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IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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WA 91A/09

	BETWEEN	STEPHEN FRAWLEY Applicant
	AND	EMPLOYERS' AND MANUFACTURERS' ASSOCIATION (CENTRAL) INCORPORATED Respondent

Member of Authority:	James Crichton
Representatives:	Graham Watson, Advocate for Applicant Steph Dyhrberg, Counsel for Respondent
Investigation Meeting:	11 and14 September 2009 at Wellington
Determination:	7 December 2009

DETERMINATION OF THE AUTHORITY

The application for interim reinstatement

[1] By determination dated 6 July 2009, the Authority issued its determination on Mr Frawley's application for interim reinstatement. That application was declined and the present substantive application proceeded in due course, in the usual way.

[2] The interim determination issued subject to a prohibition on publication order and in particular the suppression of the names of both parties and of any third parties involved.

[3] For this substantive determination, the names of the parties themselves are no longer suppressed, but by agreement with the parties, this determination does not mention any third party by name. That device obviates the need for me to persevere

with an order suppressing the name of any third party or any information which might lead to the identification of such a party.

Employment relationship problem

[4] The applicant (Mr Frawley) was employed by the respondent (EMA) for 16 years. Mr Frawley occupied the position of Managing Consultant at the time of his dismissal for serious misconduct on 11 June 2009.

[5] On 7 May 2009, Mr Frawley spoke by telephone with a senior employee of an entity which was represented by EMA. Mr Frawley's evidence was that that senior employee (who I will refer to as Mr C), was a personal friend and it was the nature and extent of this telephone discussion between Mr Frawley and Mr C which led to EMA's decision to dismiss Mr Frawley for serious misconduct.

[6] It seems to be common ground that Mr C raised with Mr Frawley certain employment issues. It is common ground that Mr Frawley knew Mr C well and knew that Mr C was employed by an entity that was a member of EMA. However, Mr Frawley's evidence is that it was not clear to him, initially at least, that the matters Mr C was referring to were in relation to his own situation. However, Mr Frawley agreed in response to a question from me that there was a point in the conversation at which it became clear that Mr C was talking about employment problems relating to his own situation.

[7] Mr Frawley referred to the discussion having *morphed* from a general unspecific discussion about employment issues to a particular discussion about Mr C's own employment issues with an employer who was a member of EMA. From the point at which the discussion *morphed*, Mr Frawley indicated in his evidence that he was *concerned to work out how to end the conversation*. Mr Frawley's oral evidence was that the *morphing* took place about halfway through the conversation so even on his own evidence, half the conversation involved generalities and half involved a discussion about particular issues of an employment nature between a senior employee and a member of EMA, that senior employee's employer.

[8] The conversation was overheard by another staff member of EMA who sought advice and, in the result, EMA's Head of Legal interrupted Mr Frawley and the latter terminated the call. The other employees who had been involved in overhearing Mr Frawley's end of this conversation wrote notes of what they heard, saw and did

and the matter was promptly referred to Mr Paul Winter, EMA's Chief Executive. Mr Winter generated a memorandum dated 11 May 2009 in which he set out the allegation as he then understood it, namely that Mr Frawley was thought to have been advising an employee of an EMA client in a conflict of interest situation. The memo also alluded to the fact that a colleague of Mr Frawley's was advising the EMA client at that very time about its employment relationship with the employee to whom Mr Frawley had spoken, and Mr Frawley would know that, or would have found that out in the course of the telephone discussion.

[9] There was a lengthy investigation process with a large number of meetings between the parties. Mr Frawley was represented by very able counsel and, amongst other things, Mr Frawley was offered and given an opportunity to explain in writing his view of matters.

[10] In the course of defending his position, Mr Frawley raised a personal grievance in respect of a completely unrelated matter, and raised an argument about potential disparity of treatment in respect of an earlier incident wherein another staff member of EMA had purportedly been engaged in a similar telephone discussion with an employee who was then experiencing employment relationship problems with a client of EMA.

[11] On 11 June 2009, after an opportunity for Mr Frawley to be heard on mitigation after a finding of serious misconduct had been made, EMA announced its decision to dismiss Mr Frawley for serious misconduct. That decision was confirmed the following day.

[12] A personal grievance in relation to the alleged unjustified dismissal was promptly raised by Mr Frawley and the matter then proceeded to the Authority.

