

**Attention is drawn to the order  
prohibiting publication of certain  
information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 430  
5420333

BETWEEN                      L  
   Applicant  
  
A N D                              M  
   Respondent

Member of Authority:        James Crichton  
  
Representatives:              Jeremy Browne, Counsel for Applicant  
   Andrew Golightly, Counsel for Respondent  
  
Investigation Meeting:        15 and 16 August 2013 at Whangarei  
  
Date of Determination:        23 September 2013

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1]     The Authority is satisfied that this is a case where the proper course is to suppress details of the names of the parties and of the witnesses in the Authority's investigation meeting particularly because of the risk to the reputations of entirely innocent parties. The Authority relies on clause 10(1) of Schedule 2 of the Employment Relations Act 2000 (the Act) to determine that the names of the parties and the names of witnesses involved in the proceeding not be published.

[2]     It is also appropriate for the Authority to deal with the question of the identity of the employer, notwithstanding the order prohibiting publication of details relating to the hearing. When the matter was first filed in the Authority, there was a first and second respondent identified in the pleadings. By common consent, the employer is the first respondent identified in the original pleadings and accordingly, for the purposes of this determination, that entity is referred to as M. No other party is now involved.

## **Employment relationship problem**

[3] The applicant (L) alleges that he was unjustifiably dismissed from his employment by the respondent (M) and was also subjected to an unjustified disadvantage in being suspended without consultation by M. M resists both allegations.

[4] L was employed by M as a senior manager in October 2011 and some 12 months later was promoted further to a more senior role still.

[5] On 29 April 2013, L sent a large number of text messages to a young female subordinate of his seeking to have the young female subordinate come to his home for dinner that night. The text stream commences at 6.36pm and does not end until 10.54pm. In addition, there are three cellphone calls from L to the young female subordinate timed respectively at 9.25pm, 9.31pm and 10.05pm.

[6] The young female subordinate did not go to dinner at L's home but the following day she lodged a complaint with the employer M which then proceeded to conduct an inquiry.

[7] There was a disciplinary meeting held on 8 May 2013 at which M sought an explanation from L about the conduct complained of. Later that day, the young female complainant was formally interviewed by M and a copy of that statement was subsequently made available to L.

[8] Preliminary findings by M were notified to L on 13 May 2013, there were responses received from L two days later but in the result, M confirmed its intention to dismiss L for serious misconduct that day (15 May 2013).

[9] A personal grievance was promptly raised in respect of both the alleged unjustified dismissal and the alleged unjustified disadvantage.

## **Issues**

[10] The Authority must decide two questions:

- (a) Whether the suspension and the way it was attended to constituted an unjustified disadvantage within the meaning of the law; and
- (b) Whether the dismissal was itself unjustified or not.

### **Did the suspension constitute an unjustified disadvantage?**

[11] It is common ground that, notwithstanding the legal requirement for consultation before a suspension is imposed, and that legal requirement is sourced both from the common law and from M's own house rules, there was no consultation.

[12] What happened in essence was that the principal of M attended at L's home and in the course of attending to other business simply handed L a letter which recorded his suspension.

[13] The evidence from the principal of M is that he telephoned L's home in advance to indicate his intention to call but that evidence is disputed. It is the case that there appears to have been a seven second message sent from M's principal to L but L maintains that it would not be possible to leave a voice message in that time (because that is what M's principal maintains happened), especially as M's principal contends that the voice message would have lasted seven seconds. On the face of it then, the Authority cannot be satisfied that there was notification to L of an imminent visit from the representatives of M. Certainly it is the case that L was home on the day in question and not at work.

[14] There is also dispute about why there was no consultation attempted when M's principal attended at L's home on 1 May 2013.

[15] The evidence for M is that L was anything but rational, that he was red eyed, shirtless and aggressive. In particular, M's representatives maintain that at the end of the discussion which by all accounts was very brief, L slammed the sliding door in the faces of M's representatives.

[16] The factual issue then is whether the Authority can require M to consult if the Authority's finding is that L was truculent and aggressive. On balance, the Authority is satisfied that the evidence of M's representatives is to be preferred. M's principal gave evidence to the Authority and impressed the Authority as a straightforward and honourable man. His evidence on the point was that he was simply prevented from consulting with L by reason of L's demeanour and behaviour. While L denies that that is the case, the Authority expresses a preference for the evidence of M on the point.

[17] So at the time that the suspension proposal was first raised, the Authority is satisfied that there could have been no consultation because of L's demeanour and behaviour. The next question is whether M's representatives should have decamped at that point and attempted to engage subsequently. In fact, that is what M's representatives did in relation to the other matter that they attended at L's home for, so it would have been available to them to defer the suspension matter until another occasion particularly as L was away from the workplace at his own behest and presumably might not have been intending to return to work the following day.

[18] The law on unjustified disadvantage grievances requires the satisfaction of two separate legs: there must be disadvantage and the action complained of must be unjustified.

[19] In the normal course of events, given the legal position at common law and the emphasis of the requirement for consultation in M's house rules, it is difficult to avoid the conclusion that a failure to consult is an unjustified action even where there is provocation and difficulty.

