IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 488
5335624

	BETWEEN	PAPATAIA TOLEAFOA Applicant
	AND	VODAFONE NEW ZEALAND LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Paul Blair for the Applicant Susan Hornsby-Geluk for Respondent
Investigation Meeting:	9 August 2011
Determination:	11 November 2011

DETERMINATION OF THE AUTHORITY

A. Vodafone New Zealand Limited's decision to dismiss Papataia Toleafoa was justified. Ms Toleafoa's personal grievance application is declined.

B. Costs are reserved.

Employment relationship problem

[1] Vodafone New Zealand Limited (VNZL) dismissed Papataia Toleafoa from her job as a call centre customer service representative on 10 February 2011. VNZL contact centre manager Sulata Foai-amiatu made the decision after a disciplinary inquiry in which she concluded Ms Toleafoa breached company policies and committed four acts of serious misconduct and two of misconduct. The inquiry began because Ms Toleafoa sent a group email to co-workers about union membership after being told not to use the email lists in that way and was found making a personal call on her mobile phone when she should have been dealing with a business call on her

desk phone.

[2] The crux of Ms Toleafoa's case is that she was subjected to special scrutiny because she had encouraged other workers to join the Unite union and had challenged a manager's comments about whether or not some improvements to staff conditions resulted from union negotiations. That scrutiny included checking emails sent by her, while at work and from her work email address, to friends and family. Ms Toleafoa regarded those emails as purely personal. They contained comments and language Ms Toleafoa had not intended her managers to see and included some business information VNZL said should not have gone outside the company.

[3] Vodafone identified Ms Toleafoa's acts of serious misconduct to be:

(i) Ignoring or muting a business call on her desk phone while taking a personal call on her mobile phone.

(ii) Failing to follow instructions not to send emails to group distribution lists without prior permission.

(iii) Sending an email to "stir".

(iv) Sending confidential business information to external email addresses.

[4] It also identified two acts of misconduct by Ms Toleafoa:

(i) Making derogatory references to Vodafone and her managers in emails.

(ii) Providing false information about the use of sick leave.

Issues and investigation

[5] The Authority has investigated the issue of whether VNZL's decision to dismiss Ms Toleafoa, and how that decision was made, was what a fair and reasonable employer would have done in all the circumstances – that is whether VNZL met the applicable statutory test of justification under s103A of the Employment Relations Act 2000 (the Act).

[6] Ms Toleafoa, Ms Foai-amiatu, VNZL contact centre manager Jolene Paul and VNZL human resources consultant Emily Kidd each lodged written witness

statements for the Authority's investigation. At the investigation meeting each one, under oath or affirmation, confirmed their written statement and answered questions from the Authority member and the parties' representatives. The representatives also provided oral closing submissions, speaking to written synopses.

[7] In preparing this determination I considered the oral and written evidence of the witnesses, relevant documents provided by the parties (including emails which were the subject of the allegations made), and the parties' submissions. As permitted by s174 of Act this determination does not record all the evidence and submissions received but states findings of fact and law, and expresses conclusions on matters for determination.

How the problem arose

[8] On 18 January 2011 Ms Toleafoa sent three emails to group distribution lists in her call centre. Each email went to around 200 employees. The first at 11.52am had the subject heading: "Not in the Union but want to join?? Or would you like to know more before committing?" The text referred to upcoming salary reviews and encouraged recipients to contact Ms Toleafoa for membership forms or email her for more information.

[9] The second email, at 1.30pm, was in response to a query from a worker asking about the benefits of being in the union. Ms Toleafoa's reply had some general comments about union membership and its costs. Her third email, at 2.38pm, referred to improved mobile phone packages and broadband available to Vodafone employees and the provision of a security guard escort for staff finishing work late. She said those changes were achieved by the union in the last 12 months.