Issues

[13] There is really only one issue in the present case, and that is whether the decision made by EMA to dismiss Mr Frawley for serious misconduct was the decision a fair and reasonable employer would make in the circumstances that applied at that time and after the conduct of a full and proper investigation. This is the test the Authority is required to apply as it is set out in s.103A of the Employment Relations Act 2000 and has subsequently been interpreted by the Employment Court.

Was Mr Frawley unjustifiably dismissed?

[14] I am satisfied, on the evidence before the Authority, that Mr Frawley was not unjustifiably dismissed from his employment and the decision made by EMA was the decision that a fair and reasonable employer would make after the conducting of a proper inquiry into the matters complained of.

[15] I reach this conclusion primarily because the weight of evidence simply impels the Authority to reach such a conclusion and, in particular, Mr Frawley's own evidence does nothing to remove the conviction that the conversation which led to his dismissal was a conversation which he persevered with, even after he acknowledged that it was evident to him that the subject matter of the conversation was the employment relationship problem between his caller and his caller's employer, a member of EMA. As EMA found in its findings of fact, the continuation of the telephone discussion, once its actual subject matter became clear, was a straightforward conflict of interest for Mr Frawley who was a senior employee of an organisation whose sole *raison d'être* was the advising and representing of employers in respect of employment situations. Given that finding of fact, it is, in my judgement, inevitable that a fair and reasonable employer would conclude that it was unable to have trust and confidence in Mr Frawley in the future, given that his judgement on this particular matter was so far astray.

[16] Mr Frawley told me that he had developed a longstanding personal relationship with Mr C which led to Mr Frawley's dismissal. Mr C had been employed in a number of roles with EMA members, had had occasion to seek advice from EMA on behalf of those members from time to time and, as a consequence of that contact which was often through Mr Frawley, a personal relationship had developed. At the time of the telephone call in question, Mr Frawley was aware that Mr C was employed by a member of EMA but was not aware that there was an active involvement from EMA in dealing with an employment relationship problem between the EMA member and Mr C.

[17] When the investigation into the alleged wrongdoing was commenced by EMA, Mr Winter's initial memorandum of 11 May alleged that Mr Frawley knew that one of his EMA colleagues was advising the EMA member that employed Mr C about employment relationship problems between the member and Mr C. As became clear during the course of the investigation, that allegation was not made out. To be

explicit, Mr Winter's memorandum put the matter in the alternative: he said that either Mr Frawley knew about the conflict in advance, or it became clear to him during the course of the conversation. EMA accepted, as part of its investigation, that Mr Frawley did not know about the fact that a colleague was actually advising the EMA member at the point at which the conversation took place. That much, anyway, is common ground between the parties. However, EMA did find as a fact that Mr Frawley's telephone discussion with Mr C ought to have put him on notice that there was a conflict because he would have known that Mr C was employed by a member of EMA.

[18] In the evidence before the Authority, and in the earlier investigation undertaken by EMA, Mr Frawley provided extensive notes of the sequence of events in the telephone discussion with his caller. He sought initially to draw a distinction between representing a party and advising a party, and he also attempted to argue that EMA regularly got into this kind of situation because its principal point of contact with its employer members was typically the chief executive officer of the member, who of course in his own capacity was an employee of the member. Each of these allegations needs to be addressed.

[19] As to the first, that there is a difference between advice and representation, I find it difficult to see how the distinction is in any way helpful. Mr Frawley was not being accused of representing a party who had employment issues with an EMA member; he was accused of failing to withdraw from a conversation once it became apparent that a conflict of interest arose. It seems clear, even on Mr Frawley's evidence of the telephone discussion, that he gave the caller advice. He accepts this himself when he argues, again in mitigation, that the advice that he gave was favourable to the employer member of EMA. However, I do not think any of this discussion helps to address the issue. I agree with counsel for EMA's submission that this apparent distinction misses the point. The allegation is that Mr Frawley has breached his professional obligations by allowing himself to get into a conflict of interest situation. The problem is who he is talking to and the relationship that person has to a member of EMA when Mr Frawley is a senior employee of EMA.

