IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 423
5370020

BETWEEN	DELLWYN RHIND Applicant
A N D	CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Respondent

Member of Authority:	Rachel Larmer
Representatives:	May Moncur, Advocate for Applicant Samantha Turner and Charlotte Bates, Counsel for Respondent
Investigation Meeting:	15 and 16 August 2012 at Auckland
Submissions Received:	27 August 2012 from Applicant 10 September 2012 from Respondent
Date of Determination:	28 November 2012

DETERMINATION OF THE AUTHORITY

A The Chief Executive of the Ministry of Social Development was justified in dismissing Ms Delwyn Rhind for serious misconduct, namely her inappropriate accessing of the client records of her friends, close acquaintances and family members.

Employment relationship problem

[1] Ms Dellwyn Rhind was employed by the Ministry of Social Development (MSD) and its predecessors for 21 years in various roles.[1] At the time of her dismissal she was working as a Work Broker for Work and Income New Zealand

---

[1] These included the positions of Team Coach for Work Brokers in the Auckland Region, and Acting Service Centre Manager in Clendon.

(WINZ).[2] One of her main tasks was to assist clients into work by matching them with vacancies from employers.

[2] It is a contractual term of employment of all MSD employees that they comply with the MSD's Code of Conduct and with the State Services Commissioner's Code of Conduct. Employees are contractually required to read and adhere to these Codes which set out required standards of integrity and conduct.

[3] Various Codes of Conduct have applied over the course of Ms Rhind's lengthy employment. The WINZ Code of Conduct came into effect in 1998 when the Department of Work and Income was created. This required employees to inform their manager if the employee's duties involved working with someone who was a friend or relative. An update to this Code in December 1999 informed employees they were not permitted to access or action a client's file if that person was a friend or family member of the employee.

[4] The MSD Code came into effect when MSD was created in 2001. The MSD Code prohibits an employee from working with clients who are also that employee's friend, relative, colleague, or close acquaintance. It also reiterates that employees should never access or action the client files of friends or relatives to avoid possible compromise or criticism.

[5] The MSD Code was updated in July 2011. It continues to require employees to advise their manager if they had a relationship with someone they dealt with in the course of their role. It also expressly prohibits employees from accessing or processing the records or information of a friend, relative, colleague or close acquaintance, even if that person asked the employee to.

[6] MSD says over a five year period Ms Rhind undertook 25 inappropriate actions[3] involving the records of 13 WINZ clients who were also her family members, friends or close acquaintances. MSD says these actions were serious breaches of its 2001 and 2011 Codes and amounted to serious misconduct.

[7] Ms Rhind admits accessing the client files of friends and family members but she says she never gained financially from doing so. She says her actions are not

---

2 Work and Income is a service of MSD.
3 22 searches/accesses and 3 processing actions.

serious misconduct because she only wanted to help her friends and family members get work.

[8] Ms Rhind claims her dismissal is unjustified. She seeks reinstatement, lost wages and distress compensation.

Issues

[9] Section 103A(2) of the Employment Relations Act 2000 requires the Authority to objectively assess whether "the employer's actions, and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal […] occurred."

[10] This test requires the following issues to determined:

- Did MSD conduct a full and fair investigation into its concerns?
- Could a fair and reasonable employer have concluded Ms Rhind's actions amounted to serious misconduct?
- If so, was dismissal within the range of responses available to a fair and reasonable employer?
- If not, what remedies should be awarded?

Did MSD conduct a full and fair investigation into its concerns?

[11] Ms Rhind says MSD's investigation was unfair because it did not properly put its disciplinary concerns to her. It also failed to follow up her explanation that it was common practice for work brokers at Manukau to place their friends and family members into employment, and that management knew about and condoned such a practice.

[12] Ms Rhind says MSD did not explore whether she had placed or referred people close to her into employment. She believes her dismissal was pre-determined and that the decision-maker relied on inadequate information.

Did MSD properly put its disciplinary concerns to Ms Rhind?

[13] MSD sent Ms Rhind a disciplinary letter in advance of the first disciplinary meeting. This letter identifies the names of the WINZ clients known to Ms Rhind (i.e. friends, family members or close acquaintances) whose client files MSD alleged she had inappropriately dealt with. It also recorded the alleged relationship or association of these known people to Ms Rhind, the number of searches/accesses that had allegedly occurred for each person known to her and the processing actions it alleged she had undertaken for people known to her.

[14] Ms Rhind told me she understood the nature of MSD's concerns and the specific disciplinary allegations against her before she went into the first disciplinary meeting. I find that the way in which the disciplinary concerns were raised with Ms Rhind was not unfair because she was fully and properly on notice of the matters she was required to respond to before she was asked to respond to MSD's disciplinary concerns.