[10] Two days later Ms Foai-amiatu sent an email to the same distribution lists, with the same subject heading, as Ms Toleafoa's three emails. It stated Vodafone wanted to "clarify" that the changed conditions referred to by Ms Toleafoa were discussed with the union but did not occur as a result of negotiation with the union.

[11] Before sending that email Ms Foai-amiatu had spoken with Ms Toleafoa and cautioned her that the three emails sent on 18 January were in breach of company

policy about sending emails for non-business purposes. Ms Toleafoa said she would not do so again.

[12] However at work on the next morning, on 21 January, Ms Toleafoa responded to Ms Foai-amiatu's 'clarification' email with a further email sent to the same distribution lists. She apologised if her information in previous emails was "not 100% accurate". She then included an extract from an earlier email sent by a VNZL human resources advisor to a union representative. That extract referred to VNZL's budget for salary increases for the 2010/11 financial year being exhausted and a proposal for consultation with the union representative as part of salary reviews to be finalised in May 2011. Ms Toleafoa wrote that this showed the union could represent staff in salary negotiations. Ms Toleafoa then wrote: "This will be my last email regarding emailing about the UNION, as I've been advised that it's not permitted. Therefore, any UNION info will be put out via flyers, and in meetings".

[13] Ms Paul saw Ms Toleafoa's email that day and knew Ms Foai-amiatu had told Ms Toleafoa not to use group email lists in that way. During the afternoon of 21 January Ms Paul decided to take Ms Toleafoa off the phones and talk with her about why she had sent her latest email to group email lists despite being told not to do so.

[14] Ms Paul walked to Ms Toleafoa's workstation and found she was using her mobile to make a personal call. While standing behind her and waiting for the call to finish Ms Paul saw a work call come up on Ms Toleafoa's screen but Ms Toleafoa did not answer it. The call centre's telephone system automatically put business calls through to representatives' screens and Ms Paul assumed Ms Toleafoa must have muted the business call as the caller would otherwise have heard her talking on her mobile phone.

[15] After Ms Toleafoa finished her personal call Ms Paul took her to an office and spoke about that call and the latest group email. Both matters were referred to Ms Foai-amiatu for further action as Ms Paul had to attend to other business matters. Ms Toleafoa was formally advised on 26 January of a disciplinary inquiry about two allegations – firstly, taking a personal mobile call while on duty and not answering a business call and, secondly, failing to follow instructions not to send group emails without prior approval.

[16] Ms Toleafoa and her union representative attended the disciplinary meeting with Ms Foai-amiatu and Ms Kidd on 1 February. She explained she had received a call on her mobile from her husband about arrangements for a family event on the weekend. She could not recall missing or muting a business call while she was speaking with him. She said she knew she should not have been on a personal call and took full responsibility for the incident. On the allegation about sending emails to group lists Ms Toleafoa agreed she had been asked not to do that but felt she needed to clarify some aspects referred to in Ms Foai-amiatu's email and disputed whether she had intentionally failed to follow an instruction. Her representative said union delegates were allowed to send information about the union through VNZL's email system and described the issue as being "covered by legal access" for the union in the workplace.

[17] The meeting was adjourned in order for Ms Foai-amiatu and Ms Kidd to make further inquiries. These included Ms Kidd arranging to check other emails Ms Toleafoa sent from her work address. This check identified a number of other emails of concern to VNZL and resulted in additional allegations being included in the disciplinary inquiry.

[18] In an email to a friend on 25 January Ms Toleafoa said: "I'm off home, coz I've told my pule that I'm going home coz I'm stressed. Aoooo, fia ki'o more like it". The word pule meant boss and the phrase "fia ki'o" was translated by VNZL (in a letter to Ms Toleafoa on 2 February) as meaning "going for a shit".

[19] This friend's email address identified her as working at a major insurance company. In other emails sent to her between 21 and 25 January Ms Toleafoa included the following comments (original spelling and punctuation):

- "I'm jus stirring cuz. I shldn't but it's been kinda quiet at work lol."
- "These ufa's are just being pukio's coz I spoke out."
- "These kefe's are pushing me out bwahahaha."

