IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 447
5358286

	BETWEEN	ROGER JORDAN Applicant
	AND	INVITROGEN NEW ZEALAND LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Lorne Campbell for Applicant Michael Quigg for Respondent
Investigation Meeting:	13 October 2011
Determination:	17 October 2011

DETERMINATION OF THE AUTHORITY

A. The application by Roger Jordan for interim reinstatement pending the hearing of his personal grievance is granted on the condition given in this determination. He has provided the necessary undertaking as to damages.

B. Costs are reserved.

Employment Relationship Problem

[1] On 15 September 2011 Invitrogen New Zealand Limited dismissed Roger Jordan for serious misconduct. He raised a personal grievance alleging the dismissal was unjustified and sought interim reinstatement while awaiting the hearing and determination of his grievance application.

[2] INZL employs around 170 staff in New Zealand and Australia. Mr Jordan was its human resources manager. INZL is a subsidiary of an American corporation,

Life Technologies, and Mr Jordan reported to its human resources director, Debra Swiatlowski. She is based in California.

[3] On 12 September 2011 Ms Swiatlowski came to New Zealand for a work visit. Late the following morning Ms Swiatlowski told Mr Jordan she wanted to talk with him about whether the proper approval process was followed in converting a human resources administrator from fixed-term to permanent employment in June. He began talking about the matter immediately but Ms Swiatlowski stopped him and set a "formal meeting" time for 3pm that afternoon. She followed this discussion up with an email sent to Mr Jordan at 11.20am which said the meeting was:

> *… to discuss in detail the hiring of Charlotte Smith as an HR officer at the New Zealand site as a permanent employee without following current hiring process or getting approvals from me, your manager. The current facts indicate that you wilfully disregard* (sic) *company standard operating procedures for the hiring of a permanent employee. Not following company policies and procedures can result in the immediate termination of your employment, and I would like to discuss the facts in this hiring process with you prior to me coming to a final conclusion.*

[4] The phrase "formal meeting" referred to a step in the company's disciplinary code included in Mr Jordan's employment agreement. The code provided that step was to occur after an investigation of an employee suspected of breaching company rules.

[5] At 12.04 pm Mr Jordan emailed Ms Swiatlowski a written explanation of how Ms Smith was offered permanent employment before he got formal permission for the role. In this explanation he agreed he had not followed procedure and said he "offer[ed] no excuses for this". At 3pm he attended the formal meeting with Ms Swiatlowski. Mr Jordan told Ms Swiatlowski he thought he had her permission to recruit Ms Smith into the permanent role and the formal requisition form required by company policy would be approved. Ms Swiatlowski took Mr Jordan's comments as acknowledging he had misled her and she told him that she had lost trust in him. She adjourned the meeting in order to talk to her manager and legal advisor in the United States.

[6] On the following morning she met again with Mr Jordan and told him he was dismissed immediately but would be paid four weeks notice. Mr Jordan protested

about the procedure that was followed, whether his conduct was serious misconduct and whether he should receive a warning rather than dismissal as a consequence. He asked Ms Swiatlowski to consider letting him work through to the end of the year, by which time he would have turned 65 and could retire, or, alternatively, to make arrangements for him to go on medical leave so he could continue to receive part of his salary under a scheme paid for by the company. Ms Swiatlowski discussed those proposals with her managers in the United States and met again with Mr Jordan on the following day. She then confirmed his dismissal and made arrangements for him to leave INZL's premises.

[7] On 16 September Ms Swiatlowski wrote Mr Jordan a letter explaining the reason for his dismissal for serious misconduct in this way:

> *The decision is based on your wilful disregard for company policies and procedures with the permanent hiring of Charlotte Smith … As discussed you did not follow our policy and procedure for hiring an employee to the company, you did not have my approval as your manager as required nor did you have an approved requisition prior to making an offer which is required.*

[8] Mr Jordan's personal grievance application is scheduled to be investigated by the Authority in late February 2012. He sought interim reinstatement and provided the required undertaking as to damages.

Principles

[9] Under s127 of the Employment Relations Act 2000 (the Act) the Authority must apply the law relating to interim injunctions in determining whether to order interim reinstatement. In doing so the Authority is to have regard to the object of the Act which emphasises good faith in employment relationships.

[10] Good faith requires neither party to do anything likely to mislead or deceive the other and for the employer to provide an employee with access to information relevant to the continuation of the employment, and an opportunity to comment on it, before any decision is made to end that employment. In this particular case those obligations are reinforced by the terms of Mr Jordan's employment agreement which include an express recognition of good faith and, in its disciplinary code, an opportunity "to view any evidence".

