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Hohaia v New Zealand Post Limited AA362/10 (Auckland) [2010] NZERA 670 (17 August 2010)

Last Updated: 9 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 362/10 5313063

BETWEEN LYNDON HOHAIA

Applicant

AND NEW ZEALAND POST

LIMITED

Respondent

Member of Authority: Alastair Dumbleton

Representatives: Max Whitehead, advocate for Applicant

Naomi Jones, advocate for Respondent

Investigation Meeting: 13 August 2010

Determination: 17 August 2010

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

[1] Before the Authority is an application brought under [s 127](#) of the [Employment Relations Act 2000](#) for interim reinstatement.

[2] After it was lodged on 22 July 2010, the parties attended mediation but were not able to resolve the claim of the applicant Mr Lyndon Hohaia that he had been unjustifiably dismissed by the respondent New Zealand Post Ltd (Post).

[3] As required by [s 127](#) of the Act, an undertaking has been given by Mr Hohaia to abide by any order that the Authority may make in respect of damages in determining his employment relationship problem.

[4] Mr Hohaia seeks an order requiring Post to reinstate him pending the full investigation and determination of his claim of unjustified dismissal. The investigation meeting for that purpose will take place in under three weeks time, on 3 September 2010. The substantive remedies claimed by Mr Hohaia are permanent reinstatement as a Postie, payment of salary lost since his dismissal and compensation of \$7,000 for loss of dignity and injury to feelings.

[5] In considering interim reinstatement applications the Authority is required to apply the law relating to interim injunctions and also to have regard to the object of the [Employment Relations Act](#). The relevant law requires that four recognised tests or questions are to be applied to the circumstances of each case. In relation to the object of the Act, the Authority must have regard to the principle that productive employment relationships are founded on good faith behaviour and also on mutual trust and confidence.

[6] A further relevant object of the Act, at s 101C, is the recognition of reinstatement as a remedy for any personal grievance. It is the primary remedy under [s 125](#).

[7] The evidence before the Authority for the purpose of determining this application has been presented as usual in affidavit form by the parties' witnesses. They included Mr Hohaia and Mr Gwion Thornley, the Delivery Leader at the Rosedale Delivery Branch where Mr Hohaia had been employed as a Postie. Mr Thornley was the decision maker in the disciplinary process that culminated in Mr Hohaia's dismissal for serious misconduct.

[8] As the affidavit evidence must necessarily remain untested until the substantive investigation of the personal grievance claim, any findings of fact by the Authority in this determination are provisional only and may change later once the claims have been fully investigated and all witnesses, including Mr Hohaia and Mr Thornley, have been examined about their evidence.

[9] The standard tests or questions the Authority must consider in determining this application are:

- Is there an arguable case?
 - Where does the balance of convenience lie?
 - Are other adequate remedies available?
- Where does the overall justice of the case lie?

The dismissal

[10] The decision by Post to dismiss Mr Hohaia was confirmed to him by letter dated 15 June 2010. At the end of a meeting held earlier that day Mr Hohaia and a representative from his union were told of the decision.

[11] The dismissal letter referred to the 15 June meeting as having taken place "in relation to your recent behaviour, where you operated a publicly accessible Facebook blog site for a period of over 6 months..." About this Mr Thornley in his letter said Mr Hohaia had:

1. ... *brought New Zealand Post into disrepute and seriously damaged the reputation of our business.*
2. ... *undertook and facilitated comments on your Facebook site that denigrated and humiliated a work colleague.*
3. ... *undermined the leadership and effective operation of the Rosedale Delivery Branch.*

[12] Mr Thornley also said that at an earlier meeting on Friday 11 June the above allegations and information in support had been discussed with Mr Hohaia who had "accepted and agreed with all three allegations."

[13] Mr Thornley advised that the explanation offered by Mr Hohaia for his behaviour had been found to be totally unacceptable. He ended his 15 June letter by saying:

The conclusion reached was that serious misconduct had in fact occurred and the decision was made to dismiss you from your employment with two weeks notice, which you are not required to work. Your effective last day of work will therefore be 29 June 2010.

The disciplinary enquiry

[14] The disciplinary enquiry leading to the dismissal was commenced in the following circumstances. Mr Thornley had requested Mr Hohaia's attendance at an investigation meeting to be held on 1 June 2010. He said the request was made because "I have become aware that you may be facilitating a Facebook site, namely 'PostieLad' which has public access." [15] Mr Thornley advised Mr Hohaia of the possibility that as a result of the investigation meeting formal disciplinary action might be taken against him. He was strongly encouraged to bring a representative with him to the meeting.

[16] At the 1 June meeting Mr Hohaia admitted that he had set-up the 'PostieLad' and 'PostieLand' Facebook sites. When asked if they were accessible to the public, and when referred to the Facebook privacy statement "All content is public," Mr Hohaia said "I may have been erroneous on my part. I thought you could only be invited. Security things are not my forte."

[17] Mr Hohaia was unsure but thought he had created the sites about a year earlier. He said the intention had been to give a finite number of people 'a laugh.' When reminded that the site was a public one he said "as I discovered this morning."

[18] Later in the meeting Mr Hohaia said 'PostieLad' and 'PostieLand' were two separate things and he had thought only 'Friends' could read one of them. He said that there were two different sites, one for fans and the other for Friends. According to the notes taken of the meeting, when asked he agreed that his actions reflected badly on Post as a business. He was again asked to confirm that one of the sites was open to the public and said "I don't know. Maybe we need to take up with Facebook."

[19] In discussing some of the material on the sites contributed by friends and others Mr Hohaia said "I can't deny customers would be upset." He expressed regret and remorse and described himself as having acted stupidly. He said he was concerned about Facebook security.

[20] Mr Thornley told Mr Hohaia the employer's concern was with his Facebook site comments not with his performance

delivering mail as a Postie. Mr Thornley repeated that it was obvious the internet site was public and that once someone makes a comment it is tabled.

[21] Following the meeting of 1 June a request was made for Mr Hohaia to attend a formal disciplinary meeting on 8 June. Before that meeting Mr Hohaia was advised in considerable detail of the concerns that would be presented to him regarding his behaviour of establishing and operating his Facebook site. A number of specific entries in the Facebook were quoted in this regard. The content of many of them, if they were accessible to the public, seem capable of bringing Post into disrepute and/or seriously damaging the reputation of its business. Also some of the comments denigrated a work colleague, some were sexual in nature and others undermined the leadership and effective operation of the Rosedale Delivery Branch.

[22] Mr Hohaia was referred to specific entries in relation to each of the allegations. He was also advised that Post regarded the various entries referred to as unacceptable and in breach of provisions of the employment agreement as set out under the heading "New Zealand Post's Expectations of its People," to be found at clause 28 of Section A. Those expectations include "being honest and professional in dealings with the public and with each other" and "being customer focused, and using initiative."

[23] The disciplinary meeting was eventually held on 11 June 2010. Mr Hohaia advised that the Postie blog site PostieLand had been started by him in March 2010 and that he had had a personal profile for two years in relation to which there had been blogging since December 2009. According to the meeting notes, when he was asked by Mr Thornley whether he acknowledged the site was publicly accessible during this time, Mr Hohaia replied "I acknowledge PostieLand had public accessibility - yes." He also said it was a social networking site and that without being a Friend Mr Thornley had accessed it, but he considered it was a private site.

[24] Mr Hohaia agreed that the site clearly identified him as the holder of the Facebook profile and he agreed that the blog clearly identified him and others as working for Post as Posties.

[25] He was asked, according to the meeting notes, "do you agree that in establishing the site, you put no controls in place to prevent other people making publicly viewable statements on the site?" Mr Hohaia replied "I agree with that. Because of my stupidity I did not realise that." He referred to his behaviour as being unacceptable, idiotic and stupid. He also accepted that his behaviour had not been customer focused as a result of his own naivety and stupidity, and he described himself as having "stuffed up."

[26] Later on during the 11 June meeting Mr Hohaia's representative said on his behalf "Lyndon has made a serious error of judgment. Grave error. Putting inner thoughts into a public forum. He acknowledges it is serious. Do we need to go on?" [27] Mr Hohaia acknowledged he could see the damage that might be done by the type of statements that had been put in the public domain through his Facebook blog site. He had been referred in particular to comments on the site about misusing items of mail sent for delivery by a well known bulk mailing customer.

[28] There was also an exchange between Mr Thornley and Mr Hohaia about a highly unflattering description given in crude colloquial terms of Post's customers. Although Mr Hohaia had not been the author, it was put to him he had enabled the description to be stated publicly. He acknowledged the words had been written on his profile but said he had thought, naively, they were contained to a private site.

[29] Mr Hohaia also acknowledged that unflattering references made to the body shape or size of an individual were in fact references to a female work colleague of his.

[30] From the meeting notes it appears that Mr Thornley with Mr Hohaia went thoroughly and exhaustively through a considerable volume of entries on the Facebook and blog sites, under PostieLad and PostieLand, for his responses to the questions about the content of the material.

[31] On 15 June near the end of the disciplinary meeting Mr Thornley acknowledged to Mr Hohaia that he had been forthright in his responses and he acknowledged an offer Mr Hohaia had made to publicly apologise and close down the sites. Mr Thornley said:

Against that is the reality that you conducted the Facebook site for a period of over six months, which was publicly accessible, which conveyed your own comments which you accept were frequently inappropriate, enabled others to contribute towards negatively and ultimately got drawn to my attention my employees at Rosedale Delivery who were upset and offended by the comments.

You stated you didn't realise you were operating a public site and I cannot accept this as the opening page of the site clearly states this. Ultimately this is only one factor anyway as your comments demonstrated a totally unacceptable attitude towards the business and colleagues.

[32] Mr Thornley then advised of the conclusion he had reached that Mr Hohaia's behaviour amounted to serious misconduct and was conduct which could hardly have been more contrary to the expectations of Post of its 'People' under the collective

employment agreement. He advised that although the conduct could arguably justify a summary dismissal, Post was prepared to dismiss on notice to take account of the co-operation given by of Mr Hohaia during the investigation and disciplinary meetings.

[33] In considering the tests for interim reinstatement the Authority must have regard to the impact potentially contributory behaviour may have on the remedy of permanent reinstatement. In this regard Post's concerns about Mr Hohaia's conduct are that it affected other employees who were referred to in a disparaging and discriminatory way, and also customers of the business and members of the public served by Post.

[34] As submitted by Ms Jones for Post, as a matter of principle not only must Mr Hohaia establish an arguable case that he was unjustifiably dismissed, he must also establish that if successful with his grievance claim he will be reinstated, not just compensated monetarily. The Employment Court referred to this in *Cliff v. Air New Zealand Ltd*, CA 6A/05, Colgan J, 24 February 2005, at para.[12], as follows:

So whilst plaintiffs must establish an arguable case of personal grievance (unjustified dismissal), they must also establish an arguable case that they will thereafter be reinstated in employment and not simply compensated monetarily for their grievances.

[35] Submissions were made by Mr Whitehead and Ms Jones as to whether the tests for interim reinstatement are satisfied in this case.

Arguable case

[36] For several reasons I find Mr Hohaia has an arguable case. First, there is a question about whether his explanations and responses given to allegations and propositions put to him during the disciplinary meeting, were as recorded in the meeting notes and were as represented by Post in the letter of dismissal. Mr Hohaia disputes that he accepted and agreed, as stated in the dismissal letter, that his actions had damaged the employer's reputation or had denigrated and humiliated a work colleague.

[37] Further, there is a question as to whether Post had understood the extent to which the two different internet sites PostieLad and PostieLand had been accessible to the public, or had been intended by Mr Hohaia to be accessible.

[38] There is also a question as to whether the employer had condoned Mr Hohaia's conduct by not taking any action about his Facebook blog sites earlier, when Mr Hohaia's Team Leader had first learned of their existence.

[39] Another question raised is whether other Post employees who participated in the Postie Facebook blog by contributing objectionable material to it were treated more favourably than Mr Hohaia and, if there was disparity of treatment, whether there is any reasonable explanation for that. Although a number of employees were written to by Post and advised of their obligations under Section A of the collective employment agreement, no other action was taken against them in relation to the participation or involvement they were considered by Post to have had in 'PostieLad' or 'PostieLand.'

Balance of convenience

[40] I find the balance of convenience favours Post, as the full investigation of the personal grievance will take place in less than three weeks, although there will be a further period after that before a determination is issued.

[41] Mr Hohaia in his sworn affidavit evidence has given no details of his financial situation. I accept that he supports children, paying for their schooling and tuition as well. I accept that his wife is in paid employment and he has a financial interest in a business but that he also has a mortgage to pay. Other than that it is not possible to say accurately how precarious his financial position is, as he alleges it to be. I consider that an award of lost remuneration, including interest at an appropriate rate, is an adequate remedy for loss of income in the relatively short space of time before the Authority can determine whether he has a personal grievance and if so what remedies he is entitled to.

Overall justice

[42] At the very least the nature of his Facebook statements suggests on the part of Mr Hohaia a significant loss of respect, trust and confidence in his employer. The negative attitude towards Post demonstrated by him may seriously hinder his ability to undergo reinstatement sincerely and fully. I conclude that the overall justice of the case lies in leaving the situation as it was when Mr Hohaia was dismissed, until a full investigation takes place and a final determination is given. Reinstatement as an appropriate remedy will be better addressed after a full investigation, including an opportunity for Mr Hohaia to address the way he views his employer.

Determination

[43] For the above reasons the discretion the Authority has in relation to this interim reinstatement application is exercised by not making the order sought. The application is declined.

Costs

[44] Costs are reserved, pending the final determination of the personal grievance.

A Dumbleton

Member of the Employment Relations Authority

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