

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 441
5397270

BETWEEN JULIE SCHWARTFEGER
Applicant

A N D THE MINISTRY OF SOCIAL
DEVELOPMENT
Respondent

Member of Authority: T G Tetitaha

Representatives: Paul Blair, Advocate for Applicant
Samantha Turner, Counsel for Respondent

Investigation Meeting: 17 October 2012 at Auckland

Submissions Received: 15 October 2012 from Applicant
15 October 2012 from Respondent

Date of Determination: 6 December 2012

DETERMINATION OF THE AUTHORITY

Orders/Directions

- A. Pursuant to an undertaking as to damages, an order for the interim reinstatement of Ms Schwartfeger to her job with the Ministry until hearing of her personal grievances. This order is subject to conditions Ms Schwartfeger:**
- (a) discloses to the Ministry the names of all of her “Facebook friends” and the names of any persons known to her whom she has reason to believe may be previous or existing clients.**
- (b) refrains from working on client files of any persons known to her unless authorised to do so by the Ministry.**
- B. A direction for a teleconference to be convened for timetabling evidence and fixture dates.**

Employment relationship problem

[1] Ms Julie Schwartzfeger was employed for 28 years by the Ministry of Social Development. As a Case Manager she provided customer services to client beneficiaries including the granting, changing and reviewing of benefit entitlements. She had access to client records containing personal client information as part of her job.

[2] The Ministry Code of Conduct sets guidelines for staff use and access to client records. The Code prohibits employees from accessing client records of family, friends and acquaintances.

[3] Ms Schwartzfeger was issued with a written warning in 2009 for accessing the client records of a family member and friend's daughter. The warning recorded "*an acquaintance in the context of the code of conduct is any person you are familiar with.*"¹

[4] Following a routine systems check in 2012, the Ministry claimed Ms Schwartzfeger had accessed/searched client records of people known to her as "Facebook friends" in breach of the Code.

[5] Ms Schwartzfeger was called to a meeting on 7 September 2012 where six people were identified as her Facebook friends. Two were clients (Persons A & B)², two former work colleagues (Persons C & D), one friend's husband's niece (Person E) and one the wife of a friend of her mother (Person F).

[6] The Ministry alleged these actions constituted a serious breach of the Code and combined with a written warning in 2009 for similar conduct warranted dismissal.

[7] Ms Schwartzfeger denies breaching the Code, claiming Facebook friends are not friends or acquaintances, the 2009 warning is historic and occurred after an instruction by the Ministry to notify them of relatives on benefits.

[8] Following an investigation, Ms Schwartzfeger's employment was terminated on 25 September 2012. She seeks reinstatement to her job until the substantive hearing of these matters in 2013.

¹ Exhibit "JMK 22" Affidavit Jeffrey Mathieson Keene sworn 12 October 2012

² The clients' names have been anonymised pursuant to an order of the Authority prohibiting publication.

Issues

[9] In determining interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the objects of the Act.³

[10] The following issues need to be determined:

- (a) Does Ms Schwartfeger have an arguable case that she was unjustifiably dismissed?
- (b) Does Ms Schwartfeger have an arguable case for reinstatement?
- (c) Where does the balance of convenience lie between the parties in the period until the Authority's determination is given?
- (d) Does the overall justice of the case dictate interim reinstatement of employment is appropriate?

Does Ms Schwartfeger have an arguable case that she was unjustifiably dismissed?

[11] The Ministry alleges that Ms Schwartfeger's conduct of working on client files who were also Facebook friends amounts to serious misconduct. The dismissal letter highlights persons A and E as the affected Facebook friends.⁴ The Code states employees "*must not access ... the record of a friend, ... or acquaintance for any reason...*" and if unsure, to take the issue to a manager.⁵ The Ministry submits Ms Schwartfeger knew about the Code and was aware of the meaning of acquaintance from her 2009 warning. Either she should not have accessed these records or taken the issue to her manager. Ms Schwartfeger denies the Facebook friends were friends or acquaintances in terms of the Code.

[12] An arguable case is "a case with some serious or arguable, but not necessarily certain, prospects of success."⁶

³ Section 127(4)

⁴ Letter dated 25 September 2012 Exhibit MRB 5 Affidavit Michael Ross Bryan sworn 12 October 2012

⁵ Code of Conduct p 10 Exhibit JMK 1 Affidavit Jeffrey Mathieson Keene sworn 12 October 2012.

⁶ *X v Y Ltd and the NZ Stock Exchange* [1992] 1 ERNZ 863, 872-3.

[13] It is accepted Ms Schwartzfeger was employed and dismissed. The burden of justifying the dismissal lies with the employer.⁷ It will be difficult for the Ministry at an interim stage to assert there is no arguable case.⁸

[14] To the extent there is a conflict of evidence in the affidavits – and there is – the Authority is not in a position to resolve this at an interim hearing on the papers.

[15] The Code does not define *friend* and *acquaintance* to include Facebook friends. This requires an employee to identify actual and potential conflict dependant upon their understanding of what friend or acquaintance means. While conflict may be taken to a manager to resolve, it presupposes knowledge there is actual or potential conflict in the first place.