[11] The interim reinstatement application is determined on affidavit evidence and the parties' submissions about the application of the relevant principles. Those principles consider whether there is an arguable case, where the balance of convenience lies, and the overall justice of the matter. While the evidence at the interim stage is untested and may not be complete, the Authority may make a commonsense assessment regarding unanswered and disputed assertions in the affidavits. If an order for interim reinstatement is made, it may be subject to any conditions the Authority thinks fit.

[12] In this case the Authority has affidavit evidence from Mr Jordan, Ms Swiatlowski, and Lucynda Zachman. Ms Zachman works for INZL's parent corporation in California and is described as a "senior human resources generalist". I also received oral and written submissions from the representatives about the facts, principles and whether any orders made should be subject to conditions. Documents lodged by the parties include copies of the company's modified hiring policy (referred to as Talent Acquisition) introduced from 20 May; emails between Mr Jordan, Ms Zachman and Mr Jordan about Ms Smith's position; a requisition form for Ms Smith's position generated on 19 June; employment agreements signed by Ms Smith on 10 May 2010, 26 May 2011, and 1 June 2011; and the employment agreement of Mr Jordan current at the time of his dismissal.

Arguable case

[13] Assuming Mr Jordan can prove all the facts he alleges, he must persuade the Authority he had some real or serious, but not necessarily certain, prospect of establishing both that he was unjustifiably dismissed and that, if such a finding were made in the substantive investigation and determination of his application, he would be reinstated rather than only compensated monetarily.

Arguably unjustified dismissal

[14] INZL submitted Mr Jordan's case was not arguable because its actions met the applicable test of justification at the time of his dismissal. That test, adapting the wording used in a Court of Appeal case to take account of its most recent statutory

exposition, was said to be whether a fair and reasonable employer could, in good faith, characterise Mr Jordan's conduct as deeply impairing of, or destructive of, the basic confidence or trust essential to the employment relationship.[1]

[15] In considering whether the employer acted fairly and reasonably in reaching its conclusion of serious misconduct the Court, in that same case, said:[2]

> *[W]hat must be evaluated is the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach.*

[16] I consider such an evaluation supports the arguability of Mr Jordan's case that his conduct was not serious misconduct because the evidence in support of INZL's conclusion was not as convincing in its nature as the alleged serious misconduct was grave.[3] This is for the following reasons:

(i) It was not clear that a hiring procedure – given the name Talent Acquisition by the company and introduced on 20 May – required Ms Smith's change of employment status to be approved under the steps set out in the policy because she was not a new employee. In an email to Ms Swiatlowski on 9 June, Ms Zachman said she "thought" a requisition form was needed for the conversion of Ms Smith's status which she refers to as a "backfill requisition". Ms Zachman deposed in her affidavit of 11 October that she spoke with Mr Jordan on 7 June and said he needed to open a requisition form for Ms Smith's role. However in an email exchange with Mr Jordan about whether there was a requisition form for Ms Smith's change of status, Ms Swiatlowski said on 14 June that she had spoken to Ms Zachman and "she mentioned that she hadn't need [sic] it".

(ii) Mr Jordan believed, on reasonable grounds, Ms Swiatlowski had approved or would approve the change of Ms Smith's employment status. He deposed Ms Smith had said "that's fine" about a proposal for a permanent role for Ms Smith and when she said to send through a requisition form, he understood it would be approved automatically. Ms Swiatlowski's affidavit did not comment on or refute that evidence about what she said.

(iii) Mr Jordan acted to change Ms Smith's employment status because the

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[1] *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] ERNZ 767 at [36].
[2] *Buchanan*, above, at [36]
[3] *Honda NZ v NZ Shipwrights Union* ERNZ Sel Cas 855 at 858 (CA).

other human resource team member in New Zealand had resigned in May and he was concerned that Ms Smith might also leave. He had discussed that concern with Ms Swiatlowski. In doing so he acted in the interests of the company to ensure retention of staff and the ability to carry out necessary human resource functions.

(iv) Importantly too, Mr Jordan openly discussed his intentions for Ms Smith's role not only with Ms Swiatlowski and Ms Zachman but also INZL's country manager, Peter Airey. While Ms Swiatlowski was not aware until later of when Ms Smith had actually signed her new employment agreement, she and Ms Zachman were most likely aware from no later than 12 June that Ms Smith's employment status was said to be permanent "effective June 1" because they were both sent an email on 12 June by another human resources administrator which referred to this "effective" date. Subsequent email correspondence between them referred to processing the conversion but contained no queries about its effective date.

