

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 463
5324387

BETWEEN

ELAINE MARTIN
Applicant

AND

EASY MIND WAIKATO
LIMITED
Respondent

Member of Authority: K J Anderson

Representatives: J Peebles, Advocate for Applicant
E Burke, Counsel for Respondent

Investigation Meeting: 30 June 2011 at Hamilton

Submissions Received: 14 July 2011 for the Respondent
29 July 2011 for the Applicant

Determination: 26 October 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Martin claims that she was unjustifiably dismissed, effective from 14th September 2010. She asks the Authority to find that she has a personal grievance and award her the remedies of reimbursement of lost remuneration and compensation of for hurt and humiliation, pursuant to section 123 of the Employment Relations Act 2000. The respondent, Easy Mind Waikato Limited, says that the actions of Ms Martin seriously undermined the trust and confidence required of the employment relationship, hence the dismissal was justified.

Background facts and evidence

[2] Easy Mind Waikato Limited (EMWL) operates a home-based childcare service. This business provides knowledge in regard to nannies that are available to

provide home-based childcare. The nannies are engaged by families requiring the service and EMWL is contracted to process wage payments on behalf of the families. Ms Paula Lovegrove is the Director of the company. She explained to the Authority that she also operates another company, Kids at Home Limited (KAHL). This business was purchased in January 2010 and one of its assets was a list of approximately 80 people that are available to provide their services as educators of children at the family home of those that wish to access this service. The evidence of Ms Lovegrove is that KAHL has approximately 55 educators currently providing a home-based education service to children in their family homes.

[3] Ms Martin commenced her employment with EMWL on 8th February 2010, as the Accounts Manager.

[4] The evidence of Ms Lovegrove is that on or about 16th June 2010, Ms Martin informed her that Ms Martin's mother, Ms Margaret Reitema, had decided to set up a small company that would engage a few "*grandmothers/friends*" as child educators.¹ Ms Martin says that she felt "*morally obliged*" to inform her employer of her mother's plans. The evidence of Ms Martin is that she explained to Ms Lovegrove that she was aware that the existence of Ms Reitema's business could make her employment situation uncomfortable but she assured Ms Lovegrove that her loyalty and commitment remained with EMWL. Ms Martin says that she also asked Ms Lovegrove if she wanted to talk to Ms Reitema and the following day, Ms Lovegrove obtained Ms Reitema's contact details.

[5] The evidence of Ms Lovegrove is that while Ms Martin had informed her that Ms Reitema's business would not be in competition with Ms Lovegrove, she told Ms Martin that the business of Ms Reitema was the same as KAHL. Ms Lovegrove says that Ms Martin would have been aware of this as she had done some work for that business. Subsequently, Ms Lovegrove implemented measures to ensure that the confidential information of KAHL was protected. This included removing information held at the Hamilton office, where Ms Martin worked, back to the Te Awamutu office, and installing a computer programme to track internet and email usage.

¹ Ms Reitema had worked as an educator for EMWL but some time in the week beginning 14th June 2010, she gave notice that she would no longer be available.

[6] It appears that following the disclosure by Ms Martin about her mother's business, the employment relationship continued as normal, at least on the surface. Nonetheless, Ms Lovegrove met with Ms Reitema on 17th June 2010. The evidence of Ms Reitema is that there was a conversation about her new business but then, she says, that she started to feel "*bullied and intimidated*" by Ms Lovegrove and the meeting appears to have concluded on a rather terse note.

[7] On 18th August 2010, Ms Lovegrove was at the home of one of the educators (Sandra), who worked for her business, and was shown a letter and a circular dated 17th August 2010. The letter was signed by Ms Reitema and introduced the recipient to: "Family Matters Homebased Childcare Service Ltd, offering a fresh alternative to educators and families requiring childcare." Reference is also made to Ms Reitema's lengthy experience in the early childhood sector and the recipient was invited to attend an "information evening" on 25th August 2010 to "find out more" about Family Matters Homebased Childcare Service Ltd. The evidence of Ms Reitema is that she sent out approximately 250 such letters. Ms Lovegrove says that she subsequently discovered that that the same letters had been sent to most of the educators that currently worked for her business, and while some of them were aware of Ms Reitema, because she have previously worked for the business, none of the educators had contacted her. Ms Lovegrove says that she became concerned about not only protecting the private information of her company, but also the information that was private to her employees (educators), such as their contract details.

[8] Ms Lovegrove subsequently made telephone contact with Ms Reitema and enquired about how Ms Reitema had attained a list of the educators that worked for Ms Lovegrove's business. The evidence of Ms Lovegrove is that Ms Reitema informed that she had obtained the contact details through "*extensive advertising*" and from names "*given to her*" but with no explanation as to whom had provided the names. Ms Reitema also said that she obtained contact details from the "*White Pages*." Subsequent to this discussion, Ms Reitema wrote to Ms Lovegrove on 25th August 2011. In her letter, Ms Reitema refers to being caught off guard by Ms Lovegrove's phone call, especially by an alleged "*aggressive and demanding approach*."² Ms Reitema then informs:

² The evidence of Ms Lovegrove is that she was "yelled at" by Ms Reitema who also informed Ms Lovegrove that she was "paranoid."

I felt that I owed you an explanation and I apologise if some of ‘your’ educators contracted me as a result of my advertising. Fortunately it is not illegal for people to answer advertisements at this time that I am aware off [sic] at least. People won’t leave if they are happy. To follow up on the applications I received, I did this mail out. I have certainly contacted people that I know have left Easymind [sic] and make no excuses for that. If some information was incorrect then I apologise again. Slip ups do happen. In future, before I do mail outs, I am happy to give you a list of names, so that you can eliminate any of your educators on the list. This would certainly save a lot of aggravation for both parties.

Disciplinary Action

Suspension

[9] While the evidence is somewhat unclear, it appears that Ms Lovegrove initiated a meeting with Ms Martin on or about 18th August 2010. There is no evidence from Ms Martin regarding this meeting. Ms Lovegrove attests that the meeting was for the purpose of discussing with Ms Martin where Ms Reitema had obtained her list of potential educators from. Ms Lovegrove says that she “*proposed*” suspending Ms Martin from her employment while matters were investigated further, and that is what happened. While it seems that Ms Martin was not forewarned or consulted about the suspension, nor is there any written record pertaining to this action, Ms Martin does not take issue with it. The evidence of Ms Lovegrove is that upon being notified of the suspension, Ms Martin returned to her work computer and removed a memory stick from it and put it in her bag. Ms Lovegrove says that she asked Ms Martin to allow her to check what was on the memory stick to ensure that it didn’t contain company information; but Ms Martin refused to give it to her. It is the view of Ms Lovegrove that if there was nothing to hide on the memory stick, Ms Martin would have allowed her to check it as this would have helped to “*exonerate*” Ms Martin’s behaviour, that was otherwise suspicious. The evidence of Ms Martin to the Authority, when asked about this, is that Ms Lovegrove is wrong in that the item in question was not a memory stick; rather it was it was an infrared wireless device. Given that Ms Martin was not prepared to allow Ms Lovegrove access to the device and that she did not give this explanation to her at the time, I have to say that I do not find Ms Martin’s explanation about this matter to be credible.

Invitation to attend a disciplinary meeting – the allegations

[10] Via a letter from Ms Lovegrove dated 26th August 2010, Ms Martin was invited to a formal disciplinary meeting on 31st August 2010. Ms Martin was informed that there was three “specific allegations” to be discussed:

1. Your failure to notify me in a timely manner of the possible conflict of interest between your mother's business and your role at Easy Mind in a timely way. You informed me on June 16th that there was a conflict of interest, however I have reason to believe that as early as April 30th that you were aware of a potential conflict of interest and did not declare it. At the time it appears that you were looking for another job so you had 'options' for when you would tell me. See attachment 1.

Attachment 1 is a copy of an email exchange between Ms Martin and her sister on 30th April 2010. The apparent relevant content being that Ms Martin conveys to her sister:

Hi got that email with that job, thanks. I will get a cover letter done today. Ultimately I am hoping to keep my job here cos I really enjoy it and enjoy the people I work with, I just want to have another option for when I tell Paula what is happening. If she feels it's a conflict of interest then I will have something to move on to.

Ms Martin's sister responds:

Of course, always good to have options.

[11] The letter from Ms Lovegrove to Ms Martin continues:

We allege that this action constitutes serious misconduct as it is in breach of section 6.3 of your employment agreement which requires you to declare in writing any situations in which your interests could come into conflict with the interests of Easy Mind Waikato Ltd.

[12] The second allegation made in the letter to Ms Martin is:

2. We further allege that you deliberately planned of [sic] the timing of your notification of the conflict of interest with Easy Mind Waikato Ltd to suit your, and your families [sic] own personal needs without due regard for your employer . See attachment 2.
We allege that this collusion with your family amounts to serious misconduct on the grounds that you have failed to act in good faith towards Easy Minds [sic] Waikato as your employer.

Attachment 2 refers to a copy of an email dated 11th June 2010 from Ms Martin's sister to Ms Martin, the relevant content being:

- (3) We are going to cancel care with EasyMind from 14/7/10 (last day in care). Mum said to wait until you have notified Paula [Ms Lovegrove] of things, but letting you know. Mum has the forms and stuff.

[13] Then there is a third allegation:

3. We further allege that you are in breach of your employment agreement in that you have breached clause 6.1 'Access to confidential information' by having Easy Mind confidential information sent from your home e-mail address. Please see attachments 4 and 5.

We know of no reason why you send confidential company information from your personal e-mail address except to then allow you access to this information remotely at a later time. We also have evidence of you sending an email to yourself using your work address and once again, can think of no other reason than this would allow you access to this information remotely via your email address. Further, the content of an email dated 5 May from yourself to [Ms Martin's sister] indicates to us that you may be intending at that point to disclose information. Please see attachment 2.

We also wish to discuss with you an email dated 25th June to [Ms Martin's sister] which had an attachment. We want to know what this attachment was and why you say in the contents of that email that you wish the other party to use your personal email? Please see attachment 6.

Attachment 4 is an email header dated 10th May 2010 indicating that an email was sent from Ms Martin's personal email address to her work email address. It appears that there was an attachment "*Child List.pdf*" but the parties have not been able to produce any evidence pertaining to the content of this attachment.