[20] The words 'ufa' and 'kefe' translated as terms of abuse similar to 'dickhead' or 'fuckwit'.

[21] On 21 January Ms Toleafoa also emailed two cousins and her sister about getting into trouble at work and asked their advice. Those emails included the chain of her earlier emails to VNZL staff that contained the extract from the human resources advisor's email to the union representative referring to salary negotiations.

[22] These various emails were the foundation for VNZL's additional allegations that Ms Toleafoa had not taken sick leave for genuine reasons, had been derogatory about her managers and had revealed internal business information (about salary negotiations) to outsiders.

[23] While at work on 4 February Ms Toleafoa sent a further email to two group lists of employees (covering around 15 people). Her email commented about a company email requesting volunteers for a VNZL project. It said: "Mayb a payrise wld b better? Ooopos, better be careful, they'l pull my email and take it the wrong way" (original spelling).

[24] When the disciplinary meeting reconvened on 10 February, the 4 February email was raised as a further instance of disobeying instructions not to send emails to group lists.

[25] Ms Toleafoa protested that the additional emails were personal. Her union representatives described them as private conversations that were "throw away comments" and company policy allowed employees to send personal emails. Ms Toleafoa said her comment about using sick leave was sarcastic. After hearing from the union representative and adjourning the meeting, Ms Foai-amiatu and Ms Kidd returned and advised that they considered Ms Toleafoa's employment should be terminated due to a breakdown of trust and confidence. They listened to submissions on that proposal but then confirmed their decision to instantly dismiss Ms Toleafoa.

Were the serious misconduct findings justified?

[26] Ms Toleafoa's personal grievance application does not rely on any significant procedural concerns about how VNZL raised and investigated its allegations. She had adequate notice, representation, provision of information and opportunity to explain and comment before decisions were made. What is at issue is the employer's

justification for its findings of serious misconduct and opting to dismiss on the basis of those findings.

Failing to follow instructions

[27] Ms Toleafoa argued her 25 January email was technically replying to – rather than sending – an email, so she did not breach the instructions given to her. She questioned the reasonableness of VNZL's actions in seeking to apply its email policy to messages about union matters. She also suggested there was a disparity between how her emails were treated compared with VNZL's tolerance of emails other employees sent to group lists about social or fundraising events.

[28] Ms Toleafoa's argument about her group list email of 21 January merely being a reply is unconvincing. There was no ambiguity about the instruction Ms Foai-amiatu gave her on 20 January. That was clear from the 21 January email Ms Toleafoa sent to three relations – and which she regarded as a private communication – in which she described Ms Foai-amiatu's instruction and recorded that she had said "fine, won't happen again". However she recanted from that position because she disagreed with the content of Ms Foai-amiatu's 20 January email. There would be some strength to an argument for Ms Toleafoa that she was provoked into a rash and hurried reaction if what she had said in other emails (which she thought were private) did not cast some real doubt on her motivation. In one she said she was "just stirring" and in another she indicated a recklessness as to the consequences:

> *"well, I have a problem that if something needs to be said, then I say it LMFAO. Bad Bad Bad but I can't help myself lol … I always have to voice it. If I get fired, then it's time to move on anyways, coz it'l b my 7th year this year at this job lol.*

[29] She also took some time in preparing her response, including talking to a former union delegate at her workplace, before sending her 21 January group list email.

[30] In that context I accept VNZL's submission that Ms Toleafoa's actions were a deliberate and intentional flouting of the specific instruction given to her by her manager. It was not accidental or one off – she repeated the conduct by her 4 February email, an email not 'provoked' by Ms Foai-amiatu's 20 January email.

After the 2 February disciplinary meeting Ms Toleafoa could have been in no doubt her 4 February email breached a specific instruction.

