationship cannot function effectively while the investigation is continuing. It does not connote culpability and may benefit the employee as well as the employer in the sense of allowing the employee time to investigate and answer serious allegations. It is a serious step but its significance should not be overstated. To use a not entirely apt analogy, an employee suspended is entitled to the presumption of innocence of the misconduct being investigated.

[75] An employee should usually be provided with all relevant information on which a decision to suspend may be made and be given an opportunity to comment on or disabuse the employer of any views reached. All the circumstances should be such that the employer concludes, fairly and reasonably, that they are inconsistent with even temporary continuation of employment by the employee pending outcome of the investigation. The age and nature of the complaints and the strength of them will be factors to be taken into account in deciding whether to suspend.

[76] Contrary to Mr Tawhiwhirangi's pessimistic prognosis, I do not consider that it would be a foregone conclusion by any means that the defendant would decide to suspend him in the course of this inquiry. Even if that were to occur, Mr Tawhiwhirangi is aware of his ability to challenge such an action as he has done once previously in what is now something of a landmark case, *Tawhiwhirangi v Attorney-General in respect of Chief Executive, Department of Justice* [1993] 2 ERNZ 546.

[77] I conclude that the most just disposition of this case is to decline to make the orders sought by Mr Tawhiwhirangi although to acknowledge, as I have, the several not insubstantial faults that he has identified correctly in the defendant's inquiries and investigations to date but in respect of some of which he acknowledges it will do better.

[78] I now set aside the consent interim order made by Judge Shaw by on 14 August 2007 affecting the defendant's enquiry.

[79] I reserve costs on this application and would prefer to deal with them if they cannot be settled by the parties themselves once the defendant's investigations are concluded. To the extent that this can be estimated, I imagine that they should be disposed of one way or another in the next three months so that any application for costs should be made within that period with the respondent to it having a further month to reply by memorandum.

GL Colgan
Chief Judge

Judgment signed at 4.30 pm on Friday 14 September 2007