Attachment 5 is an email header dated 13th May 2010 indicating that an email was sent from Ms Martin's personal email address to her work email address. It appears that there was an attachment "*Educator List.pdf*" but again, there is no evidence before the Authority as to the content of this attachment.

Attachment 6 is a copy of an exchange of emails dated 25th June 2010 between Ms Martin and her sister. The relevant extracts follow:

Ms Martin's sister records:

Mum said you had a promising interview, heard any more?

Ms Martin responds:

Will talk to you tonight about the rest. Can you please email me to elainebryers@hotmail.com cause im not sure if my emails are being scanned or not in breach of my privacy.

Disciplinary meeting

[14] A disciplinary meeting subsequently took place on 2nd September 2010. Both parties were represented. Notes were prepared by the representative for EMWL at the time and these have been produced to the Authority. In regard to the first allegation made by EMWL, pertaining to the failure of Ms Martin to notify Ms Lovegrove in a 'timely manner' of the possible conflict of interest relating to Ms Reitema's business, and Ms Martin looking for alternative employment; her response was that at the time she sent the email to her sister (Attachment 1), Ms Reitema had only talked about the "possibility" of setting up a business in opposition. Ms Martin said that she had not been informed of her mother's business until a few days before she told Ms

Lovegrove. However, it was (and remains) the view of Ms Lovegrove that Ms Reitema must have begun setting up her business much earlier, given the registration processes involved with such businesses.

[15] In regard to the second allegation pertaining to Ms Martin's sister terminating her childcare arrangement with EMWL, Ms Martin explained that this was due to Ms Reitema establishing her business and the decision of her sister to support her mother's enterprise.

[16] In regard to the third allegation, pertaining to Ms Martin sending an email (with attachment 4) from her personal email address to her work email account, Ms Martin explained that the method she used was the only way to access the information from her workplace in Hamilton, due to KAHL being located in Te Awamutu. When asked why the information in the attachments was needed, Ms Martin said that the KAHL staff had left for the day, so she was doing some work on behalf of KAHL. The information was needed for a resource grant and that the information required included; the hourly rates, children's names, and children's dates of birth and educator names. Ms Lovegrove stated that the list was not complete, therefore, how could it be used for the purpose given by Ms Martin. It appears that Ms Martin had some difficulty with her response to this query.

[17] When Ms Martin was asked about the KAHL Educator List (attachment 5), sent by using her personal email account to her work account, she stated that she was going to complete some work using this list, but was unable to say exactly why she required it. Upon being asked why she used her personal email account, Ms Martin stated that the remote login email was not working, and that the remote login option was slower. Ms Martin also gave explanations pertaining to the other emails and attachments that have been referred to.

[18] Following an adjournment for 30 minutes to allow Ms Lovegrove and her representative to consider Ms Martins explanations, the view of EMWL was conveyed to Ms Martin. In summary, Ms Martin's employer believed that:

- (a) A conflict of interest did exist as early as 30th April 2010.
- (b) It was not accepted that Ms Martin was unaware of a conflict of interest until shortly before telling Ms Lovegrove on or about 16th June 2010.

- (c) Ms Martin had accessed KAHL information via her personal email account without authority to do so. This was a violation of the EMWL privacy and confidentiality policies and hence constituted misconduct. However, it was accepted that there was no evidence that Ms Martin had used this information for non-work purposes or that the information was supplied to her mother.

The meeting concluded on the understanding that EMWL wished to seek some clarification about the matter of whether a conflict of interest existed.

Further exchange of information

[19] A letter dated 10th September 2010, from the representative for EMWL (Mr Collins) to Ms Martin's advocate (Mr Peebles), informed that further investigation revealed "other incidents" that needed to be considered "alongside" the information that had been discussed at the disciplinary meeting on 2nd September 2010. The specific allegations that Ms Martin was required to respond to were set out as follows:³

1. We allege that Elaine purposefully deleted information from the server. We have attached an email dated 18 March 2010 from [A]⁴ to Elaine enabling her to get access to the server from home (Attachment 1A). Attachment 1B provides information surrounding the creation of this remote desktop connection on 18 March 2010 and the subsequent deletion of this connection on 6th August 2010. This connection enabled Elaine to access information remotely from home. Our client did not authorise the removal of this connection. Our client's computer technicians have both confirmed that they did not delete this connection.
Following our investigation this week, our client's computer technicians have advised that all remote login tracking information is missing from the server up to 7 September 2010. This means that the log-in tracking information as well as the remote connection detailed above has been removed/interfered with. We know from the work done by the computer technicians that this feature had previously been working. Our client asserts that Elaine, and only Elaine had the motive and skills to delete this information. We therefore allege that Elaine at best, purposely deleted the remote login from the server for the sole purpose of stopping our client from obtaining her login history. We further allege that this incident significantly supports our client's allegations discussed at the disciplinary meeting held on 2 September regarding the reasons for Elaine accessing information. This action constitutes serious misconduct as well as failure to act in good faith towards Easy Minds [sic] Waikato as the employer.
2. Our client's computer records have an email showing that Elaine sent her CV to her sister [C] at 11:47 on 28 April 2010 (please see attachment 2A). Attachment 2B shows that the document was last modified on the same day 28 April 2010.

³ Given that the allegations set out in this letter is largely evidence of the respondent's general position pertaining to its perception of the conduct of Ms Martin, the allegations are set out in full.

⁴ As some parties are not directly involved in the proceedings before the Authority, their identities are protected for privacy reasons.

The email from Elaine indicates that this action was performed whilst at work and in all likelihood during her working hours. Some of the details supplied on Elaine's CV are incorrect. Whilst we accept that Elaine's CV is a personal item, we allege that the misrepresentations on her CV, as outlined below, bring her honesty and integrity into question:

- A) Elaine's title is Accounts Manager not Assistant Accountant. Although we recognise that this was the title Elaine preferred before her employment transferred from Easy Mind Limited to Easy Mind Waikato Limited. Upon consultation her title was changed to Accounts Manager, and this is a more accurate representation of her role. This title is clearly stated on Elaine's business cards.
- B) [A] left the employment of Easy Mind Limited prior to the modification of Elaine's CV. Elaine's CV states that she reported to [A] at the time the CV was created.

We allege that Elaine emailed her CV during work time, to the detriment of her employer, constituting misconduct. Elaine storing her CV on her workstation strongly suggests that Elaine created or modified her CV whilst at work, again constituting misconduct. In addition we allege that Elaine sought to misrepresent her role with Easy Mind Waikato Limited. This action demonstrates dishonest behaviour eroding our client's trust and we believe could fairly be treated as serious misconduct.

- 3. Our client also found a copy of [T's] CV on Elaine's computer. This CV is dated July 2010. Whilst the CV is not Elaine's, having the CV on her work computer indicates that Elaine was involved in reviewing the CV. The job title assigned to Elaine on this CV is that of Office Manager. This is not Elaine's job title, nor has it ever been. We allege that Elaine has been involved in non-work activities in work time to the detriment of our client, potentially demonstrating dishonest behaviour further eroding our client's trust.
- 4. During the course of our investigations we have also discovered e-mails that we believe further demonstrate that Elaine has conducted herself in a manner that is not in the best interests of our client and are in breach of our obligations to act in good faith towards our client. The attached emails clearly indicate the avoidance of faithfully performing her duties and undertaking activities not related to her employment whilst at work. The last email clearly indicates this with the intent to "look busy." As such we further allege that she conducted herself dishonestly as our client reports that she was often told by Elaine that she was busy. Elaine's emails indicate that she has frequently deceived our client. We, again, allege serious misconduct by deliberately misleading her employer.
- 5. We also allege numerous performance issues have taken place over the last few months.
 - A) Attached is a creditor's report showing that the [sic] numerous accounts were not paid on time. Elaine was previously spoken to by our client about this matter and the client still believes the matter to be unresolved.
 - B) In addition, the unacceptable state of the Company's debtor's reports has now come to our client's attention as a result of Elaine's suspension. Our client states that she was given regular reassurance from Elaine prior to her suspension that 'the debtors were fine.' Whilst we understand that our client must accept some of the blame for not requesting the accounts information to check these responses,

we allege that Elaine misrepresented the information and did not perform her duties to the required standard.

We assert that the allegations given above when viewed alongside the discussion at Elaine's disciplinary meeting on 2 September constitute serious misconduct. As you are aware, this could result in summary dismissal. We seek written submissions on these issues from your client by 5pm on Monday 13 September 2010.

The possible consequences of substantiation of these allegations is that our client will consider summary dismissal on the grounds of serious misconduct. As this has been a protracted process, we therefore also seek your submissions by 5pm on Monday concerning the contemplated sanction of serious misconduct and/or dismissal with notice.

[20] Ms Martin's representative (Mr Peebles), responded to the additional allegations, via a letter dated 12th September 2010. The response was largely dismissive in regard to the substance of the allegations made against Ms Martin and can be best summarised as follows:

Deletion of information from the server

Mr Peebles referred to the disciplinary meeting held on 2nd September 2010, indicating that Ms Martin's explanation about this was accepted then.⁵ The evidence about whether or not Ms Martin's explanation was accepted is inconclusive, but it also seems that EMWL was not able to show that it was more probable than not that Ms Martin did delete the information in question.

The matter of Ms Martin's CV and associated details

The response is that there is no express term of employment that prevents Ms Martin from using her work computer for personal use. In regard to the allegation of Ms Martin misrepresenting her role with EMWL, in addition to it being posited that the Ms Martin's CV is a "personal item," the response is that this is not relevant as any alleged misrepresentation has not been made to EMWL.

The emails sent by Ms Martin during working time

The response is largely dismissive but refers to such emails being "prevalent and common place" in the workplace and that any attempt to portray Ms Martin's actions as dishonest is "ludicrous."

The performance concern regarding EMWL creditors and debtors

The response is that the report on such relates to one specific week and hence it was difficult to comment on why there were outstanding creditors and debtors, without

⁵ The Authority also notes that upon the advice of Mr Peebles, Ms Martin sent a personal explanation to the representative for EMWL (Mr Collins), via an email dated 14th September 2010.

knowing who those parties were. Further, it is pointed out that “in any event” the performance concerns could not be classified as serious misconduct.

[21] In summary, the response for Ms Martin concludes that:

Hence it can again be stated that the various findings of serious misconduct, breaches of good faith, dishonesty and performance failings are merely attempts to clutch at the proverbial straw and are indeed a very strong indicator of your client’s premeditated intent to dispose of Ms Martin.

The dismissal

[22] Via a letter dated 14th September 2010, from Mr Collins to Mr Peebles, the final position of EMWL is set out. Ms Martin is reminded of the “specific allegations” that were raised at the meeting on 2nd September 2010; thus:

1. Failure to notify [EMWL] in a timely manner of the possible conflict of interest between your mother’s business and your role at Easy Mind Waikato Limited in a timely way.
2. The deliberately planned timing of [Ms Martin’s⁶] notification of the conflict of interest with Easy Mind Waikato Limited to suit Ms Martin and/or her families [sic] own personal needs without due regard for your employer.

The response provided by Ms Martin, regarding these allegations, is acknowledged, being that Ms Martin had “no interest whatsoever” in her mother’s business, hence there has never been any potential conflict of interest. However, Ms Martin’s attention is again drawn to clause 6.3 of the employment agreement and she is informed that EMWL contend that she had a conflict of interest: “... as captured by the wording *‘any situations in which the employee’s own interest, financial or otherwise.’*” It is posited that given that Ms Martin’s mother was setting up a business in opposition to EMWL, this shows a “personal interest” on the part of Ms Martin. Reference is then made to Ms Martin having access to confidential information pertaining to KAHL, prior to informing of her mother’s business, and hence this information was not able to be protected, as it could have been, if Ms Martin had notified of her mother’s intentions, when she first had knowledge of such. It is contended that as of 30th April 2010, Ms Martin was seeking employment elsewhere and this demonstrates, that she knew then, that a conflict of interest existed. It is alleged that:

Ms Martin’s assertion at the disciplinary meeting, that her mother decided to discontinue setting up a business in direct competition to EMWL, thus removing the

⁶ Because the letter is written by the representative for EMWL (Mr Collins) to Ms Martin’s representative (Mr Peebles), the respective legal or professional references to “your client” and “my client” are used. In order to put matters into a context that is more easily understood, I have inserted the respective names of the parties.

requirement to inform EMWL of the potential source of conflict, only for Ms Martin's mother to set up a competing business within five weeks is difficult to believe.

[23] The letter then informs Ms Martin that EMWL had therefore concluded that:

[... serious misconduct did indeed occur under section 6.3 of the employment agreement. In addition, EMWL's disciplinary and policy procedures clearly states: *'Acts of serious misconduct are those inconsistent with the due and faithful discharge by an employee of the duties and service; dishonesty, inability to carry out work due to consumption of non prescription drugs or alcohol, **breach of confidence**, insubordination, insolence, violence.'*

As a result, we have concluded that serious misconduct did indeed occur and Ms Martin did not fulfil the obligations of her employment agreement in this area.

[24] The letter then informs Ms Martin of a third allegation. That she:

[... was in breach of her employment agreement in that she breached clause 6.1 'Access to confidential information' by having Easy Mind Waikato Limited and Kids at Home confidential information sent to and from Ms Martin's home email address.

Reference is made to Ms Martin's emails dated 10th May, 13th May and 2nd July 2010.

It is alleged that "confidential information" was "made available" by Ms Martin by emailing this information to herself. It is alleged that:

In summary, the information contained in the emails specified above demonstrates a breach of section 6.1 of her employment agreement, in particular *'All information about Easy Mind Waikato Limited, its operations, the way it provides its goods and/or services, employee information, confidential financial transactions and the like, including information contained within emails is to be **properly secured** against unauthorised access. Any breach of confidentiality is likely to be regarded as serious misconduct warranting summary dismissal'* in that by emailing this information to her personal computer the information was no longer secured. It also made the information more portable.

Whilst Ms Martin's explanation that having information accessible via her personal email account was a quicker way to access the information (despite an alternative authorised method existing) is plausible, the fact remains that Ms Martin failed to properly secure the information in accordance with section 6.1 of her employment agreement. Failure to secure the information constitutes misconduct.

[25] The letter then sets out the four additional allegations raised in the letter dated 10th September 2010. Namely:

A) That Ms Martin:

[... purposefully deleted the remote login information from the server for the sole purpose of stopping EMWL from obtaining her login history. The absence of information from you does not assist us with making a judgement on whether Ms Martin deleted the login history.⁷

⁷ Perhaps Mr Collins may not have received Ms Martin's emailed explanation sent on 14th September (3:19p.m.), before he wrote this letter of the same date. Ms Martin gives what appears to be a quite rational explanation about the allegation made against her and concludes that: "While I am fairly confident with using computer programmes, interfering with or deleting anything from a server in the

- B) The allegation that Ms Martin emailed her CV during work and the further allegation regarding misrepresentations on her CV. Section 6 of her employment agreement clearly states that Easy Mind Waikato Limited interests must come first. We cannot understand how Ms Martin performing tasks potentially to the disadvantage of EMWL (potentially applying for employment elsewhere or assisting her co-worker to apply for employment elsewhere) can be in the best interest of her employer.
In relation to the allegation of misrepresentation, we agree that Ms Martin's CV is a person [sic] item thus, and as stated previously, should not be found on EMWL's computer system. The misrepresentation of Ms Martin's CV does indicate dishonest behaviour that directly affects the confidence that Easy Mind Waikato Limited has in Ms Martin. We agree that in isolation these issues would not constitute serious misconduct, and again in isolation, misconduct would be the appropriate sanction.
- C) The allegation that Ms Martin has wilfully avoided her duties and undertook activities not related to her employment whilst at work. The emails dated 2, 6 and 9 September 2010 show that Ms Martin was again engaged in activity not in the best interests of EMWL. This activity, again in isolation, would constitute misconduct.
- D) In relation to the performance allegation regarding the status of the debtors and creditors. We accept that you may need more information on the creditors to address the concerns raised. As such, we cannot draw a reasonable conclusion from the information in front of us at this point in time.

However, in relation to the status of debtors, Ms Martin was informed that:

The amount of the outstanding debtors does contradict the reassurances given to EMWL from Ms Martin that the 'debtors were fine.' Again we struggle to understand how such a large balance of outstanding debtors could be deemed as acceptable. Based on the information in front of us, including the information you provided to us, we conclude that Ms Martin misled EMWL regarding the status of the debtors.

[26] The letter concludes with a summary; thus:

The first two allegations, number 1 and 2 of this letter, constitute serious misconduct. The further breaches of misconduct, as specified in this letter, if taken in isolation would warrant a written warning. Put together these breaches have impaired EMWL's trust and faith in the employment relationship. As such, they constitute serious misconduct. For the above mentioned reasons, Ms Martin's employment shall be terminated without notice, effective immediately.

Analysis and Conclusions

[27] Section 103A of the Employment Relations Act 2000 provides the test to be applied when determining whether or not the dismissal of Ms Martin was unjustifiable. The Authority is required to consider on an objective basis, whether the

technical manner alleged in the letter dated 10 September 2010 is beyond my capability as a recreational/work based computer user. I have no formal IT training."

employer's actions, and how the employer acted, were what a fair and reasonable employer would⁸ have done in all the circumstances at the time the dismissal or action occurred.

[28] But as was held by the Employment Court in *Air New Zealand v Hudson* [2006] ERNZ 425:

However, the s103A requirement for the Authority and the Court to stand back and determine the matter on an objective basis by evaluating the employer's actions does not give an unbridled licence to substitute their views for that of an employer. Their role is instead to ask if the action of the employer amounted to what a fair and reasonable employer would have done and evaluate the employer's actions by that objective standard. It may mean that the Court [Authority] reaches a different conclusion from that of the employer but, provided this is done appropriately, that is objectively and with regard to all the circumstances at the time the dismissal occurred, a conclusion different from that of the employer may be a proper outcome.

And then further, in regard to the application of s103A:

The section does not differentiate between aspects of the dismissal process but, because it refers in general to the employer's actions, the test for justification applies at all stages including the employer's decision that misconduct has occurred and the employer's decision to dismiss. Each of these stages are open to scrutiny although this is not to be done in a mechanical way as it is recognised that the lines between each stage are often blurred.

[29] The meaning of s103A was again clarified by a full bench of the Employment Court in *Air New Zealand Ltd v V* [2009] ERNZ 185:

The meaning of the text of s103A is clear on its face and in the light of its common law antecedents. It sets out a test of justification where a personal grievance has been alleged. In cases of dismissal, it requires the Authority or the Court to objectively review all the actions of the employer up to and including the decision to dismiss.

Were the actions of Ms Martin such that EMWL was entitled to conclude that she had been involved in serious misconduct?

(a) *Was there serious misconduct pursuant to clause 6.3 of the employment agreement?*

[30] The basis for the dismissal of Ms Martin appears to firstly centre on the two allegations discussed at the meeting on 2nd September 2010 and specifically set out again in the dismissal letter of 14th September 2010. The allegations (paraphrased) are that Ms Martin:

⁸ Given that Ms Martin was dismissed before 1st April 2011, the changes introduced by the Employment Relations Amendment Act 2010 are not applicable.

- (a) Failed to notify EMWL in “a timely manner” of the possible conflict of interest relating to her mother establishing a business that would be in competition with that of her employer; and
- (b) That Ms Martin deliberately planned her timing of the notification of the possible conflict, relevant to her mother’s business, in order to “suit” her own personal needs, and those of her mother, “without due regard” for her employer.

[31] In support of these allegations, EMWL substantially relies upon clause 6.3 of the employment agreement:

Conflict of Interest

At all times Easy Mind Waikato Limited interest must come first and employees must declare in writing to the appropriate manager, any situations in which the employee’s own interest, financial or otherwise could come into conflict with the interests of Easy Mind Waikato Limited.