Did MSD fail to follow up Ms Rhind's explanation during the disciplinary meeting that it was common practice for work brokers at Manukau to place their friends and family members into employment and that management knew about and condoned such a practice?

[15] Ms Rhind says she told MSD at the first disciplinary meeting that to she had placed people known to her at Ford Motors and that MSD should "let other work brokers know that they can't help family or friends." She says these comments put MSD on notice there was common practice for work brokers to place their own friends and family into work, and that management knew of and condoned such a practice.

[16] Ms Rhind accepts she never specifically told MSD she believed it was common practice for work brokers to place their own family and friends into employment, or that management had condoned that.

[17] I find that if Ms Rhind had believed such a practice was occurring then she should have expressly raised that with MSD. I also find she should have identified the work brokers and management involved so MSD had something to actually investigate. I find that MSD cannot be criticised for not following up on an issue that Ms Rhind did not raise during the disciplinary process.

[18] Ms Rhind did not make MSD aware she believes her actions were common practice or that such a practice was condoned by management until after she had been dismissed. Justification is to be assessed at the time of the dismissal, not in light of new information that arises subsequent to dismissal and which was never put to the employer.

Did MSD fail to explore whether Ms Rhind had placed or referred people close to her into work?

[19] At the disciplinary meeting Ms Rhind says she "placed" her ex-husband, her sister, a step daughter and other people she identified as known to her into employment. I find that MSD was not required to make further inquiries into this issue because it was entitled to rely on Ms Rhind's admissions.

Was Ms Rhind's dismissal pre-determined?

[20] Ms Rhind says her dismissal was predetermined. I do not accept that. Ms Rhind has not identified any evidence to support her predetermination claim. The evidence satisfied me the decision maker, Ms Isobel Evans, kept an open mind and did not decide to dismiss Ms Rhind until the end of the disciplinary process.

Did the decision maker rely on inadequate information?

[21] Ms Rhind says Ms Evans relied on inadequate information because she was not aware Ms Rhind believed the Ford Motors project demonstrated management knew there was a custom and practice of work brokers placing their own friends and family into work.

[22] I do not accept that claim. It was understandable Ms Evans did not have that information because the custom and practice issue was not raised by Ms Rhind until after she had been dismissed. Ms Evans had the notes of the disciplinary meeting which Ms Rhind had reviewed and amended. Ms Evans was therefore fully aware of the specific explanations Ms Rhind had already given in response to the disciplinary concerns.

[23] It is also clear from the notes of the disciplinary meeting that Ms Rhind's reference to Ford Motors was limited to the identification of people known to her whom she had placed in jobs at Ford Motors. That information was never linked to a common practice by work brokers or to management knowledge of such a practice.

[24] I am satisfied Ms Evans had all relevant information before her and that she properly considered it before deciding to dismiss Ms Rhind.

Finding

[25] I find MSD conducted a full and fair investigation. It put specific disciplinary concerns to Ms Rhind to respond to. She was provided with details of the allegations against her, and given copies of the information MSD was relying on. Ms Rhind was advised that disciplinary action up to and including dismissal was a possible outcome of the disciplinary process, she was advised of her right to representation, and she was given paid time off work to enable her to prepare for the disciplinary meeting.

[26] Ms Rhind had two support people/representatives with her throughout the disciplinary process. She was provided with all relevant information and was given an opportunity to consider and respond to that information before she was dismissed. Ms Rhind was provided with a copy of the disciplinary notes and she amended them to reflect her view of what had been discussed before they were passed to the decision maker, whom Ms Rhind also met with.

[27] I find that MSD complied with all four tests in s.103A(3) of the Act. It sufficiently investigated its concerns; it raised those concerns with Ms Rhind before dismissing her; it gave her a reasonable opportunity to respond to those concerns before she was dismissed; and it genuinely considered her explanation before dismissing her.[4]

[28] I have not identified any process defects or which would have resulted in unfairness to Ms Rhind.[5]

Could a fair and reasonable employer have concluded Ms Rhind's actions amounted to serious misconduct?

[29] Ms Rhind says her actions do not amount to serious misconduct because she only accessed the records of her friends and family members to help them get work. She believes the Code allows her to access the files of friends and family for "business purposes" i.e. to assist them into work.

---

4 S.103A(3)(a)-(d) of the Act.

5 S.103A(5) of the Act.

[30] Ms Rhind believes the restriction in the Codes about working with friends and family relates to case managers only (not work brokers) because case managers dealt with money and work brokers did not. Ms Rhind believes the Code allows her to place friends and family in jobs provided she did not grant them any money.

[31] Ms Rhind says it was common practice for work brokers to place their friends and family in work and that management knew of and condoned that practice.

[32] Ms Rhind says she was not properly trained on the Code. She says she never knew that accessing client files of her friends and family members breached the Code or would be viewed as serious misconduct. She says her actions should have been dealt with as a performance issue, not as serious misconduct.

Was accessing of friends and family client records permitted for "business purposes"

[33] Ms Rhind believes she was allowed to access the client files of friends and family to assist them into work.

[34] I do not accept that. Ms Rhind was unable to point to anything in the Code to support this claim. I consider the 2001 and 2011 Codes both made it clear an employee was not to access client files of people known to them. There were no exceptions to that rule. The Codes emphasised that by stating "you should not work with a client who is a friend or relative or work on a file […] of a friend, relative, colleague or close acquaintance."

[35] I consider both Codes made the prohibition on working with friends and family members very clear. The 2001 Code stated "you should never":

- access a file on behalf of someone else (including friends or family)
- access the file of a friend, relative, colleague or close acquaintance without appropriate permission
- action a file for a family member or friend.

[36] The 2011 Code states "you must not access […] the record of a friend, relative, colleague or acquaintance for any reason, even if the person asks you to."

[37] I find it was reasonable for MSD to reject Ms Rhind's explanation that she had not breached the Codes because she accessed records of friends and family to help them get off benefits and into work.

Did the restrictions in the Codes on accessing the files of friends and family apply to case managers only and not to work brokers?

[38] Ms Rhind says any restrictions in the Codes only apply to case managers because they had the authority to grant up to $1,000 without a service centre manager's sign off. Ms Rhind says the Codes do not apply to work brokers because they cannot grant any money to beneficiaries.

[39] This claim was contrary to the direct wording of the Codes which made it very clear they applied to all MSD employees. There was no exception for work brokers. The prohibition on working with friends and family was not limited to cases involving money. Nor was it limited to case managers. I consider it was open to Ms Evan's to reject this explanation by Ms Rhind as to why her actions did not amount to serious misconduct. Ms Evan's had objectively justifiable grounds for concluding that it was unreasonable (in light of the clear wording in the Codes) for Ms Rhind to believe in the supposed exceptions she sought to rely on.

Was it common practice for work brokers to place their own friends and family in jobs and if so did management know of and condone such a practice?

[40] Ms Rhind says her actions cannot be serious misconduct because what she did was common practice among work brokers and condoned by management.

[41] I find there was no credible evidence of the custom or practice which Ms Rhind said existed. I heard from eight MSD witnesses that it was not common practice for employees to work with their own friends and family because they all knew that would be a breach of the MSD Code. I consider the evidence convincingly established Ms Rhind's colleagues were well aware of the prohibition on working on or accessing files of their own friends and family members.

[42] Ms Rhind appeared to acknowledge that when she told the Authority work brokers "worked outside of the system" when placing friends and family members into jobs. Ms Rhind says "working outside the system" meant that a work broker asked a colleague to register the colleague's name against a placement by the work

broker of their own friend or family member so that the direct placement by an employee of their own friends or family into work was not visible to management.

[43] This evidence shows that even if such a practice did occur (and I am not satisfied it did) any such activities were deliberately hidden from management. This deliberate concealment suggests that anyone involved in such activities must have known that the Codes prohibited them from placing their own friends and family members in work.

[44] Ms Rhind was unable to identify which work brokers had engaged in the alleged "common practice", she could not identify any WINZ clients who had been placed in jobs as a result of the alleged common practice, she gave no evidence about when such activities may have occurred.

[45] Ms Rhind failed to provide credible evidence of who in management was aware of or had condoned such actions or when that may have occurred. The one manager Ms Rhind named as having had responsibility for the Ford Motors project (which she claimed was an example of management knowing work brokers had placed their colleagues into jobs with Ford) was not even involved in that project.

[46] The evidence of custom and practice Ms Rhind relies on does not support such a claim. The examples she gave demonstrated other work brokers placed their colleagues' friends and family members, not their own friends and family, into work. The former was permitted because the individual being placed in work was not known (i.e. did not have a close personal relationship) with the work broker who had placed them.

[47] There was no evidence that any managers were aware of the custom and practice Ms Rhind claims management had condoned.

Was Ms Rhind properly trained on the relevant Codes?

[48] Ms Rhind says MSD was at fault because she did not get any training on the Codes.

[49] The evidence does not support that claim. Ms Rhind admits she was aware MSD had a Code of Conduct in place which was a contractual term of her employment which she had to comply with.

[50] I find MSD ensured Ms Rhind received training on the various Codes throughout her employment. One training programme[6] presented to staff in June 2009 specifically stated that accessing the records of friends and family, even with their permission could result in dismissal.

[51] Training documents[7] made it clear staff "should never":

- work with friends, family, colleagues or a close acquaintance
- access or action the files of friends of family members.

[52] In June 2007 employees received training[8] which identified there had been an increase in disciplinary meetings involving staff accessing the files of friends and family. They were reminded the Code formed part of their terms and conditions of employment and together with the Public Service Code set out expectations of appropriate behaviour and breaches could result in disciplinary action up to and including dismissal.

[53] This training made it clear staff should never become involved with an application from a family member, friend, colleague or close acquaintance and that they should not action or access a file for a family member of friend. Employees were told electronic files of people known to them should be locked off so they could not be inappropriately accessed.

[54] In June 2007 Ms Rhind signed a "Friends and Family Acknowledgement Form" which confirms she had received training and was aware that a breach of the restrictions in the Code relating to friends and family could result in dismissal.

[55] When the 2011 Code was implemented in July that year Ms Rhind was sent an email which highlighted that the restriction on employees being involved in applications from friends or family or accessing the files of friends or family members remained unchanged.

[56] Employees were required to sign six monthly declarations that (among other things) they understood the MSD Code and would not work on the record of a friend, relative, colleague or close acquaintance.

---

6 The Right Way – Integrity at MSD – what's ok and what's not ok.
7 HR Framework and Code of Conduct.
8 The Way We Work – Confidentiality and Security of Personal Information.

[57] I consider it was reasonable for Ms Evans to reject Ms Rhind's claim her actions were not serious misconduct because she did not understand her obligations because she had not been trained on the relevant Codes.

Were Ms Rhind's actions in breaching the Codes performance issues instead of serious misconduct?

[58] Ms Rhind says she did not know her actions were prohibited under the relevant Codes or that they would be viewed as serious misconduct. She says her actions should have been dealt with as performance concerns, not as serious misconduct.

[59] I consider it was unreasonable for Ms Rhind to claim she was not aware the relevant Codes prohibited her from accessing the files of friends or family members. The Codes were written in plain language which made the obligations they imposed on staff clear and easy to understand.

[60] These messages were also reinforced by the training and other communications that occurred which made it clear employees were not to work on or access the files of their own friends and family members. The Codes also made it clear breaches would result in disciplinary action and possibly dismissal.

[61] I find it was fair and reasonable for Ms Evan's to conclude that Ms Rhind's actions involved serious misconduct, not performance issues.

Finding

[62] During the disciplinary process Ms Rhind admitted that from 24 November 2005 to 23 June 2011 she:

- searched/accessed the files/records of friends or family members 22 times

- undertook non-payment processing actions[9] for three clients who were also friends or family members

---

[9] She updated the contact details of two people who were related to her and she re-secured her mother's file which a manager had inadvertently left open.

- processed a Special Needs Grant (SNG) for her niece[10]
- accessed or processed the client files of 13 of her friends or family members.

[63] Whether these actions are capable of being viewed as serious misconduct depends on the nature of the obligations imposed on Ms Rhind, the nature of the breaches of Codes that occurred, and the circumstances of the breaches that occurred.

[64] Serious misconduct is conduct which fundamentally undermines or deeply impairs the trust and confidence inherent in an employment relationship. I find Ms Evans had reasonable grounds for concluding Ms Rhind had engaged in serious misconduct and that Ms Evan's also genuinely believed serious misconduct had occurred.

[65] I find a fair and reasonable employer could have reached the same conclusion as Ms Evans. It was clear Ms Rhind:

- knew she was required to read and comply with the relevant Codes, which formed part of her contractual terms of employment
- had ready access to the relevant Codes, which clearly set out her obligations
- was given ongoing training on her obligations under the relevant Codes
- was repeatedly reminded of the importance of not accessing the files/records of, or working with, people known to her
- signed forms acknowledging she understood the Code
- signed an acknowledgement recording she would not work on or access files of people known to her
- was on notice that breaches of the relevant Codes could result in dismissal.

---

[10] The disciplinary notes (which were checked and amended by Ms Rhind) record she did a SNG for her niece. During the Authority's investigation meeting Ms Rhind denied she had done a SNG for her niece and said the notes about that were wrong. MSD is entitled to reply on the information Ms Rhind gave it during the disciplinary meeting.

[66] The serious nature of Ms Rhind's breaches, the importance of the relevant Codes and the consequences to MSD of her breaching them were such that a fair and reasonable employer could have concluded Ms Rhind's actions amounted to serious misconduct.