[16] The definition of acquaintance in Ms Schwartzfeger’s 2009 warning as “*any person you are familiar with*” is unhelpful. Taken in its widest sense it could encompass every person Ms Schwartzfeger has ever interacted with, imposing overly onerous duties of disclosure. The warning later omits reference to any obligation to disclose in respect of acquaintances,⁹ contrary to the Code.

[17] It is general knowledge Facebook friends are created when users send others requests to be added to their website page as *friends*. This is the process of “friending”. “Friending” does not prevent users from accepting requests from persons they have not met or who would not ordinarily be considered a friend or acquaintance in the traditional sense.

[18] Ms Schwartzfeger has an arguable case for unjustified dismissal. This is evidenced by the lack of definition of friend and acquaintance in the Code, the unhelpful and contradictory definition of acquaintance in the 2009 warning, the Facebook “friending” process and the conflict of evidence.

Does Ms Schwartzfeger have an arguable case for reinstatement?

[19] The Ministry claims Ms Schwartzfeger does not have an arguable case for permanent reinstatement because reinstatement is no longer the primary remedy, she has contributed to her predicament and reinstatement is not practicable or reasonable.

⁷ Section 103A

⁸ *Ansley v P and O Services (NZ) Ltd* (Unreported Employment Court, 3 June 1998, WC 34/98) at p2

⁹ Letter dated 25 September 2012 at p2, Exhibit MRB 5 Affidavit Michael Ross Bryan sworn 12 October 2012

[20] Reinstatement is no longer the primary remedy for an unjustified disadvantage or dismissal,¹⁰ but may still be ordered where it is “*practicable and reasonable*” to do so¹¹.

[21] It is premature to determine if there was contributory behaviour preventing reinstatement. The authorities cited followed substantive hearings in the Authority and Court.¹² There is a conflict of evidence about the nature and extent of Ms Schwartfeger’s conduct. It cannot be resolved at an interim stage without hearing from the parties.

[22] Whether it is practicable to reinstate involves a balancing of the interests of the parties and the justices of their cases with regard to the past and future.¹³ Practicality is both about whether it can occur and the consequences.¹⁴

[23] The Ministry deposes reinstatement is impracticable and unreasonable because there are insufficient resources to closely monitor Ms Schwartfeger’s work.¹⁵ Monitoring requires checking 100% of her work using 1 of 3 fulltime Service Quality Officers employed in the Bay of Plenty. SQO’s check 100% of new employees work for 3 months and 5 % of other employees. Checking Ms Schwartfeger’s work would impose an additional burden upon the SQO’s which is not sustainable in the long term or reasonable. It would require recruitment of an additional SQO if one is available at all.¹⁶

[24] A substantive hearing date is available in March 2013. The SQO checking would be required for 3 months, within the timeframe allowed for checking 100% of new employees work. It would be unusual if checking 100% of new employees work for 3 months can occur within current staffing, but checking Ms Schwartfeger’s work cannot.

[25] The ongoing need for 100% ongoing SQO checking in the event of permanent reinstatement can be reviewed at hearing. This matter is likely to make Ms

¹⁰ *Angus & McKean v Ports of Auckland* [2011] NZEmpC 160 at [61]

¹¹ Section 125(2) of the Act and see above at [62]

¹² *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 40 and *Drader v Chief Executive of the Ministry of Social Development* [2012] NZEmpC 179

¹³ *Lewis v Howick College Board of Trustees* [2010] NZCA 320, at [2] citing *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 (CA)

¹⁴ See above.

¹⁵ Affidavit J Arstall sworn 15 October 2012 paragraphs 48.6 to 48.8

¹⁶ Second Affidavit MR Bryant sworn 25 October 2012 paragraphs 6 to 9.

Schwartfeger more vigilant about disclosing prior to accessing client records of persons known to her. A condition for Ms Schwartfeger to disclose to the Ministry all known persons whom are or were clients should assist.

[26] There are other branches where Ms Schwartfeger may be placed if there are concerns about her return to Rotorua.¹⁷ The general concerns about the impact on staff at smaller Ministry branches of checking her work is dealt with above. The Ministry may arrange 'garden leave' i.e. continue payment without requiring attendance at work in the period of time until hearing.

[27] There is no evidence of criminality¹⁸ or other dysfunctional behaviour by Ms Schwartfeger to prevent reinstatement.

[28] Ms Schwartfeger's undertaking can be enforced if she was reinstated. Wages of \$700 per week will result in a \$200 per week surplus and there is equity in a property to meet any damages award.¹⁹

[29] Concerns Ms Schwartfeger may continue to breach the Code have been addressed in further evidence.²⁰ These concerns can be dealt with by conditions on reinstatement specifying disclosure and to refrain from working on files of persons known to her.