[20] As the Authority has already made plain, the representatives for M could have withdrawn and chosen to address the matter later as in fact they did with the other purpose for their call on that day. M makes the point in its evidence that the journey from M's base to L's home was a 60km round trip but that cannot be a defence of the failure to consult if in fact M was forced to make another trip to L's home for the other purpose for their 1 May 2013 visit. Put another way, if it was available to M to postpone resolution of the other reason for its visit to L, then it could equally presumably have postponed the delivery of the suspension letter until it had had an opportunity to consult with L about the reasons for it.

[21] However, that is not an end of the matter because, in addition to the action being unjustified, in order for the personal grievance of unjustified disadvantage to be made out, there must also be disadvantage.

[22] In the present case, if there is disadvantage it is slight indeed; L was suspended on full pay and M told other staff that L was on leave. In fact, that statement was only partly untrue because at the point at which L's suspension commenced, he was indeed on leave. In any event, the actions taken by M protected L.

[23] Balanced against that, was the need for M to protect a junior female staff member from contact with L. The circumstances were that the only allegations against L were allegations made by a very junior female staff member who had complained to M about L's behaviour towards her. Given that she reported to L, it is difficult to see how, in any circumstances, M could have contemplated having L back in the workplace.

[24] Taking all that into account then, the Authority's considered view is that the defects in the process undertaken by M were minor and they did not result in unfairness to L and that the decision made by M in all the circumstances of the time (in particular taking into account L's attitude at the 1 May 2013 contact at L's home), was an action that a fair and reasonable employer could have taken in the particular circumstances at the time: s.103A of the Act applied.

### **Was L unjustifiably dismissed by M?**

[25] The young female subordinate received the string of text messages from L during the evening of 29 April 2013. The following day, she discussed those exchanges with M's management and, amongst other things, was clearly anxious about the effect, or potential effect, of those exchanges on her continued employment. She was at the time in her first significant employment since completing her training, and M formed the view, (which the Authority accepts), that the young woman was genuinely concerned about the possible impact of the texting, and her ultimate refusal to accept L's proposal to go out to dinner at his house, on her continued employment, given that L was her immediate superior.

[26] The principal of M told the Authority he "*had an obligation to look after* [the young female employee]". In his first engagement with her, he sought to reassure her that she was not in trouble, that she would be protected and that M would take the matter up on her behalf.

[27] Understandably, M's investigation of matters was informed by the context. Of particular importance in that regard was the age disparity between L and the young female employee. He was in his late 30s and she was in her early 20s.

[28] Further, she reported to him.

[29] And, she was in her first serious employment since finishing her training and he was a well experienced member of the workforce, although he claimed in his evidence to the Authority that he was not particularly well trained as a senior manager. That aside, he nonetheless had held a senior management role with M for fully 18 months before the incidents complained of and had had a number of previous significant roles for other organisations prior to that.

[30] The text messages themselves, which the Authority has carefully reviewed, went on for over four hours and were accompanied by three telephone calls made within that four hour period by L to the young female staff member.

[31] The text messages contain three aspects which the Authority desires to highlight: first a reference to the young female staff member being given a day off from work if she chose to accept L's offer of going out to his home for dinner, the second was a reference which might be sexual, to "*an admin whore*" and the third and, for the Authority, most important was that the young female staff member sent a text at 8.45pm, more than two hours before the text messages stopped, indicating that she was not going to accept the invitation.

[32] M was shown the text messages exchange and the principal described himself as being "*extremely concerned*" by the messages. He told the Authority:

*... it immediately struck me that it was wrong for somebody in L's position to ask a junior office girl out to his house in such a persistent way, particularly since he seemed to be offering her a day off work if she did so.*

[33] At the disciplinary meeting on 8 May 2013, L described the junior female staff member as "*his friend*" and referred to the offer of a day off in lieu as "*a joke*". L's position was that he had done nothing wrong and was simply engaging in banter with a friend outside the workplace.

[34] Clearly then, there was a major disjunct between L's impression of what was going on and the young female staff member's impression. Indeed, L confirmed as much in answer to a question from the Authority when he indicated that he was extremely surprised at the evidence presented to the Authority by the young female staff member.

[35] In any event, having obtained from L his explanation of matters at the 8 May 2013 disciplinary meeting, M quite properly re-interviewed the young staff member and in particular had her respond to the fundamental proposition that she and L were friends and that in consequence, her complaints about her behaviour were misconceived.

[36] Despite L's attempts to deal with this aspect, it is fundamental to the decision that M made to dismiss that, contrary to what L said at the disciplinary meeting (and at the Authority's investigation meeting) that he and the young female staff member were friends, she maintained, both to the employer and to the Authority, that they were not friends at all. Her evidence was that she was a friend of L's former partner and she had met L through that person.

[37] Even the text responses from the young female staff member to L make clear that she is compromised because of her loyalty to his former partner and she is at some pains to try to explain to him why she cannot be his friend. On the face of it, it is an impressive effort for a young woman of limited experience to try to explain to her boss why she could not engage with him socially in the way that he was clearly proposing.