The question that then arises is: How applicable is this clause to the circumstances of Ms Martin? The declaration of a potential conflict of interest is to be “in writing” but EMWL have not taken any issue about this. The operative words of the clause refer to “any situations” in which the employee’s “own interest, financial or other otherwise” come into conflict with those of EMWL. It has been argued for Ms Martin that she did not have any active or participatory interest in her mother’s business. In a literal sense, this appears to be true, but it seems to me that it is open to the employer to interpret the clause broadly, in that Ms Martin’s “own interest” would include her close relationship with her mother and the significant fact that her mother’s business is competing with that of EMWL, her employer. Furthermore, Ms Martin obviously believed that a conflict of interest may exist, hence she notified Ms Lovegrove accordingly.

[32] The issue then becomes the timeliness of the notification. EMWL says that Ms Martin knew well before 16th June 2010 (the date of notification), that her mother intended to establish a competing business. In support of this allegation, EMWL relies on the email dated 30th April 2010 from Ms Martin to her sister, whereby she thanks her sister for forwarding information about “that job.” Ms Martin says that while there had been some indication from her mother, that setting up a business was a possibility, it was not until mid-June 2010, that it became definite and this is when she notified Ms Lovegrove. However, EMWL says that given that the preparation work

involved in such a business, including registration with the Ministry of Education and the development of documents and manuals, Ms Martin's mother would have been planning for her business well before mid-June 2010. Ms Reitema provided the Authority with the application that she made to the Ministry of Education. I note that as part of this application, she signed (a JP witnessed) statutory declaration on 31st May 2010. It seems that the application would have been forwarded to the Ministry of Education on, or shortly after, that date. The *CERTIFICATE OF LICENCE* to provide a home-based early childhood education and care service was issued by the Ministry of Education on 1st July 2010. I also note that Ms Rietema's company, Family Matters Homebased Childcare, was incorporated on 8th June 2010.

[33] I accept that it is more probable than not that it would have been necessary for Ms Rietema to undertake substantial preparation for setting up her business prior to 16th June 2010, and most certainly prior to 31st May 2010. I also accept that the content of the email dated 30th April 2010, suggests that it is more probable than not that Ms Martin had significant knowledge of her mother's confirmed plans to set up a business that would be in competition with a business operated by her employer. I therefore conclude that Ms Martin could have and should have, notified her employer considerably sooner than she did. I do not accept that Ms Rietema's plans to set up a business were uncertain until mid-June 2010, as is suggested by Ms Martin and Ms Rietema. Rather, I conclude that both women were fully aware, as of at least 30th April 2010, that the business was a definite possibility.

[34] That then brings us to the associated allegation from EMWL: that Ms Martin deliberately planned the timing of the notification of the possible conflict, in order to give her mother (and/or herself) some possible advantage. In regard to this latter point, the argument for EMWL is that Ms Martin used the time from 30th April to 16th June 2010, to access confidential information, as evidenced by the emails (with attachments), dated 10th and 13th May 2010. Rather oddly, the actual content of the attachments is not available, but it appears that they may have contained information relating to a list of children under the care of KAHL (*Child List pdf*) and a list of KAHL educators (*Educator List pdf*). I accept that the "subject" information for these attachments can be seen as circumstantial evidence, entitling EMWL to become suspicious of the actions and motives of Ms Martin, particularly given that Ms Rietema subsequently made contact with educators engaged by EMWL. However,

given that it cannot be shown what specific information Ms Martin had access to, and/or whether any useful information was given to assist her mother with her business, I do not accept that there is (or was) sufficient evidence for EMWL to conclude that Ms Martin had been involved in serious misconduct pursuant to clause 6.3 of the employment agreement.

(b) *Was there misconduct pursuant to clause 6.1 of the employment agreement?*

[35] The third allegation made against Ms Martin is that she was in breach of clause 6.1 of her employment agreement. This clause refers to: **Access to Confidential Information:**

As part of normal duties a [sic] employee may obtain or have access to confidential information concerning Easy Mind Waikato Limited and/or its clients. Under no circumstances is use to be made of this information except for the purposes directly related to the business objectives of Easy Mind Waikato Limited, while in Easy Mind Waikato Limited employment or after employment has ceased. All information about Easy Mind Waikato Limited, its operations, the way it provides its goods and services, employee's information, confidential financial transactions and the like, including information contained in emails, is to be properly secured against unauthorised access. Any breach of confidentiality is likely to be regarded as serious misconduct warranting summary dismissal.

Reference is again made by EMWL to the emails dated 10th May and 13th May 2010 and a further email dated 2nd July 2010. The latter email has not been produced to the Authority; hence its relevance is unknown. But in any event, it is the two emails with attachments (as already identified) that appear to be of significance. It is alleged that Ms Martin breached clause 6.1 of the employment agreement because she accessed EMWL and KAHL confidential information, which she "sent to and from" her personal email address. It is alleged that because Ms Martin emailed the information in question to her personal computer, the information was no longer "properly secured" and the information became more "portable."

[36] But having heard Ms Martin's explanation about accessing the information in the manner that she did, EMWL seem to have accepted that what she had to say was "plausible." Nonetheless, EMWL still says that Ms Martin "failed to secure the information" in accordance with clause 6.1 of the employment agreement and that the alleged failure constitutes misconduct. But it seems to me that this argument has a fatal flaw. This is because the relevant words of clause 6.1 state that confidential information "is to be **properly secured** against **unauthorised access**." (Emphasis

added). There is nothing to suggest that the access by Ms Martin was unauthorised. Neither is there any evidence that the information in question was not properly secured. While I can understand the suspicions of EMWL, as to the information that Ms Martin had accessed and why, I do not accept that EMWL had sufficient evidence to show that she breached any of the provisions of clause 6.1 of the employment agreement. It follows that the allegation of misconduct is not proven.