Was dismissal within the range of responses available to a fair and reasonable employer?

[67] Ms Rhind says mitigating factors were not properly considered and that dismissal was an overreaction. She says she is a longstanding employee with a positive employment history. Ms Rhind says dismissal is inappropriate because she believes she was doing the right thing by helping people known to her get jobs so they could get off benefits.

[68] Ms Evans dismissed Ms Rhind because she did not trust her to act appropriately in future. Ms Evans specifically considered Ms Rhind's long service and her previous good employment record, but ultimately concluded that her conduct was of such a serious nature that trust and confidence in her had been destroyed.

[69] MSD has a very high profile in the communities it serves and its reputation can be called into question by the inappropriate actions of its employees. It is clear MSD takes confidentiality, the protection of personal information of its clients and the protection of the integrity of its benefit system very seriously. That message is clearly and regularly communicated to employees throughout their employment. Ms Evans considered Ms Rhind's actions struck at the heart of those fundamental principles.

[70] It is also important to MSD that it is seen to be fairly and responsibly administering government funds. In order to do that appropriately MSD is dependent on its employees to display high levels of honesty, professionalism and integrity. It is clear Ms Rhind's actions fell far below what MSD requires from its employees.

[71] Ms Evans says Ms Rhind, whilst apologetic for breaching the Code, was of the view she had not done anything wrong. Ms Evans did not accept Ms Rhind's view about that because she believes the relevant Codes set out very clear requirements. Ms Evans was therefore concerned that Ms Rhind failed to understand the seriousness of her actions.

[72] Ms Evans considered Ms Rhind's actions to be very serious breaches which had occurred over a lengthy period of time. Ms Evans was particularly concerned by

Ms Rhind's admission[11] she had processed a SNG for her niece, because it undermined MSD's ability to ensure the administration of funds to WINZ clients was done fairly and impartially.

[73] Ms Evans was also concerned by Ms Rhind's admissions she had applied for a skills investment subsidy for family and friends and that she had looked up her stepdaughter's records to see whether she was entitled to a subsidy. Ms Evans says such actions put Ms Rhind's work integrity and impartiality at risk, and therefore also put MSD's reputation at risk.

[74] A subsidy payment may be an incentive for an employer to take on a particular client and it could potentially be seen to influence referrals, or be seen as an attempt to give Ms Rhind's friends and family a head start at the expense of clients who had no relationship to Ms Rhind. Ms Evans was extremely concerned that such actions called MSD's systems and impartiality into question, and she therefore believed such breaches fundamentally undermined the protections MSD had specifically put in place.

[75] Ms Evans was concerned Ms Rhind did not accept or take responsibility for her actions. She also believes Ms Rhind failed to recognise the impact of those actions on MSD and failed to display a willingness to accept or acknowledge the seriousness of her breaches of the Code. That was clearly a legitimate concern because Ms Rhind maintained in her evidence to the Authority that she did not believe she had done anything wrong.

[76] Ms Evans says she considered whether a sanction short of dismissal may have been appropriate but, based on Ms Rhind's continued insistence she had not done anything wrong, concluded she did not have trust and confidence in her to continue working for MSD or to comply with required working practices.

[77] I find dismissal was within the range of responses available for a fair and reasonable employer to impose "in all the circumstances"[12] as a response to Ms Rhind's serious misconduct.

---

[11] Recorded in the disciplinary notes, as amended and accepted by Ms Rhind as accurate.

[12] S.103A(2) of the Act.

Outcome

[78] I find MSD has justified Ms Rhind's dismissal under s.103A of the Act because its "actions and how [it] acted, were what a fair and reasonable employer could have done in all the circumstances."[13]

[79] This means MSD conducted a full and fair investigation which disclosed conduct capable of being viewed as serious misconduct, and which it did actually conclude was serious misconduct. I also find that a fair and reasonable employer could have responded to Ms Rhind's serious misconduct by imposing dismissal as a disciplinary outcome.

Costs

[80] The parties are encouraged to resolve costs by agreement. If that is not possible MSD has 14 days from the date of this determination within which to apply for costs, Ms Rhind has 14 days within which to respond, with MSD having a further seven days to reply.

[81] Costs will be assessed based on the Authority's usual notional daily tariff-based approach. The current notional daily tariff is $3,500 which may then be adjusted if required to reflect the particular circumstances of this case. The parties are invited to identify in their submissions any factors they say should result in an adjustment to the notional daily tariff.

Rachel Larmer
Member of the Employment Relations Authority

---

[13] S.103A(2) of the Act.