(v) The change occurred shortly after the company had introduced a headcount freeze. While there is some doubt about when Mr Jordan first became aware of this freeze – he did refer in a 3 June email to "constraints currently in place" – the change for Ms Smith's status was on the basis of his human resource team reducing from three to two so did not breach that policy or goal of the company.

(vi) Although the evidence may well be incomplete, there is nothing so far to suggest Mr Jordan's actions were for personal gain or inappropriate motive. Ms Swiatlowski has not deposed that Ms Smith's change of status would have been refused if she had seen the requisition form before Ms Smith signed a new employment agreement as a permanent employee on 1 June.

[17] For those reasons I accept Mr Jordan has an arguable case that a fair and reasonable employer could not have found that his breach of the hiring policy – which he has not denied – was at the level of "wilful disregard" required by the company's disciplinary code to establish serious misconduct. That is not to say his conduct was not negligent or deliberate but the company rules in its code states acts of that nature must cause injury or damage in order to constitute serious misconduct and there is – so far – no evidence of actual economic or other damage to INZL.

[18] Another factor supports the arguability of Mr Jordan's case – it is the delay in Ms Swiatlowski taking action on conduct which she later deposed to finding so serious that it warranted dismissal. Ms Swiatlowski deposed that Mr Jordan had not told her the truth for three months about the conversion of Ms Smith's employment status "until I uncovered it and asked him".

[19] However, as noted above she was most likely aware from an email copied to her on 12 June that Ms Smith's change of status was said to be effective from 1 June. The same email was copied to Mr Jordan.

[20] On 14 June Ms Zachman sent Mr Jordan an email asking him to have a requisition form opened in order to "go through the formal process" and the records shows this was generated on 19 June. However if Ms Swiatlowski considered all steps of the formal approval process needed to be completed before the change became effective for salary purposes, she must have known at that stage that this had not occurred because she was a manager who had to provide one of the necessary sign offs. She deposed to being "surprised" when another human resources administrator, Shelley Applegate, emailed her on 9 August to ask whether she was aware of the change to Ms Smith's status.

[21] She deposed to then doing a "thorough investigation" which included getting a copy of the employment agreement Ms Smith signed on 1 June.

[22] Despite her declared concerns, and the information she was most likely aware of from the 12 June and 9 August emails, Ms Swiatlowski did not raise this matter immediately with Mr Jordan. She waited until she came to New Zealand on 12 September to deal with some other business. She said this was so she could have a face-to-face meeting about it. However, if the conduct was as surprising and serious as she said she found it, I consider – as a matter of credibility and likelihood – that she would have made some immediate, interim inquiry or direction by email or telephone, or even have arranged to have Mr Jordan suspended. The fact she did not does not sit easily with the later conclusion that Mr Jordan's actions were serious misconduct.

[23] There are some other, essentially procedural, elements of Mr Jordan's case

about the justifiability of his dismissal that I accept also cross the threshold of arguability:

(i) Whether Ms Swiatlowski should have given him earlier access to the documents and other evidence she had gathered in her investigation and more time than she did to consider that material before responding in the 13 September meeting.

(ii) Whether there was "second hand decision making". Mr Jordan deposed that Ms Swiatlowski initially told him the issue could be worked through but changed her position to one of dismissal after adjourning to speak to her managers and advisors in the United States.

(iii) Whether a manager other than Ms Swiatlowski should have conducted the investigation and made the decision, given her earlier involvement in discussions about Ms Smith's employment.

(iv) Whether there was inconsistency or disparity in INZL's decision to dismiss Mr Jordan because another staff member who had also recently breached a company procedure was warned, not dismissed.

Arguably likely reinstatement

[24] I accept that, if Mr Jordan is found to have been unjustifiably dismissed, it is arguable he would be awarded reinstatement. While that remedy no longer has statutory primacy, it is a remedy within the discretion of the Authority to grant where it is practicable and reasonable to do so.

[25] While Mr Jordan's line management is offshore, that is a result of how INZL and its parent corporation have chosen to arrange its human resources department, rather than reporting to local operational senior managers. While Ms Swiatlowski deposed that she could no longer trust Mr Jordan, she was prepared to let him work for at least a month (or possibly three) after discovering his breach of policy so is not well placed to say it is not practicable for him to continue to work if INZL is found to have acted unjustifiably towards him.

[26] INZL counsel advised the Authority he was instructed INZL may not wait until Mr Jordan's grievance application is decided before appointing a replacement to the position he held. INZL may, of course, do so but at its own risk should there be

an order from the Authority for permanent reinstatement under s123(1)(a) of the Act.

Balance of convenience

[27] The Authority must weigh the relative inconvenience – in the sense of detriment or injury – to INZL of having to bear the burden of an order reinstating Mr Jordan until his substantive case is heard when INZL might well win, against the inconvenience to Mr Jordan, who may have a just case, of having to bear the detriment of unjustifiable action until his case is heard.[4]

[28] In a case with some relevant parallels with Mr Jordan's, the Employment Court in *Melville v Chatham Island Council* described assessment of the balance of convenience in this way:[5]

> *It is a consideration that is concerned with questions of relative hardship and moral justice. Where an employee has been dismissed from gainful employment, it is not often that the employer can convincingly assert that the hardship of being required to take the unwanted employee back for a short time is greater to it than the hardship of keeping out an employee who has been unjustifiably dismissed. The hardship from the employer's point of view is simply that it is being prevented from doing what it wants. Any injunction is unwelcome and in that sense inconvenient. However, in terms of concept, that is rarely a greater hardship than that suffered by the employee of having something done to the employee that the employee does not want because the consequences for the employee are more drastic. The balance favours the employee. As to considerations of moral justice, it can be fatal to an application for interim relief if the applicant is undeserving. However, the lack of merits must have some relationship to the circumstances giving rise to the application for an injunction. It is not enough to show that, at some earlier stage, the plaintiff seeking the injunction has not been an entirely satisfactory employee. The important consideration in my judgment is that the plaintiff did nothing to provoke the action that was taken against him. He accounted for his actions as required, he admitted fault where that was appropriate, and apologised for it.*

[29] The risk of financial hardship is a factor favouring Mr Jordan in this case. While there was no evidence on his savings or other assets to see him through this period, Mr Jordan did depose to being the sole income earner for him and his wife and having "all the usual financial outgoings" to meet. While presently healthy enough to have run a marathon earlier this year, last year Mr Jordan suffered a mild stroke and

[4] *X v Y Limited* [1992] 1 ERNZ 863, 872-3 (CA).
[5] [1999] 2 ERNZ 76, 100-101.

had a malignant melanoma removed so continued access to the medical insurance provided as part of his salary package is important to him.

[30] The likelihood of hardship is increased by the time it will take until Mr Jordan's case is heard and determined. The investigation meeting is likely to be held in late February 2012 and a determination would normally be expected to be issued in the following six to eight weeks. In the present economic conditions Mr Jordan, as a man due to turn 65 next month and having experienced health problems last year, is likely to have some difficulty fully mitigating his loss by getting alternative employment at a similar salary level to his INZL job. All up he, quite likely, faces a period of six months without little or no income if not reinstated on an interim basis, at least to the pay roll.

[31] That situation also means that the prospect that he might ultimately be successful in his personal grievance (and then be awarded permanent reinstatement, lost wages and compensation) is not an adequate alternative justifying the Authority withholding the relief of interim reinstatement.

[32] INZL submitted there would be considerable difficulty reintegrating Mr Jordan to his former role on an interim basis. It asserted he would require additional supervision because he could not be trusted due to his conduct over Ms Smith's appointment and how he had handled two other job appointments. Ms Swiatlowski deposed that after Mr Jordan left the office on 16 September she uncovered two other situations where he "appears" not to have obtained necessary prior approvals for recruitment actions. While those situations might ultimately be considered in relation to contributory conduct as after-discovered conduct, I do not take account of them here because Mr Jordan has not had any full and proper opportunity to explain them except to depose that he believes the necessary approvals were given.

[33] While Mr Jordan's interim reinstatement might be inconvenient for INZL, there is not sufficient, albeit untested, evidence to establish that it would not be practicable or reasonable. INZL counsel advised that, on instructions, he understood the company would send a manager from the United States to supervise Mr Jordan directly if he were reinstated on an interim basis. That is an action which is within the company's discretion to do at any stage and does not, I find, tip the balance of

convenience in its favour.

[34] The considerations which the Court in *Melville* referred to as moral justice, I find, favour Mr Jordan. Mr Melville was a general manager who signed a commercial agreement on behalf of his employer without authorisation and in breach of procedure. Mr Melville later failed to advise his employer of inquiries from a government agency about the agreement he had entered on the employer's behalf. The Court found his conduct did not disentitle him to the remedy of reinstatement because, among other factors, he had not benefit personally from the unauthorised transactions, he made them believing they were in his employer's best interests, and, when confronted about his actions, he was frank in his admissions. Those conclusions, from what appears in the untested evidence in this case, also tentatively apply to Mr Jordan. He need not have been an entirely satisfactory employee or have followed the most prudent course to be entitled to the interim remedy.[6]

[35] Overall I consider that balance of convenience favours Mr Jordan.

Overall justice

[36] Standing back from the detail of the case and looking at it in a broad or global way, I consider the overall justice of the case lies with Mr Jordan.

[37] His case is not speculative or weak and has a realistic prospect of success, although that is not to say it has no weaknesses.

[38] There is a real issue about whether his conduct, as it was known at the time of his dismissal, amounted to serious misconduct. There is much contested evidence about what was said in conversations between Mr Jordan and Ms Zachman and between Mr Jordan and Ms Swiatlowski and whether the two women could realistically have been misled about the employment of Ms Smith when they must have seen or should have seen the email of 12 June referring to the effective date of her appointment. Even if Ms Swiatlowski did not appreciate the full picture until enquiries she began after 9 August, the fact Mr Jordan was then left to continue doing his job without check for several weeks raises real doubt about INZL's subsequent

[6] *Melville,* above, at 101

conclusions as to the seriousness of his actions.

[39] Another strong point of his case concerns the procedural question of how the decision to dismiss him was made, again the subject of contested evidence. A weak point is an apparent conflict in Mr Jordan's affidavits of 28 September and 11 October over whether he had submitted a requisition form about Ms Smith's employment before offering her a permanent role. He said so in the earlier affidavit but acknowledged in the second affidavit that the documentary evidence, so far, shows this was not done until 19 June.

[40] However, in my assessment at this interim stage and on the untested evidence, the overall justice lies with Mr Jordan given the nature of his conduct, discussed above as considerations of 'moral justice', and because of how Ms Swiatlowski dealt with the matter once she was alerted to, or should have been alert to, Ms Smith's change of status. The policy provided – on her account – that she should have signed a requisition form and Ms Swiatlowski must have known that she had not. It was many weeks before she addressed that situation.

Orders and conditions

[41] After hearing submissions from counsel I had indicated a preliminary view that interim reinstatement would likely be granted and then provided, at counsels' request, an adjournment so they could take instructions. Having done so, I heard further submissions from them by telephone conference addressing whether the order for interim reinstatement should be subject to any conditions.

[42] Mr Jordan opposed conditions. He wished to be reinstated to the workplace, use his skills and perform services. He submitted this would benefit his self esteem and restore his reputation with his family, community and workplace.

[43] INZL sought conditions allowing restoration to the payroll only – that is on a 'garden leave' basis – or, preferably, that reinstatement be on what it called a 'nominal' basis only. That latter option was said to allow Mr Jordan access to insurance and health benefits but not wages or the right to attend work. It was not a proposal I considered I could adopt as it would leave him, for the meantime, placed in

a position financially less advantageous than the one from which he was dismissed and would not be consistent with the statutory requirements.

[44] I was however persuaded the interim reinstatement order should be on the condition that INZL had a discretion to have Mr Jordan serve that period on a 'garden leave' basis. Should it exercise that discretion, INZL must be aware this may well limit what it might recover under the damages undertaking if it were ultimately successful in defending Mr Jordan's grievance application. That is so because INZL would have denied itself the benefit of Mr Jordan's labour when he has indicated he is willing and able to work for the pay.

[45] The 'garden leave' condition is given reluctantly because INZL sought it on the basis that its conclusions about no longer trusting Mr Jordan were justified, a point yet to be fully investigated and determined and which I do not accept it can at this stage rely. However Mr Jordan also potentially benefits if INZL opts to exercise the discretion given. INZL had indicated it would fly out a US-based manager to supervise him if he returned to work on an interim basis and he could then be liable for those expenses should his grievance not ultimately succeed – a risk he may not face if INZL does put him on garden leave instead.

[46] **Accordingly under s127 of the Act, with Mr Jordan having provided the required undertaking, INZL is ordered to reinstate him on an interim basis pending the hearing of his personal grievance. The order is subject to the condition that INZL may chose to have Mr Jordan serve the period of reinstatement on 'garden leave' – that is INZL is obliged to employ and pay Mr Jordan but not obliged to have him work. Pay in this context includes providing all the benefits forming part of the remuneration in Mr Jordan's employment agreement.**

Next steps

[47] Dates of 23 and 24 February 2012 have been reserved for the Authority's investigation meeting. Arrangements have also been made with counsel for a case management conference by telephone on 5 December 2011. Matters for discussion in that conference include (i) exchange of relevant documents that can be called for

under s160 of the Act, (ii) necessary witnesses and timetable for lodging written statements, and (iii) attendance of witnesses, including whether some witnesses may attend by video conference (with technical arrangements and costs borne by INZL).

[48] Costs regarding the interim reinstatement application are reserved.

Robin Arthur
Member of the Employment Relations Authority