(c) *The other actions of Ms Martin alleged to amount to misconduct*

[37] A number of other matters were taken into account when EMWL came to the conclusion that it was appropriate to dismiss Ms Martin. In summary, these are:

- (a) That Ms Martin used her work computer for personal use. In particular, working on her CV (and possibly the CV of a work colleague) during working hours; effectively for the purpose of obtaining employment elsewhere;
- (b) That Ms Martin misrepresented her employment status with EMWL on her CV in that she portrayed that she was Assistant Accountant, rather than her actual role of Accounts Manager. Also, at the time that Ms Martin modified her CV, she represented that she reported to Ms [V], when in fact, Ms V was no longer employed by EMWL. It is alleged that these misrepresentations demonstrate dishonest behaviour by Ms Martin with a consequent erosion of the trust that is essential to the employment relationship;
- (c) That during working hours, Ms Martin was undertaking activities not related to her employment. Particular reference is made to an email exchange between Ms Martin and Ms [V] on 18th August 2010, where both of them were, purportedly, “trying to look busy.”
- (d) That there was a performance issue in regard to Ms Martin allowing 6 weeks (+) EMWL debtors to accumulate to the sum of \$21,800.18. It is also alleged that Ms Martin had misled Ms Lovegrove by informing her that the debtors “were fine.”

[38] In summary, EMWL concluded that the combination of the above four matters, the possible deletion of the login details and the two allegations pertaining to the matter of a conflict of interest, had: [“...impaired [EMWL’s] trust and faith in the employment relationship. And further: “As such they also constitute misconduct.”

Would a fair and reasonable employer have dismissed Ms Martin given all the circumstances?

[39] In determining the question of whether the dismissal of Ms Martin is justifiable, the Authority is cognisant of the established (and often quoted) finding by the Court of Appeal in *Northern Distribution Union v BP Oil NZ Ltd.*⁹

For a discussion of the kind of conduct that will justify summary dismissal it is unnecessary to look any further than this Court's judgment in *BP Oil NZ Ltd v Northern Distribution Union* [1989] 3 NZLR 580. Definition is not possible, for it is always a matter of degree. **Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence and trust that is an essential of the employment relationship.** In the context of a personal grievance claim under the Labour Relations [Employment Relations] Act, questions of procedural and substantive fairness are also relevant. In the end, the question is essentially whether the decision to dismiss was one that a reasonable and fair employer would have taken in the circumstances. (My emphasis)

Determination

[40] I recognise that much of the evidence relied upon by EMWL in regard to its decision to dismiss Ms Martin is circumstantial in nature; hence this is a factor that must be weighed accordingly. The parties have not addressed the Authority about this factor in their submissions, but it seems to me that the finding in *Chief Executive of the Ministry of Maori Development v Travers-Jones*¹⁰ is particularly relevant to this matter. It was held that:

In reaching conclusions, an employer is entitled to draw reasonable inferences from surrounding or circumstantial facts and it is not a valid objection that such inferences may not have been the subject of direct proof.

And in *Boyd v BHP New Zealand Steel Ltd*¹¹, Palmer J. cited with approval the “well known observations” of Chief Barron Pollock in *R v Exall* (1886) 176 ER 850, 853:

“It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of.”

[41] Having weighed the overall evidence and the respective positions of both parties, I find that a fair and reasonable employer faced with the totality of the circumstantial evidence surrounding the actions of Ms Martin, would have dismissed

⁹ [1992] 3 ERNZ 483,487

¹⁰ [2003] 1 ERNZ 174 at 184

¹¹ Unreported, 20 December 2001, AC 87/01

her, on the grounds that her overall conduct deeply impaired or was destructive of the basic trust and confidence that is an essential of the employment relationship. There is one specific element of the overall evidence that I found to be of particular relevance in upholding the dismissal of Ms Martin. This is that on the day that she was suspended from her employment, Ms Martin took an item from her computer and placed it in her bag. Ms Lovegrove believed that the item was a memory stick and she asked Ms Martin to allow it to be checked as to whether it contained company information. Ms Martin refused to surrender the item but gave no explanation as to why. This refusal added to the suspicions of EMWL that Ms Martin was acting inappropriately. When questioned about this at the investigation meeting, Ms Martin told the Authority that the item in question was not a memory stick but an infrared wireless device. The submissions for Ms Martin inform that the item taken was for a remote mouse. The relevance of this matter is that if this was so: why didn't Ms Martin simply show the item to Ms Lovegrove and offer an explanation when requested to do so? I repeat that I did not find the evidence of Ms Martin about this to be credible, and when placed in the context of the other circumstances pertaining to her behaviour, I conclude that the dismissal was justifiable.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can, taking into account the daily tariff approach of the Authority and that the investigation meeting was completed within one day. In the event a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority