

ATTENTION IS DRAWN TO THE
SUPPRESSION ORDER REFERRED
TO IN THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

5165755
WA 91/09

BETWEEN A
 Applicant

AND B
 Respondent

Member of Authority: James Crichton

Representatives: Paul McBride, Counsel for the Applicant
 Steph Dyhrberg, Counsel for the Respondent

Investigation Meeting: 2 July 2009 at Wellington

Determination: 6 July 2009

DETERMINATION OF THE AUTHORITY

Prohibition on publication orders

[1] Pursuant to the power invested in the Authority by Schedule 2, clause 10(1) of the Employment Relations Act 2000, I made an order during the hearing to suppress the name of both parties in the present proceeding together with the names of third parties and any information which might lead to the identification of any of those parties.

[2] It follows that I have directed that the determination issue with the names of all parties being removed and substituted with a consecutive letter of the alphabet.

Employment relationship problem

[3] The applicant (Mr A) has been employed by the respondent (B) for sixteen years in a senior capacity. He was dismissed for serious misconduct on 11 June 2009.

[4] On 7 May 2009, Mr A participated in a telephone conversation with a senior employee of an entity which was represented by B. Mr A provided employment advice to the third party and at a point during that telephone conversation it is clear

that Mr A became aware that the employment circumstances in question were the personal circumstances of the caller.

[5] At no stage did Mr A signal to the caller that there was a conflict of interest in his talking to the caller in the way that he did or even a potential conflict of interest, nor did he terminate the telephone call until interrupted by a senior colleague (also an employee of B) who encouraged him so to do.

[6] As a consequence, B had to take appropriate action by advising its client of the actual or potential conflict of interest situation which caused B embarrassment particularly as another employee of B was at the relevant time acting for the client in relation to Mr A's callers employment situation.

[7] B formally raised the issue with Mr A, conducted a process of investigation, heard Mr A's explanation and in mitigation and then determined to summarily dismiss Mr A. Throughout the process, Mr A was represented by very experienced senior employment counsel.

[8] B's conclusion and the basis for the summary dismissal was that Mr A had advised an employee of a client and that created a conflict of interest or a potential conflict of interest. B formed the view that Mr A ought to have known that he was in such a situation by virtue of his long service with B.

[9] Despite Mr A claiming to have learnt *a serious lesson*, B formed the view that it had completely lost trust and confidence in Mr A and accordingly summary dismissal was the only possible outcome.

[10] Mr A brings this application to the Authority seeking interim reinstatement to his employment pending an investigation of the substantive matters, which is set down for hearing on 19 and 20 August 2009.

[11] Mr A has provided the required undertaking as to damages.

Issues

[12] It is trite law that in order for an application for interim reinstatement to succeed in the Authority, the Authority must be satisfied that the applicant has met the tests required by law pertaining to the granting of interim injunctions but also have regard to the object of the Employment Relations Act: s.127(4) of the Act.

[13] There are three issues which are traditionally considered when a Court or Tribunal decides whether or not to grant such interim relief. It is the examination of those three issues or questions which forms the basis of this determination. Those three issues are:

- (a) Whether Mr A has an arguable case;
- (b) Where the balance of convenience lies; and
- (c) What is the overall justice of the case.

Does Mr A have an arguable case?

[14] I am satisfied that Mr A does have an arguable case. In urging on me the appropriateness of reaching that conclusion, Mr McBride for Mr A made the following broad observations:

- (a) That the dismissal was centred fairly and squarely on alleged impropriety in a single telephone discussion which impropriety was allegedly so grave as to outweigh all possible mitigation, lengthy service in a senior position and contrition about the alleged error of judgement;
- (b) That the evidence of the telephone discussion comes exclusively from Mr A and that insofar as B did not speak to Mr A's caller, it failed to properly investigate the central allegations;
- (c) The nature of the information imparted by Mr A was *innocuous* and was material that was effectively in the public domain and not advice at all;
- (d) That Mr A did not know that at the relevant time B was acting for the employer of Mr A's caller;
- (e) That B pre-determined the outcome of the investigation by indicating in writing that a conflict of interest had been established before a full investigation had been conducted.

[15] For B, Ms Dyhrberg submitted that:

- (a) While it was true that the decision to dismiss rested on a single telephone discussion, the failure of judgment evident in that single telephone discussion was so grave as to fundamentally extinguish the necessary trust and confidence that must exist in an employment relationship, particularly between that employer and an employee at a senior level;
- (b) That the terms of telephone discussion were not actually in dispute and that even on Mr A's own recollection of the events, there was a grave failing of judgment which went to the heart of the employment relationship;
- (c) That the conflict of interest exists not so much because of the subject matter of the conversation but because of the risks that ought to have been apparent in a conversation between Mr A and his caller when Mr A knew or ought to have known that his caller was employed by a client of B;
- (d) That there was never pre-determination by B.

[16] As I have already indicated, I think Mr A's application clears the relatively low threshold required by the *arguable case* test.

Does the balance of convenience favour Mr A's application?

[17] The essence of the Authority's obligation in this regard is to consider the relative inconvenience to each party of the other succeeding. In a practical sense the Authority must weigh the relative hardship to B of having Mr A returned to his employment, against the hardship potentially suffered by Mr A in remaining away from the workplace for a further period until the substantive hearing determines the matter one way or the other.

[18] Mr A submits that he would potentially suffer irreparable harm if he remains away from the workplace to his reputation, his health and the financial and emotional wellbeing of his family while the harm potentially suffered by B would, it is contended be modest indeed. Mr A suggests that appropriate arrangements could be

made for him to return to the workplace and that harm to B would be *no more than inconvenience*.

[19] In essence Mr A emphasises to me the loss of reputation which would be occasioned by his failure to return to work and the inability of the Authority to restore that reputation by an award of damages.

[20] For its part, B submit that reinstatement is quite simply *out of the question*. Ms Dyhrberg for B adopted the ringing phrase that *judgment can't be taught: If Mr A doesn't have it by now, he never will*.

[21] Ms Dyhrberg suggested that there were risks to B from Mr A's relationships with other staff of B and the potential impact of Mr A's return on other clients. Ms Dyhrberg made the point that the incident in question had already damaged the relationship between B and its client who employed Mr A's caller and the potential for that damage to accelerate was real.

[22] Ms Dyhrberg also argued that the failure of trust and confidence which ultimately underpinned the decision to dismiss could not be restored by the effect of an interim reinstatement decision of the Authority and that B would, of necessity, have grave difficulty in finding work for Mr A in circumstances where B felt able to say that it could trust Mr A.

[23] B also argued that Mr A's behaviour post dismissal (a failure allegedly to promptly return property and an allegation of improperly retaining information that might be confidential) indicated that Mr A had not come to equity with clean hands. While the Authority must always be cautious about making judgements based only on untested affidavit evidence, I must say that I am not attracted by this particular argument; I have read Mr A's second affidavit and I think the explanations that he offers in relation to those issues are at least arguable and for that reason I do not accept B's propositions in respect to Mr A's *unclean hands*.

[24] However, I have formed the view that the balance of convenience favours B and not Mr A. This is a dismissal of an employee in a professional calling and the whole basis of B's *raison d'être* is the giving of advice to clients. Given that Mr A was part and parcel of that very undertaking and was dismissed allegedly for failing to meet B's standards (and arguably industry standards in respect to conflicts of interest)

it seems to me to draw a very long bow to contemplate a situation where Mr A is returned to the workplace for the purposes of continuing to fulfil his usual obligations.

[25] I am not attracted by Mr A's contention that by he worked safely from the point that the errant telephone call was discovered down to the point of dismissal. All that really does is criticise the tactics of the employer in dealing with what must have been a very difficult situation for it to manage. B could have suspended Mr A on pay thus removing him from the workplace in order that an investigation could have been undertaken. However B chose not to do that precisely on the footing that that created an argument of having pre-judged the outcome and it preferred not to create that argument.

[26] The Authority can only have the greatest sympathy for Mr A and the economic and social consequences of continuing to be without gainful employment at this difficult time for him. However, his argument about reputation seems to me to cut both ways; the employer B is equally concerned about its reputation with its clients, notes that its reputation has already suffered with one client as a consequence of Mr A and it is concerned at the impact that Mr A's return might have on its reputation with other clients and its reputation with its own staff. I think those concerns are made out and remain strongly influenced by the practical impossibility of Mr A being returned to the workplace to provide advice to clients of B when B has decided that it has completely lost trust and confidence in Mr A. I accept B's submission that, in consequence, Mr A would effectively need to be supervised more or less constantly and that that is simply impractical in all the circumstances.

[27] As I say, I have reached the conclusion that the balance of convenience favours B. Mr A will not have to wait long for his substantive hearing. It has been scheduled for next month. I would expect to be able to give the determination on the substantive matter some urgency.

Overall justice of the case

[28] Standing back and evaluating the case on the currently untested affidavit evidence before the Authority and the very helpful submissions of both able counsel, the Authority must look at the overall justice of the case as between the parties.

[29] That untested affidavit evidence frankly suggests to me that, despite Mr A's attempts to persuade me otherwise, a return to the workplace on an interim basis

before the substantive basis for the dismissal has been investigated and determined by the Authority, would be fraught with danger for both parties. I simply cannot see how, in a fundamental issue of judgment such as this, the employment relationship could be re-established for a short period in the absence of any determination of the ultimate merits of the dismissal itself.

[30] The employer provides advice to clients and Mr A is one of its senior advisers (or was). B says that it would have to effectively supervise everything Mr A did if he were reinstated on an interim basis and I accept that submission. It seems to me to follow logically that in circumstances where all B does is provide advice there would be no alternative for B other than to provide continuous supervision for Mr A given B's view that it has completely lost trust and confidence in Mr A.

[31] The only other alternative would be to consider the prospect of Mr A being returned to the payroll but not being required to do anything, in effect a period of garden leave until the substantive determination issues. In my opinion in the present case, such an arrangement would meet neither party's needs. Mr A seeks to restore his reputation or at least prevent further damage to it by returning to the workplace; B, conversely, seeks not to have Mr A involved in its operations because it does not trust him given what he is alleged to have done.

[32] I accept also the submissions of B about difficulties with other clients and difficulties with other employees of B if Mr A were to be restored to the workplace on an interim basis.

[33] Taken together, all my instincts tell me that unless and until the basis of B's decision to dismiss has been addressed by the Authority through the substantive investigation, any prospect of Mr A returning to the workplace on an interim basis would be fraught with danger for both parties. That being the position, I determine that the overall justice of the case favours B and it follows that the application for reinstatement brought by Mr A must fail.

Determination

[34] The application is declined for the reasons advanced in this determination.

Costs

[35] Costs are reserved.

James Crichton
Member of the Employment Relations Authority