[31] However Ms Toleafoa might have been justified in ignoring the instruction if it were unlawful or unreasonable.[1] She argued it was because it suppressed legitimate union activity and treated her conduct differently from what VNZL permitted other employees to do.

[32] The collective employment agreement between VNZL and Unite included a term that union delegates would have "access to use technology such as email" as a means of making information available to members. However Ms Toleafoa was not a delegate of the union. Neither did Ms Foai-amiatu's instruction forbid union activity as she had mentioned being able to use flyers and a work notice board to promote union membership.

[33] VNZL's email policy, which applied to Ms Toleafoa by virtue of another term of the collective agreement, warned against overloading the system with unnecessary traffic and forbade inappropriate use of email. Inappropriate use was defined as including "emailing large number of recipients for non-business purposes e.g. spamming". There is a plausible argument that emails about union membership, working conditions and salary reviews – as referred to in Ms Toleafoa's emails – are for a business purpose and are within the scope of the policy as such matters may relate directly to the operation and interests of the business. However the collective agreement makes provision for such communication to be legitimately conducted by union delegates rather than giving an open licence for enthusiastic individual members to send as many emails as they liked to as many people as they wished. Ms Toleafoa's three emails of 18 January went to around 200 people on the group lists she selected, a total of around 600 messages. I accept VNZL could legitimately instruct Ms Toleafoa to cease such traffic without impinging on the rights of its employees to communicate on union matters, given the other provisions it had made for that communication to occur. Ms Kidd said VNZL's human resources department also had an arrangement with the union's organiser to distribute material to employees when requested. And, provided group email lists were not used without prior permission, VNZL allowed personal use of email during breaks so individual

[1] *NZ Food Processing IUOW v Unilever* [1990] 1 NZILR 35, 44.

employees could exchange emails about union matters during that time.

[34] I do not accept Ms Toleafoa's other argument that she was unfairly treated in comparison with employees who were allowed to send group emails for social and fundraising purposes. All witnesses confirmed VNZL sometimes allowed call centre employees to sell meals – referred to as plates or suppers – at work as fundraisers for social and family activities. Those employees were permitted to send group list emails soliciting orders for plates. However the evidence, albeit sketchy, seemed to be that those employees got the centre manager's prior permission to send such emails – something Ms Toleafoa did not do despite being told it was needed.

Ignoring business call and taking personal call

[35] Ms Toleafoa agreed from the outset that she should not have taken a personal call and missed a company call on 21 January. In her witness statement she said she accepted it was a breach of policy and was not acceptable.

[36] From her evidence to the Authority it was established that her husband phoned her at work and she then phoned him back to discuss arrangements for getting chairs for a weekend family event. There was no satisfactory explanation as to why she could not have waited until a scheduled break to call him or let her supervisor know that she needed to be taken off the phones to attend briefly to an urgent matter.

[37] Attention to business calls is the very purpose of the VNZL call centre in which Ms Toleafoa worked. There is no question that not carrying out her duties could constitute serious misconduct. She admitted the conduct and VNZL's finding was justified in light of that admission.

Emails to outsiders

[38] Two concerns arose from the emails Ms Toleafoa sent to relations and friends outside VNZL between 21 and 25 January – firstly, that they revealed confidential business information of VNZL and, secondly, they contained derogatory comments about her managers.

[39] I consider VNZL was not justified in its finding of serious misconduct about Ms Toleafoa's inclusion of an extract from a human resource advisor's email about salary reviews, that she 'cut and paste' into her 21 January email to other employees, which was then part of the emails she forwarded to her relations. While it may technically have breached a confidentiality term in the collective agreement, all that information really said was that VNZL would consult with union representatives about a salary review in May and planned no increases until then. It was hardly surprising or a real commercial secret of advantage to anyone else.

[40] However VNZL was justified in finding the language Ms Toleafoa used in some of her emails was misconduct. Her defence that those emails were private fails because it is inconsistent with the terms of VNZL's policy on using email.

[41] The policy applied to Ms Toleafoa, as she knew or should have known. It stated all messages generated on company systems were the property of Vodafone. While personal use was allowed, such use was restricted to outside work time and the policy noted VNZL had the right to monitor all employee email passing through its system. Inappropriate use was forbidden and expressly included coarse language. Derogatory or abusive language about managers, referring to them as "ufas" and "kefes", was coarse language.

[42] Further derogatory language was found in an email Ms Toleafoa sent three other VNZL employees while at work on 20 January. The message read: "Do u guys reckon that Jolene talks like a cow chewing on grass??" It referred to Ms Paul. Ms Toleafoa had no explanation for it, except to say it was "joking around".

[43] Another factor weighs against Ms Toleafoa's argument that the emails she sent from her work address to relations or friends were private. In at least three cases those emails were sent to those people at their own work email addresses – two worked for a large logistics company and one worked for a major insurance firm. Both of those businesses would likely have their own policies allowing monitoring of emails sent or received from their work addresses so Ms Toleafoa was not necessarily communicating her views only to selected relations and friends in their private capacity, but potentially also to managers of those other businesses.

[44] Whatever Ms Toleafoa might choose to say about her managers in genuinely private situations, she took the risk of disciplinary action when she made derogatory comments about them during working hours and while using VNZL's own technology and resources. The language used by Ms Toleafoa in those emails justified VNZL's finding of misconduct.

False information about sick leave

[45] VNZL decided Ms Toleafoa had no genuine reason for taking sick leave on six days between 24 and 31 January because of her "fia ki'o" comment in an email on 25 January. On each occasion the reason for the leave was given as stress arising from the disciplinary process.

[46] I do not accept that a fair and reasonable employer would have come to the conclusion that taking the leave was misconduct in those circumstances. Ms Foai-amiatu's evidence was that she had offered Ms Toleafoa the opportunity to take the leave if she needed it and this was part of her standard procedure in a disciplinary inquiry. No medical certificates or assessments were suggested or required. Ms Toleafoa's "fia ki'o" comment may have been bravado or only applied to the situation on that particular day and not reflected her genuine distress on other days. Having appropriately offered the leave, I do not accept VNZL had a sufficient basis for saying otherwise without having made further inquiry at the time or having required some independent medical assessment, as it would have been entitled to do.

[47] VNZL submitted that its decision to dismiss Ms Toleafoa was justified because a chain of events – comprising ill-judged actions by her – demonstrated she had no respect for her managers or her employer's rules generally. While I have disagreed that a fair and reasonable employer would have reached the same conclusions as VNZL did regarding the misuse of business information or giving false reasons for taking sick leave, I find a fair and reasonable employer would have reached the same decision as VNZL that ignoring instructions and making personal calls were, in all the circumstances at the time, serious misconduct. In turn, those incidents of serious misconduct justified VNZL's conclusion of a loss of trust and confidence, even though its assessment of all incidents has not been accepted in the Authority's investigation.

Determination

[48] For the reasons given I find VNZL's decision to dismiss Ms Toleafoa was justified. Accordingly her personal grievance application is declined. The issue of remedies need not be addressed.

[49] I note that, as a result of the conclusions reached in this determination, I have not had to consider some evidence about a 'fake' Facebook profile of Ms Foai-amiatu created after Ms Toleafoa's dismissal. That evidence, and the question of whether Ms Toleafoa was in any way responsible for its contents, would only have been relevant if contributory conduct had needed to be addressed in relation to remedies.

Costs

[50] Costs are reserved. The parties are encouraged to agree any matter of costs between themselves. If they are not able to do so and an Authority determination of costs is sought, VNZL may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Ms Toleafoa would then have 14 days from the date of serve to lodge any reply memorandum. No application for costs will be considered outside this timetable without prior leave.

Robin Arthur
Member of the Employment Relations Authority