[30] Ms Schwartfeger has been employed by the Ministry for 28 years. She had not at the time of hearing been able to obtain alternative employment. It is unlikely the alternative of compensatory damages for lost remuneration will replicate the loss of ongoing employment in the Bay of Plenty. She has provided evidence of financial hardship including a deficit of \$508 per week.²¹ Her budget refers to school fees and a mortgage. There is likely to be a negative impact upon family and retention of mortgaged property if reinstatement is not ordered.

[31] There is an arguable case for reinstatement.

¹⁷ Affidavit J Arstall sworn 15 October 2012 paragraphs 48.1 to 48.5

¹⁸ Exhibit A Second Affidavit J Schwartfeger sworn 15 October 2012

¹⁹ See above.

²⁰ Second Affidavit J Schwartfeger sworn 15 October 2012 paragraphs 4 and 11.

²¹ Third Affidavit J Schwartfeger sworn 16 October 2012 paragraph 2.

Where does the balance of convenience lie between the parties in the period until the Authority's determination is given?

[32] The Ministry alleges the balance of convenience strongly favours it because reinstatement is not the primary remedy, the Ministry has lost trust and confidence in Ms Schwartfeger, reinstatement would not establish and maintain a productive working environment due to the lack of close supervision of Case Managers, Ms Schwartfeger's significant contribution to the situation, financial losses can be adequately compensated by damages and the negative impact upon third parties of reinstatement.

[33] The balance of convenience requires the Authority to weigh up the inconvenience to an employer of having to bear the burden of reinstatement before the substantive case is heard (which it may win) against the inconvenience to a plaintiff (who may have a just case) of having to bear the detriment of wrongful or unjustifiable action until hearing.²² Inconvenience means detriment or injury.²³

[34] All of the issues with the exception of the loss of trust and confidence and third party impact have been dealt with above. Any detriment or injury identified by the Ministry can be dealt with in other ways and by substantive hearing in March 2013.

[35] The breach of trust and confidence is based upon the evidence of Mr Michael Bryant, the decision maker. No independent evidence of breach of trust and confidence has been filed. The facts relied upon for breach are disputed and cannot be resolved at an interim hearing. Fears of ongoing breaches of the Code are addressed above by SQO supervision, conditions and garden leave.

[36] The alleged damage to the Ministry's public profile and confidence by this particular reinstatement decision is at best speculative.

[37] Third party impact is alleged to Ms Schwartfeger's previous manager who undertook the initial investigation recommending disciplinary action. No independent evidence of third party impact has been filed. Options such as SQO supervision, March 2013 fixture date, alternative managers, placement, conditions and garden leave should alleviate third party impact.

²² *X v Y Ltd and the NZ Stock Exchange* [1992] 1 ERNZ 863, 872-3.

²³ See above.

[38] In the absence of evidence of any other dysfunctional behaviour preventing reinstatement, it is difficult to conclude reinstatement will cause significant disruption to a workplace given the above options.

[39] Overall the balance of convenience favours Ms Schwartzfeger.

Does the overall justice of the case dictate interim reinstatement of employment is appropriate?

[40] The Ministry alleges overall justice favours it because the evidence strongly favours no intervention, adequacy of alternative remedies and no evidence of prejudice if reinstatement is not granted.

[41] The Authority must stand back from the case and consider what the overall justice of the case requires it to do.²⁴ Relevant factors to the overall justice are:²⁵

- strength of applicant's case
- adequacy of alternative remedies
- admitted contributory behaviour other than that used to found the dismissal
- availability of an early fixture
- opportunity of earlier reinstatement by apology

[42] There are conflicts in the evidence but overall Ms Schwartzfeger has an arguable case.

[43] The alternative remedy of damages is inadequate given Ms Schwartzfeger's financial situation.

[44] There is no admitted contributory behaviour other than that used to found the dismissal itself.

[45] A fixture is available in the week of 4 March 2013. This is 6 months after dismissal and is dependant upon Counsel, parties and witnesses availability. A

²⁴ See above.

²⁵ *Ansley v P and O Services (NZ) Ltd* (Unreported Employment Court, 3 June 1998, WC 34/98) at p7

teleconference is directed to timetable evidence and fixture dates. The availability of fixture date does not weigh in favour of either party.

[46] No earlier reinstatement was offered. An apology was tendered at the investigation meeting but did not affect the outcome.²⁶

[47] The majority of relevant factors favour Ms Schwartzfeger except the availability of a fixture. The overall justice of the case favours interim reinstatement.

Determination

[48] The Authority determines the following orders/directions shall issue:

A Pursuant to an undertaking as to damages, an order for the interim reinstatement of Ms Schwartzfeger to her job with the Ministry until hearing of her personal grievances. This order is subject to conditions Ms Schwartzfeger:

- a) discloses to the Ministry the names of all of her “Facebook friends” and the names of any persons known to her whom she has reason to believe may be previous or existing clients.
- b) refrains from working on client files of any persons known to her unless authorised to do so by the Ministry.

B A direction for a teleconference to be convened for timetabling evidence and fixture dates.

[49] Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority

²⁶ Meeting Notes 17 September 2012 Exhibit MRB 2 Affidavit Michael Ross Bryan sworn 12 October 2012