[20] Mr Frawley seeks to rely upon the actual words used by Mr Winter in his initial memorandum of 11 May 2009. Mr Frawley draws my attention to the words of

that memorandum, and in particular the statement at the beginning of para.2 as follows:

> *I understand that you may have given advice to an employee … about his employment situation.*

[21] The memorandum from Mr Winter goes on in para.3 with these words:

> *I am very concerned about this issue. This represents a direct and serious conflict of interest. This goes a lot further than giving advice to an employee per se; this employee is employed by one of our members and EMA is advising the employer on this very matter. As well as the conflict of interest aspect, we will need to advise the employer of this situation, and as you will understand this has the potential to seriously jeopardise the relationship with the client.*

[22] Mr Frawley sought to argue, both in EMA's investigation and in the investigation meeting before the Authority, that EMA kept changing the allegation that he was confronting and that this memorandum was evidence of the fact that EMA's complaint was that he may have given advice. Indeed, in his oral evidence to me, Mr Frawley claimed that *Paul Winter said from the outset that the issue was I may have given advice* [to the employee]. Having carefully assessed the evidence furnished to the Authority by Mr Frawley himself and his evidence to the employer about the nature and extent of the conversation he had with Mr C, it seems to me absolutely plain that Mr Frawley gave Mr C advice.

[23] The other point in mitigation that Mr Frawley made in respect of his conversation with the employee caller is a more interesting and less obvious point. He says, in effect, that the principal point of contact for EMA is typically with employees of EMA's members, usually the chief executive or another senior officer of an entity that is the employer member of EMA. Mr Frawley goes on to argue that the relationship that EMA has with these senior employees of members is one that he quite properly sought to nurture, particularly as it would be that many of these employees move from entity to entity and thus had the ability to bring further members into the EMA fold. So, the argument goes, a failure to *look after* those individuals potentially damages the interests of EMA itself. Mr Frawley argued that his *modus operandi* included a strong emphasis on relationship building and that that was principally done by developing relationships with individual employees who happened to be senior officers of EMA members. In that context then, he invited me to appreciate his difficulty in trying to extract himself from this conversation with the employee of a member.

[24] Mr Frawley also contended that there would be situations where EMA's legal team would be advising the board on legal matters and he and his HR team would be advising the management on operational issues. Even assuming that is true, talking to an employee who has an employment relationship problem with his employer, the EMA member, is a rather different situation from the distinction between board matters and operational matters which Mr Frawley sought to illustrate.

[25] Mr Frawley also contended to me that if he had known that the board of the EMA client which employed his caller was being actively advised by EMA in relation to his caller (which was actually the fact), he would have handled the situation differently. But this, of course, begs the question about the whole point of having the judgement to make responsible and safe calls in respect of conflict of interest situations. All persons who provide professional advice for hire occasionally have situations where they are placed in a conflict of interest or a potential conflict of interest situation and the appropriate course of action is to promptly distance oneself from the conflict, or potential conflict, rather than allow oneself engage in it. That is essentially EMA's complaint about Mr Frawley's behaviour.

[26] Mr Frawley seeks to interest me in the proposition that he was never clear about the nature of the allegations against him. He says that on the one hand the employer said that he had failed to identify a conflict of interest and on the other that he had provided the employee with advice. He says that he did not know which allegation he was responding to. I do not accept that submission. These two aspects are, in effect, two sides of the same coin. The allegation he faced was that instead of identifying a conflict of interest situation and withdrawing, he continued an inappropriate conversation and, in consequence of that, provided advice to an employee in circumstances where that employee was employed by a member of EMA. The short point is that if he had correctly identified the discussion he was engaged with was inappropriate and a conflict of interest, then he would have terminated it and would not have been in the position where he spent some time (EMA says perhaps 20 minutes) asking and answering questions from the employee.

[27] In documents filed by Mr Frawley with the Authority as part of its substantive investigation, Mr Frawley seeks to rather distance himself from the material he had provided to the Authority in the earlier interim application for reinstatement, and in the material that he had provided to EMA for its investigation. In the more recent

material, Mr Frawley stoutly maintains that *I have not provided any detailed advice to* [the caller]. That frankly is an extraordinary statement when set against the detailed material and Mr Frawley's own affidavit in support of his application for interim reinstatement. In that affidavit, which is consistent with the material that Mr Frawley provided to the EMA at its investigation stage, Mr Frawley set out in detail the nature of the matters that he discussed with the caller.

[28] It is difficult to conclude from the earlier material that Mr Frawley did not give advice to the caller. What is more, even on Mr Frawley's evidence, the conversation was a lengthy one and the contention made by EMA is that the inappropriate part of the conversation (that is the conversation after it *morphed*) went on for 20 minutes or so. Mr Frawley told EMA that he asked questions and answered them during that time and that evidence is confirmed by the evidence of the staff members from EMA who overheard part of Mr Frawley's conversation and who reported the same to Mr Winter.

[29] So while Mr Frawley may dispute that he gave *reasonably detailed advice* to the caller, I am satisfied that a fair and reasonable employer, after gathering all of the information available, would conclude that Mr Frawley had indeed offered *reasonably detailed advice* over quite a period of time to an employee of a member of EMA, thus creating a conflict of interest situation.

[30] The final assessment to make is whether EMA properly considered the question of whether its trust and confidence in Mr Frawley had been completely eroded by his behaviour. In essence, this is a question about the assessment of Mr Frawley's judgement. Ms Dhyrberg, counsel for EMA, memorably opined in her submissions on Mr Frawley's interim reinstatement application that *judgement can't be taught* and that if Mr Frawley did not have the appropriate measure of judgement now after 16 years of service to EMA, then it seems unlikely that he would acquire it some way down the track. I confess I agree with those sentiments.

[31] I do not think Mr Frawley's case is assisted any by his contention that he was trying to balance the interests of EMA generally and its need to retain contact with people such as Mr C against the interests of EMA's particular member, the employer of Mr C. The exercise of judgement, I hold, required Mr Frawley to excuse himself from the conversation with Mr C immediately it became clear that Mr C was talking about his own circumstances. It is, I think, understandable that Mr Frawley might

misunderstand the nature of general inquiries being made of him in the early part of the subject telephone discussion. Clearly that is EMA's view and I agree with its finding that no blame can be sheeted home to Mr Frawley for those earlier exchanges when it was not clear who the subject of the inquiry actually was. Perhaps a more astute person might have asked the question, and thus brought the matter to a head more quickly, but certainly it seems to me axiomatic that once it was clear that the conversation was about the caller's own employment relationship problems, that call had to be terminated and a failure to do was, in my considered opinion, an absolute breach of trust.

[32] Nor am I much attracted by Mr Frawley's argument that Mr Winter predetermined the matter. Mr Frawley's contention is that the language in the Winter memorandum of 11 May 2009 was *determinative* and not preliminary and so it is contended that Mr Winter had already formed a view about Mr Frawley's alleged wrongdoing. I agree with Mr Frawley to the extent that the language used by Mr Winter is not as felicitous as it might be. It is the case, I think, that Mr Winter uses forms of expression which are rather more definite than is appropriate, but having heard Mr Winter's evidence in the Authority's investigation meeting, I am not persuaded that he had closed his mind to the matters in contention. Indeed, while it may be that the language used in the subject memorandum is less artful than it might be, the view I formed of Mr Winter as a witness was that he was honest, upright and absolutely fair minded. I think he tried exceptionally hard to reach a proper and measured conclusion after conducting a thorough inquiry and I formed the view that he was genuinely troubled by the potential effect on Mr Frawley's personal situation. So despite the claim of predetermination, I do not think that inelegant phrasing is justification for a conclusion that the employer has closed its mind to a proper process.

[33] I reach a similar conclusion in relation to Mr Frawley's suggestion (which is allied to the last point), that his dismissal was, in effect, a shortcut redundancy. Mr Frawley's evidence is that EMA was suffering through the recession with reduced billable hours and increases in costs and that he himself had been remonstrated with by Mr Winter for failing to meet budget in the immediate past. Again, I am not persuaded there is any evidence to support this allegation other than Mr Frawley's bare assertion. The fact is that Mr Frawley conducted himself in a particular way which resulted in EMA commencing inquiries which led to his dismissal. Had there

been a genuine basis for Mr Frawley's contention, EMA would likely have suggested an alternative process to the one that was eventually concluded by Mr Frawley's dismissal.

[34] Next I deal with Mr Frawley's contention that there was something odd about EMA failing to interview Mr C about the nature of the discussion between Mr Frawley and himself. Mr Frawley alleges that Mr Winter made a number of different statements in his evidence about this issue, but the short point is that Mr Winter is not under any obligation to interview Mr C if he does not wish to. In the particular circumstances of this case, Mr Winter did not interview Mr C and EMA's case rests on the evidence provided to it by Mr Frawley's own material together with the evidence from Mr Frawley's colleagues who overheard part of the conversation. I cannot imagine how EMA could have reached a different conclusion by talking to Mr C given the clear evidence that its decision on the relevant issues was primarily based on the evidence of Mr Frawley himself. Mr C's evidence, if taken, could only have either confirmed Mr Frawley's view of matters, or potentially made the position for Mr Frawley worse again. After all, Mr Frawley's evidence was designed by him, presumably to put his own conduct in a positive light and yet it was principally his evidence that EMA relied upon to reach its conclusions about Mr Frawley's fault in the matter. Accordingly, I reject the suggestion that Mr C ought to have been interviewed.

[35] Mr Frawley also complains that EMA lacked policy on the matter of conflicts and/or that he was never trained about conflicts. These both seem rather extraordinary allegations. Mr Frawley was a very senior employee with 16 years of experience. Frankly, if he did not understand the nature of a conflict of interest situation and the risks to himself and to his employer of being seen to engage in an environment where, at best, his motives and comments could be misconstrued, then no amount of training or indeed policy guidance would assist. It is the case that EMA has no formal written policy about conflicts of interest, but as Mr Winter said in his evidence (and I accept), the organisation exists to serve employers and their interests in the employment relationship and he could not imagine how any senior staff member could not clearly understand that such an environment meant that talking with an employee who was employed by a member was a conflict of interest because EMA acted for and represented the member employer, if asked or required.

[36] The next matter to address is Mr Frawley's claim that he would have behaved differently if he had known that EMA was actively involved in represented Mr C's employer at the time that Mr Frawley spoke with Mr C by telephone. I accept Mr Frawley's evidence on this point as truthful and EMA also acknowledged that it would have been more ideal if Mr Frawley had been aware that EMA was at that very point representing Mr C's employer in employment relationship problems with Mr C. However, despite the acceptance by EMA that it would have been better if Mr Frawley had known, the whole point about practice in relation to senior people in advisory roles is that risks are mitigated if proper professional obligations are attended to, and in the particular circumstances of this case, I am clear that Mr Frawley ought not to have engaged with Mr C in respect of his own employment situation. While it is plainly true that Mr Frawley did not know when he had that conversation that EMA was actively advising Mr C's employer, he did know that Mr C was employed by an EMA member and so the potential for a conflict of interest is self-evident, or ought to be. I do not think that Mr Frawley can deflect his own culpability onto EMA in the way that he seeks to do. As I say, if Mr Frawley had properly fulfilled his obligations to his employer, there would have been no objectionable conversation on which EMA would be capable of making any findings of fact.

[37] Mr Frawley says that he was treated differently from other employees in a similar situation, but this is not factually accurate. There was another situation not dissimilar to this but it was dealt with by Mr Frawley himself as the decision-maker and effectively he condoned behaviour which, on Mr Winter's evidence (which I accept), would not have been accepted if Mr Winter had himself been the decision-maker. Furthermore, there was a fundamental factual difference in the earlier case from the situation with Mr Frawley himself. In the earlier case, the employer of the employee spoken to by telephone was not a member of EMA and the employee of EMA who conducted the telephone discussion inappropriately was very young and very junior. Arguably, no conflict of interest applied at all in respect of the earlier situation if the employer is not a member of EMA. The only rule that that earlier case infringes is the more general rule that EMA only exists to provide advice to employers.

[38] Finally, in closing submissions on behalf of Mr Frawley, his advocate argues that the conduct that Mr Frawley was responsible for was not *inimical* of the employer's interests: *Makatoa v. Restaurant Brands (New Zealand) Ltd* [1999]

2 ERNZ at 319. The submission is made that, generally, serious misconduct findings require behaviour that is *inimical* of the employer's interests and that there is no evidence that this was the case here. I do not agree. Potentially, Mr Frawley's actions in engaging with Mr C placed a client relationship of EMA at risk (the client being Mr C's employer and an EMA member), as well as making the ability of EMA to deal with Mr C's employer either more difficult or potentially even impossible. Furthermore, the very nature of the behaviour complained about suggests an organisation which is incapable of operating in accordance with proper professional values which plainly would be the very thing that EMA would want to avoid as an adviser trading in an open marketplace. Undoubtedly, Mr Frawley's actions would have been the subject of comment and, with the best will in the world, would have become more widely known than either EMA or Mr Frawley might wish. That wider span of knowledge about what had happened would do EMA no credit and Mr Frawley would be directly responsible for that.

Determination

[39] For reasons which I have enunciated, Mr Frawley's claim fails in its entirety, and in consequence, he is not entitled to remedies.

Costs

[40] Costs are reserved.

James Crichton
Member of the Employment Relations Authority