

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 65
ARC 115/10**

IN THE MATTER OF proceedings removed from the
Employment Relations Authority

AND IN THE MATTER OF interlocutory applications

BETWEEN PHILIP ZHOU
Plaintiff

AND CHIEF EXECUTIVE OF THE
DEPARTMENT OF LABOUR
Defendant

Hearing: By memoranda of submissions filed on 23 May and 13 June 2011

Counsel: Rodney Harrison QC and Deborah Manning, counsel for plaintiff
Joanna Holden, Andrew Gane and Debra Harris, counsel for
defendant
Una Jagose, counsel for Director of New Zealand Security
Intelligence Service

Judgment: 20 June 2011

INTERLOCUTORY JUDGMENT NO 3 OF CHIEF JUDGE GL COLGAN

[1] In accordance with the second interlocutory judgment¹ in this proceeding, issued on 15 April 2011, the defendant and the Director have filed and served further affidavits particularising and explaining the defendant's objections to producing, and have inspected by the plaintiff, relevant documents the disclosure of which is said would be injurious to the public interest.

¹ [2011] NZEmpC 36.

[2] The plaintiff submits that the Court should not be satisfied with those further particularisations and explanations and should now proceed to inspect the relevant documents to determine whether the objections to disclosure should be upheld.

[3] The plaintiff advances two arguments to support his contention of an absence of privilege. The first is that the defendant (and the Director) cannot be correct that what has been referred to in this proceeding as “operational information” is not limited to “sources and methods of collection” (of information) but must also include “information that identifies areas and persons of interest or concern to the NZSIS”. Mr Harrison submits that it must be clear from the information before the Court that the plaintiff and/or a named work colleague were the “persons of interest or concern” in question. Mr Harrison submits that it is impossible to resist the inference that the NZSIS was monitoring the communications of a foreign embassy in New Zealand but does not wish to admit to this. Counsel submits that although that may be understandable, it should not prevail to the prejudice to the plaintiff’s prosecution of his personal grievance proceedings.

[4] The second, and not unrelated, submission made by counsel for the plaintiff challenges the defendant’s (and the Director’s) decision that the only personal information about the plaintiff contained in the relevant documents “relates to his unauthorised disclosures of information to a foreign government, including the specific instances of this activity ... [and that] ... the plaintiff has already been advised of the gist of this information.”

[5] Mr Harrison submits that the identity of the foreign government in question has already been conceded but what has not been disclosed are the “specific instances of this activity” and why they constituted “unauthorised disclosures of information”, given the nature of the plaintiff’s job function. Mr Harrison, on behalf of the plaintiff, challenges the assertion by the Director that the plaintiff has already been advised of the gist of this information, that is of the specific instances of disclosure, and why these were “unauthorised”.

[6] As noted in the second interlocutory judgment of 15 April 2011, the Court has been guided significantly by the judgments of the Court of Appeal in the

Choudry litigation² referred to in that judgment. It is also appropriate to recall the nature of the present litigation and what must be established and by whom. The plaintiff says that he was dismissed unjustifiably from his employment. The fact of dismissal is not denied by the defendant and, on the pleadings and affidavit evidence already before the Court, I consider that there is a sufficient sense of absence of justification that the onus of establishing justification has moved to the defendant. The tests are set out in s 103A of the Employment Relations Act 2000 (the Act). It will be for the defendant to persuade the Court that Mr Zhou's dismissal was, on an objective basis, what a fair and reasonable employer would have done in all the circumstances at the time, and was how a fair and reasonable employer would have acted in all the circumstances at the time.

[7] The affidavits now filed by the Director and the defendant go further than did the supplementary Ministerial certificate in *Choudry* which did not specify which aspects of national security were involved and was not broken down on a document by document basis. Here, the affidavit of the Director does so on both counts. It is significant, also, that the Court of Appeal in *Choudry* accepted that despite those deficiencies, sufficient information had been given to identify the constituent elements of the concerns and in a way to make it clear where the balance lay.

[8] The Court must consider how a judicial inspection of the documents may advance the position beyond that now reached in the context of this particular litigation. As the Court of Appeal acknowledged at para [30] of *Choudry*:

A Judge looking at the documents might conclude that on their face they were completely innocuous from the point of view of national security. But against that would stand the Prime Minister's certificate informing the Court that disclosure would be contrary to national security. The issue in these terms is hardly justiciable. How would the Judge proceed? On one view, and an obviously incomplete view, disclosure should be ordered. On the other it should not. For the Judge to approach the Prime Minister seeking further information, without reference to Mr Choudry, would be contrary to principle and inappropriate. Being unable to proceed in that matter, there is no way the Judge could properly go behind the certificate. The only satisfactory answer must be that the customary deference paid to and trust placed in such a certificate as the present should prevail. The Court simply does not have the expertise or the necessary information to say that the Prime Minister's view of the matter stated in her further, more specific, certificate should not prevail. A certificate that to disclose more would reveal

² *Choudry v Attorney-General* [1999] 2 NZLR 582.

information it is the very purpose of the claim to keep secret must be taken at face value. Ministers of the Crown giving such certificates as these bear a heavy responsibility to appraise themselves of the law and to give the issues arising careful, conscientious and independent consideration. They are accountable in their own arena for the exercise of their powers. Inspection, against a certificate of the present kind, cannot lead to a satisfactory balancing of the competing interests by the Court. It could only lead to some intuitive and superficial view that the document under consideration looked harmless enough. But against that it might be a crucial piece in the jigsaw. How could the Court's view in such circumstances responsibly prevail over what the Court must take to be the conscientious and informed view of the Prime Minister that to disclose more would itself be contrary to national security?

[9] Although, as noted in the second interlocutory judgment, this is not a Prime Ministerial certificate case, the information nevertheless is conveyed in an affidavit sworn by the Director of the NZSIS and would no doubt be the advice tendered to the Prime Minister for the completion of a Ministerial certificate had that means of asserting privilege been adopted.

[10] As the previous cases, including *Choudry*, emphasise, the court should not surrender lightly its constitutional role of determining for itself and the parties, questions of privilege in litigation including by inspecting documents that are relevant but for which public interest immunity is claimed. That obligation is undiminished where, as here, the review by the defendant has caused some further documents or parts of other documents, to be released.

[11] I am, however, satisfied that the defendant's remaining claims to immunity in the documents still at issue should be upheld. The review by the Director of those documents has resulted in the further disclosure of some of them and the further disclosure of parts of some of them. The Director has explained, to the appropriate and necessary extent, why the contents of others should make them immune from disclosure. I accept the defendant's submission that the security interests identified by the Director are ones that a judge is not well equipped to determine in the same way as, for example, may be claims to legal professional privilege. As the cases confirm, there is a risk that what may appear innocuous and therefore disclosable may nevertheless require immunity.

[12] Taking account of the entitlement of the plaintiff to file and serve an amended statement of claim within the period of 3 weeks from the date of this judgment as confirmed in the Court's Minute of 2 June 2011, counsel should now advise the Registrar whether there are any other interlocutory issues requiring determination by the court. If there are, application should be made promptly. In the absence of any, there should be a further directions conference to timetable the case to a fixture.

[13] Costs on these applications affecting document disclosure are reserved.

GL Colgan
Chief Judge

Judgment signed at 3 pm on Monday 20 June 2011