[38] In any event, as M correctly opined, if the young female staff member had accepted that she and L were friends, then the issues in contention would fall away and it would be available to M to simply admonish L and suggest that he learn to take no for an answer.

[39] But that was not the position that M found itself in. The young female staff member in the statement that she wrote concluded with these two paragraphs:

*L and I were never friends. I was a friend of N's [L's former partner] and met him through N and went out to dinner at their house because of my friendship with N.*

*I never felt comfortable being alone with him and always felt uncomfortable when he would shut the office door (to talk to me). I would never have gone out there if N wasn't there.*

[40] By the time the events complained of happened, L and N had broken up so N would not have been at L's home on the night that L invited the young female staff member to go out there. L maintained, however, that he had other people out there at the time, and for the record, the Authority accepts that evidence as truthful.

[41] Given the fundamental difference between L's position and the views advanced by the young female staff member, in the absence of any obvious attempt to reconcile those views by L, the Authority is satisfied that, in the particular circumstances of this case, M was entitled to form a preliminary view.

[42] The Authority does not accept L's argument that the investigation conducted by M was somehow substandard or, for that matter, that M was activated by malice in a determined attempt to get rid of L for reasons unrelated to the complaint from the young female staff member.

[43] L says that the basis for the employer's complaint kept shifting. The Authority accepts that, during the course of its investigations, different aspects of the texting sequence were highlighted, but the Authority is not satisfied that L can have ever been in any doubt that the basis of the complaint was the succession of text messages that he sent to the young female staff member on 29 April 2013. It is a fact that those messages traverse a number of different aspects and all of them were, at various times, addressed by the parties in the disciplinary process.

[44] But at its simplest, the young female staff member complained to her employer about a feeling of being harassed by her manager in circumstances where she was in fear of her job if she did not respond to those messages in the way that her manager wanted. That is the essence of the complaint and L's response to that complaint was effectively to make light of it and to maintain that it was an off workplace contact between friends.

[45] The difficulty with that thesis is that the person who L maintained was a friend denied it and while it is true that the events complained of happened away from the workplace, the fact that L appears to studiously overlook is that the person that he was corresponding with was a subordinate of his in the workplace and the obvious power imbalance caused not only the recipient of those messages concern but ultimately caused the employer concern as well.

[46] L also maintained that the real reason that he was in a disciplinary process was because of M's concern about L's previous behaviour when he was in a relationship with N. N was the daughter of the principal of M. But that allegation makes no sense at all. The relationship between L and N had ended before the text messaging incident, although it is referred to in the text messaging incident, particularly by the young female staff member who was a friend of N's and who makes as clear as can be her unwillingness to side with L because of the break up of his relationship with N.

[47] It is true that the principal of M did not approve of L's relationship with N (his daughter), and was pleased when the couple split up. Given that they had split up by the time the test message incident happened, it is difficult to see how there can be any relevance to the former relationship between L and N.

[48] L says that the principal of M told him that if he had any further contact with N, there would be difficulty. But that is denied by the principal of M who simply told L, he says, that N wanted to be left alone now that the relationship was over.

[49] Furthermore, witnesses for M made it absolutely clear that L was a valuable member of the management team and if they could have a choice in the matter, they would have preferred to retain L as part of the management. The Authority accepts that evidence without reservation. It was given freely and was absolutely unnecessary in the wider context of the investigation meeting. The Authority is satisfied that that evidence is truthful and can be relied upon.

[50] On that basis, the Authority rejects absolutely L's suggestion that his dismissal had anything to do with matters other than the texting of the young female staff member.

[51] The short point is that M concluded that it preferred the evidence of the young female staff member to the evidence of L. That is a conclusion that M is entitled to reach. L says that if M had done a better investigation, it would have established that the young female staff member had been out to L's home previously. But on the evidence before the Authority that is irrelevant. The young female staff member in the portion of her statement just quoted by the Authority, makes clear that she went out to L's house because N was there and N was her friend. Once that relationship came to an end, she, understandably in the Authority's view, took the view that it was no longer appropriate for her to engage socially with her boss.

[52] In all the circumstances then, the Authority is satisfied that a good and fair employer, after the conducting of a proper inquiry, could conclude that L was guilty of serious misconduct and thus liable to dismissal.

[53] It is important to emphasise that the law requires only that the employer's decision is one of the potential outcomes. It is not the Authority's job to place itself in the mind of the employer and to impose its standard on the employer. The Authority's role is to consider whether the employer could have reached the decision it has, and in the particular circumstances of this case, the Authority is satisfied that one of the outcomes available to a fair and just employer was to find that L had committed serious misconduct by reason of

having sent a long succession of text messages to a very young female staff member who reported to him in circumstances where she became fearful for her job and anxious that her negative responses to his proposal might result in her being “*punished*” (to use the word that she used in her evidence to the Authority).

### **Determination**

[54] For reasons already traversed, the Authority is satisfied that L has no viable personal grievance, either in respect of unjustified dismissal or in respect of unjustified disadvantage.

[55] It follows that L’s claim fails in its entirety.

### **Costs**

[56] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority