

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Brian Cliff Applicant)

AND Air New Zealand Limited (Respondent)

REPRESENTATIVES Jim Roberts for applicant
Kevin Thompson for respondent

MEMBER OF AUTHORITY Janet Scott

INVESTIGATION MEETING 2, 3 March 2005
21,22,23 March 2005

DATE OF DETERMINATION 1 June 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

On 24 November 2004 the respondent dismissed Mr Cliff from his employment following an investigation into his internet usage. As a result of that investigation the company concluded that Mr Cliff's actions relating to the amount of non-work related internet use and the content of sites involved amounted to serious misconduct justifying his dismissal.

At the time of his dismissal, Mr Cliff had been employed by the company since 1985. He held the role of Materials Logistics Engineer within the Engine Maintenance Materials section of the company's engineering division (ANZES). He was a senior employee in a sole charge position.

Following his dismissal Mr Cliff raised a personal grievance claiming unjustified dismissal and unjustified action leading to his dismissal.

Mr Cliff is seeking permanent reinstatement to his former position, lost remuneration and compensation for the harm he alleges has been done to him. He also seeks a penalty and costs.

Mr Cliff has been reinstated to his position pending a determination on the substantive claim. He is currently on garden leave.

The Authority's Investigation

The Authority's investigation spanned five complete days. The matter was heard with the claim brought by Allan Groom who was dismissed by the company in similar circumstances. (AEA 1216/04). I have also viewed a selection of the sites which the applicant's accessed and which were alleged by the respondent to be offensive/pornographic.

There were a number of common challenges mounted in respect of these claims. I have, however, issued separate determinations. Where the challenges are common those challenges and my findings are (where appropriate) expressed in a similar format and terms.

Issues to Be Decided

Note: I am addressing Mr Cliff's claim as one of unjustified dismissal because this is the issue upon which the evidence and submissions focussed.

In determining this matter I have had to keep in mind the following legal principles (*W & H Newspapers Ltd v Oram* [2002] 2 ERNZ 448).

Was the decision to dismiss Mr Cliff one which a reasonable and fair employer could have taken?

For me to be able to answer this question in the affirmative the respondent must satisfy me, not that it can prove serious misconduct on Mr Cliff's part, but that it has conducted a full and fair investigation that disclosed conduct capable of being regarded as serious misconduct.

However, the employer's conduct of the disciplinary process is not to be put under a microscope or subjected to pedantic scrutiny nor are unreasonably stringent procedural requirements to be imposed.

"Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person" (*New Zealand (with exceptions) Food Processing Etc IUOW Unilever NZ Ltd* [1990] 1NZILR 35).

If, following such an investigation, the employer believed that serious misconduct had occurred then the option of dismissing Mr Cliff was open to the company.

There were a large number of wide ranging challenges to Mr Cliff's dismissal which I note extended well into that territory where the employer's conduct has been subjected to the pedantic scrutiny the Courts frown upon. Nevertheless I have dealt with the main submissions put forward for Mr Cliff. I record for the sake of certainty that other issues raised by and for him but not dealt with by me are dismissed.

For the sake of clarity I am summarising the issues to be decided with the heads of challenge noted.

1. Did the company follow its own disciplinary policies in investigating this matter?

- Provision of relevant policies
- Accuracy of meeting notes

2. Did the respondent carry out a thorough and fair investigation?

- Failure to provide duration data
- Failure to provide blocked user data
- The employer did not replicate the searches conducted by Mr Cliff
- Hits overstated
- Three minute default setting
- Employer didn't check what else Mr Cliff was doing during browser sessions
- Verification of data by reference to Brian Cliff's user data
- No opportunity to respond to revised usage data prior to dismissal on 24 November
- Access to and knowledge of the company's internet use policies
- Internet Access and Training
- Delay
- Misleading Conduct
- Provision of EAP Assistance.
- Report to Management
- Disparity of Treatment

3. Was the decision that serious misconduct occurred a reasonable decision open to the employer on the basis of the investigation undertaken?

1. Did the company follow its own disciplinary policies in investigating this matter?

This issue goes to the fairness of the investigation conducted by the employer.

“In an employment relationship which provides a procedure or code which is to be followed in the event of disciplinary action, it is a term or condition of the employment that the employee will not be dismissed without the established procedure being first followed, and a good and conscientious employer will follow it.” Petersen v Board of Trustees of Buller High School unreported decision CC 7/02 following New Zealand (with exceptions) Food Processing Etc IUOW Unilever NZ Ltd [1990] 1NZILR 35.

As a result of concerns that had previously come to its attention Air New Zealand commenced an investigation into internet usage within the ANZES division for the period 31 March/24 July 2004. Gen-i (an IT Technical Support Organisation) provided the company with individual internet user reports for those employees who appeared to be high users or whose usage demonstrated significant access to offensive sites. As I understand it the relevant user reports were provided to the company on 8 October 2004.

On receipt of the relevant reports the company determined that Mr Cliff's internet usage warranted further investigation both as to the amount of internet use and the content of sites visited. In particular, a preliminary assessment of the user report by Mr Cliff's immediate manager revealed that adult/sexually explicit sites recorded as accessed were clearly not work related and that little, if any, of the other internet usage appeared to be work related.

Mr Cliff's manager (Mr Waite) wrote to him on 14 October outlining the company's concerns in relation to his high level of use and the content of the sites visited by him. He was invited to a meeting on 20 October to discuss the company's concerns. I find that letter accorded with all the steps set out in the company's disciplinary policies as to notice of allegations, the seriousness with which the allegations were viewed, possible consequences and his right to representation. Attached to the letter for Mr Cliff's information was a record of his internet usage for the period in question.

At the meeting on 20 October Mr Cliff was provided with copies of relevant company policies and was questioned as to his knowledge of the company's internet usage policies. The notes of that meeting record that Mr Cliff stated he "fully understood company policy pertaining to internet use". The notes also record his statement that "on no account could any sexual site be visited on the internet". He provided certain explanations relating to his internet use (including the fact that he used the internet to research topics relevant to his activities as a member of the Masons). He gave an explanation in relation to two (offensive) sites recorded in his internet user report including a female celebrities' site. He explained he had accessed these sites in error.

Following this meeting and having regard to Mr Cliff's explanations and other matters the company carried out further inquiries in relation to Mr Cliff's internet usage. Mr Cliff's representative was closely involved with company representatives in the ongoing investigation. Among other things that emerged as warranting further investigation was the fact the data revealed multiple hits (visits) to certain sexually explicit sites that did not seem credible. There was also an issue relating to a default of three minutes associated with the viewing time of the last page viewed in any one browser session¹. Lastly there was material included in Mr Cliff's user report that was more likely (given the time of access) to be associated with another worker (a shift worker). A review of that material also showed it did not accord with Mr Cliff's general user profile.

Over the next few weeks these issues were further investigated. Gen-i was requested to reassess all the information they had provided. They did so. In Mr Cliff's case the revised data (which became available to the company on 22 November) showed a reduction in the number of site visits (hits) overall because, in certain cases, periods within the overall three month period of the review had overlapped (resulting in double counting) and some sites visited had been counted more than once because they had been categorised in more than one category e.g. in a personal interest category and in the adult/sexually explicit category. In Mr Cliff's case the review of his internet usage showed that part of another employee's usage history had mistakenly been included in Mr Cliff's user history. This mistake was rectified and I find that material was removed from consideration of Mr Cliff's internet usage.

In addition to the technical review undertaken by Gen-i in respect to Mr Cliff's user history, Mr Waite undertook his own inquiry into Mr Cliff's internet usage. His inquiries focussed on the explanations given by Mr Cliff at the 20 October meeting in relation to his access to two offensive sites including a female celebrities' site. It was submitted by and for Mr Cliff that the employer accepted his explanations regarding these sites, the argument being that they could no longer be relied on to justify his dismissal. I reject that submission. I find that after the 20 October meeting Mr Waite had an open mind in respect to Mr Cliff's explanation that he had accessed these two sites in error. Mr Waite took that explanation at face value (at that stage) pending further investigation into other (offensive) sites listed in Mr Cliff's internet user report as having been accessed by him.

On 12 October the company wrote to Mr Cliff again referring to the company's concerns relating to his internet use and to the previous meeting held to discuss those concerns. The record of the meeting was summarised in the letter and notes of the meeting were attached for his information. In this letter the company referred to Mr Cliff's explanations offered in respect to certain offensive sites accessed by him. He was advised the company had investigated a sample of the remaining offensive sites recorded as having been accessed by him. Three sites were cited (together with the dates visited and a description of the sexually explicit contents of those sites) and Mr Cliff was invited to another meeting (16 November) to provide any further explanations he might want to put forward. He was advised that following this meeting the company would consider all matters and

¹ Three minutes viewing time is automatically recorded in respect of the last page opened in any one browser session regardless of the time that page is opened/viewed.

form a view as to what has occurred. This letter too, conformed to company policies in that it contained all the relevant cautions to the worker as to his rights and possible disciplinary consequences.

The record of the 16 November meeting shows that aspects of Mr Cliff's user profile were canvassed and he provided explanations for two of the three offensive sites highlighted by the respondent in its letter to him of 12 November. The notes of the previous meeting were addressed and Mr Cliff submitted a different perspective on parts of that record. Mr Cliff's representative debated on his behalf his knowledge of Air New Zealand internet use policies and herself raised concerns regarding the recorded number of hits versus duration times and the three minute default setting as it impacted on duration of time spent on the internet. The thrust of these concerns being that if hits were inflated and a default setting of three minutes taken as actual time spent in certain sites then both the number of visits and duration of time spent on the internet would be overstated.

Following this meeting Mr Waite, the decision maker in this case, considered all the information available including his own research into the sites visited by Mr Cliff, Mr Cliff's explanations and the revised internet user data for Mr Cliff. That record shows that Mr Cliff was engaged on non-work related internet activity for a period in excess of 50 hours over the review period of 16 weeks. Mr Waite concluded that the amount of non-work related use was excessive. The record of matters considered by the company in coming to its conclusion to dismiss Mr Cliff shows too that the company was satisfied that Mr Cliff had endeavoured to access and had succeeded in accessing multiple sites containing offensive material.

Mr Cliff was invited to a meeting on 24 November where the company's conclusions were communicated to him i.e. that his actions (in spending excessive time on the internet and accessing or attempting to access inappropriate sites) were totally unacceptable and a breach of the trust and confidence essential to the relationship. He was dismissed for serious misconduct.

I find on the evidence before me that the company has complied faithfully with its own policies in investigating this matter and in all its dealings with the applicant. In particular I find that the respondent did provide copies of relevant policies to Mr Cliff at the first meeting held with him.

It was submitted for Mr Cliff that the respondent did not keep accurate notes of the disciplinary meetings it held with Mr Cliff on 20 October and 16 November 2004 and that this contravened the company's disciplinary policies. It was also submitted that, as a result of inaccuracies in the notes taken, Mr Waite wrongly assumed that Mr Cliff admitted accessing certain sites. I do not accept this submission. My reasoning is set out below (p 7).

There were two other challenges to the dismissal under this head. They are significant and go to the policy requirement that the employer provide all relevant information to a worker at the initial interview. Because they go to the quality of the employer's investigation into the alleged wrongdoing by Mr Cliff I am dealing with them under the following head.

2. Did the respondent carry out a thorough and fair investigation?

For Mr Cliff it was submitted the company's investigation was fatally flawed in a number of significant respects.

Provision of duration data: It was submitted by and on behalf of Mr Cliff that the company had not provided all relevant data to Mr Cliff at the first meeting because it did not provide full duration (time on) data to Mr Cliff when that data was available to the respondent. As a result Mr Cliff did

not have access to information that was essential to allow him a real opportunity to respond to the allegations against him.

There is no merit in this submission. The internet user data in question was voluminous. The information provided to Mr Cliff upfront fully and fairly informed him of the company's concerns relating to his level of internet use and the nature of the sites visited by him. It included a full list of all sites alleged to have been visited by him and categorised those sites within certain user categories being adult sexually explicit and personal interest e.g. travel, arts and entertainment etc. It also included a statement summarising the total duration of his internet activity – being 4806 sites visits for a total duration of 81 hours, 28 minutes². The information originally provided was later supplemented by other more detailed information including information of duration of visits for a sample of sites visited by Mr Cliff.

I find that information on the duration of sites visits by Mr Cliff was available for the asking by him or his representative. I find further, that it was available and considered by the participants, including Mr Cliff and his representative, at the 16 November meeting between the parties. I also find that information was otherwise available to Mr Cliff's representative through her discussions with Mr Motet and they considered that information together in their discussions. That this was the case is confirmed by the fact that during the investigation, Ms Roberts (Mr Cliff's representative), herself raised the issue of the three minute default setting and the fact that certain sites had been visited for perhaps only one or two seconds (See notes of 16 November meeting).

Summarizing, I find that Mr Cliff was not disadvantaged in providing explanations for his internet use because he was not provided with full duration data up front. That material was available and was considered and utilised on his behalf by him and his representative.

Provision of blocked user data: It was also argued for Mr Cliff that the process adopted by the employer in investigating this matter was fundamentally flawed because the blocked user data relating to Mr Cliff's internet use was not made available to Mr Cliff along with other relevant information put to him for explanation.

It is the company's position that access and *attempted* access to offensive sites are equally prohibited by the company's internet use policies. As a result when it pursued its investigation the company did not distinguish between access and attempted access to offensive sites. The evidence also reveals Mr Waite was not himself working with the 'blocked user report' data at the time he was investigating the company's concerns regarding Mr Cliff's internet usage. Throughout his investigation Mr Waite worked with the time on data. Where the time on data suggested zero time duration for a visit Mr Waite made the assumption that access to that site had been blocked. Where the time on data suggested sites had been accessed Mr Waite sampled a number of sites reported to have been the entered by Mr Cliff. He satisfied himself that these sites contained sexually explicit material that was offensive to a greater or lesser degree.

In fact access was denied to Mr Cliff for all of the 16 sites listed in the category of adult/sexually explicit³. The fact that this was not advised to Mr Cliff when the company's concerns were put to him is argued as an ambush.

² This information was contained in the initial internet user report relating to Mr Cliff's internet activity. The site visit/duration data was revised downwards following the review of the data commissioned by the company as a result of problems identified in the course of the investigation. However, the sites accessed or attempted to be accessed remained the same. See explanation p.4.

³ Mr Cliff does insist he accessed the Linda Lovelace site.

However, in a somewhat bizarre twist to this story when the employer put this list of allegedly offensive sites to Mr Cliff, he provided explanations relating to his visits to some sites. He denied accessing some of the listed sites and he had no recollection of other sites in question. In particular Mr. Cliff explained his visit to a blocked 'female stars' site and to the 'Geordie girls' site a 'mature women' site and to a Linda Lovelace site. Further, at the meeting on 16 November Mr Cliff presented material from the Linda Lovelace site he had visited in support of his explanation that he was researching the life of Linda Lovelace for an address he intended to give the Masons. The material he submitted in support of his explanation regarding this site was in the nature of bio/testimony and contained a photograph of Linda Lovelace clothed.

In this regard I have noted the submissions for Mr Cliff that inaccuracies in the respondent's note taking at the meetings of 20 October and 16 November led Mr Waite to assume that Mr Cliff admitted accessing certain sites. It is clear, however, that on this point the notes of the meetings of 20 October and 16 November are supported by Mr Cliff's own evidence to the Authority and that of his witness Mr Douglas. The weight of the evidence supports a finding that Mr Cliff admitted visiting a number of the sites in question e.g. Linda Lovelace, female stars/Britney Spears, mature women, Geordie girls.

So at the time he came to consider all the information available to him Mr Waite was of the belief that Mr Cliff had accessed at least some of the sites in question because the duration information supported a finding that Mr Cliff had accessed some of these sites and Mr Cliff had admitted accessing a number of the sites in question.

I have carefully considered the submission that the failure by the employer to put the blocked user report to Mr Cliff is fatal to the decision to dismiss him for this reason. For the following reasons I have come to the conclusion it is not.

- The company's policies prohibit access or attempted access to offensive/pornographic material. It is not the case that the blocked data information was required to be factored into the company's consideration (and therefore to be made available to Mr Cliff for explanation) because, given the company's policies, it was irrelevant – the issue for the employer being whether or not the sites in question were in fact offensive and whether the access or attempted access to inappropriate sites was to be categorised as deliberate or accidental. The evidence also reveals that Mr Waite was aware at the time that certain sites were not accessed by Mr Cliff because they were blocked. It is not as if he closed his mind to the issue and in fact he concluded that attempted access (to some inappropriate sites) was a feature of Mr Cliff's overall internet usage⁴.
- In arriving at his decision that Mr Cliff had attempted to access and did access inappropriate material on the internet Mr Waite did not rely solely on the assessment that Mr Cliff had accessed or attempted to access the 16 sites in the adult/sexually explicit category of Mr Cliff's internet user report. Mr Waite also had occasion to consider Mr Cliff's access to a number of sites that were included in the 'none' category of the internet user report. Some sites in this category also contained inappropriate sexually explicit material. The evidence shows these sites were accessed by Mr Cliff. The sites in question included the 'confarming' site, the 'dfwpi' site, the 'Britney Spears nude orgy' site and the 'Jenifer Aniston' sites. I do not accept Mr Cliff's protestations that certain sites were not put to him for explanation. The evidence shows that all sites alleged to have been accessed by him were included in the material provided to Mr Cliff prior to the first meeting with him. He was allowed the opportunity to respond to the allegations regarding the content of any or all those sites and

⁴ See reasons for dismissal given at the time of dismissal.

chose to explain his visits to certain sites only. For example, he gave an explanation that he had accessed a female stars' site in error when he was trying to establish the name of the lead actress in the movie "The Bodyguard". The record shows that Mr Waite considered Mr Cliff's explanation and concluded in respect to the numerous female stars sites which feature in Mr Cliff's internet usage report "*The offensive nature (nudity) of many of the female star sites have nothing to do with the movie 'The Bodyguard'*".

- I also find that the company researched the context of Mr Cliff's searches by assessing the trail taken by him to certain site selections. This inquiry resulted from consideration of Mr Cliff's explanations in relation to his visits to certain sites. For example, Mr Cliff said that he accessed a 'mature women' site because he wanted to research possible medical complaints that his wife might suffer from as she aged. The 'mature women' site selected displayed a prominent R18 warning. While that site was blocked it was selected in a browser session along with visits to dating sites and a blocked 'model teen' site. Nothing in the context of the visit to the 'mature women' site suggested a search for health related material - a factor weighed by Mr Waite in deciding that Mr Cliff's explanation for visiting this site was not credible.
- Lastly on this issue I find it is axiomatic that if one knows it is not permissible to access offensive material on the internet one will be aware that attempted access is equally unacceptable. Certainly in terms of its affect on the trust and confidence essential to the relationship between the parties, it makes no difference whether Mr Cliff accessed or attempted to access prohibited material if that access/attempted access was deliberate.

The employer did not replicate the searches conducted by Mr Cliff: It was also submitted for Mr Cliff that the investigation into the content of sites visited by him was flawed because Mr Waite did not replicate the searches conducted by Mr Cliff in his internet browser activity⁵. This led Mr Waite to the flawed belief that Mr Cliff had accessed the (admittedly pornographic) homepages of certain sites in question. It was submitted that Mr Waite could not conclude, on the basis of his investigations, that Mr Cliff had deliberately accessed these pages. An example of the Mr Waite's flawed assumptions in this regard was cited in respect of Mr Cliff's visit to the Linda Lovelace site. It was submitted for Mr Cliff that having used the search term 'linda lovelace', Mr Cliff carefully accessed an inoffensive story about Linda Lovelace whilst avoiding material highlighted with an R18 warning.

I don't accept this submission for a number of reasons. The respondent is not required to carry out an investigation in the nature of a criminal investigation. Neither was it required to prove the misconduct of the worker. Mr Cliff's internet user data shows that he selected the site www.completelindalovelace.com. This is the first site listed in Google in response to a search request for 'linda lovelace'. There is a prominent R18 warning associated with this site. In selecting/accessing this site, Mr Cliff accessed a site relating to a person whose name is synonymous with pornography and he ignored a prominent R18 warning in doing so. The site contains pornographic material, a fact revealed to Mr Waite who checked the site. Mr Cliff admits accessing this site (albeit he argues the material he viewed was innocent). Mr Waite's investigation of Mr Cliff's access to this site was sufficiently thorough for him to come to the conclusion that Mr Cliff had attempted to access and did access an offensive site. He was not required to prove beyond reasonable doubt which page within this or any other offensive site Mr Cliff accessed/viewed.

I note another related submission made on Mr Cliff's behalf. It seems to argue that he did not search for offensive sites but just made selections from the menus presented as a result of possibly

⁵ The internet user report does not record the search terms used.

innocent searches. This submission too has no merit. A review of the evidence shows Mr Cliff was selecting sites, the dubious content of which was often signalled in the name of the site selected. The pattern of access reveals there is nothing sporadic or accidental about the nature of the sites selected. In making these selections Mr Cliff was in breach of company rules he knew and understood⁶.

Hits overstated: It was submitted for Mr Cliff that the number of site visits⁷ relied on by the respondent as the basis of its finding his internet usage was excessive was inaccurate and that the employer's investigation was insufficient to allow the respondent to arrive at the conclusion that Mr Cliff's internet access was in fact excessive. The basis for this concern seems to be an argument that certain sites and pages opened/recorded automatically without any action from Mr Cliff - such sites/pages being recorded as site visits.

The site count is a technical feature of the internet user information assessed by and for the company. I accept that the 'howdy mate' email explains how hits were counted in the investigations under examination. The same approach was taken with all internet user reports and the results were relative. The data relating to Mr Cliff's internet use put him in the high end of all internet users in ANZES division. That in itself does not make his usage excessive. It formed the basis for inquiring into his internet usage. The company was able to conclude immediately the adult/sexually explicit material was not work related. It also concluded that little if any of the other usage seemed to be work related and the sites visited by Mr Cliff were put to him for explanation. As I understand the evidence Mr Cliff did not dispute (during the employer's investigation) that his internet use was excessive. In fact it is not disputed that on the day he was dismissed he stated he could "*be dismissed for excessive use but not for pornography*".

I note too, that at the investigation meeting Mr Cliff confirmed that he knew, in respect of the period under investigation, that non-work related internet use was permitted on an *occasional* basis only. He also stated that none of his internet use was work related. A total of 4,400 site visits over 16 weeks is a lot of non-work related use (275 site visits per week).

I dismiss this submission and note in concluding on this point the employer is not required to conduct an investigation such that it can show beyond reasonable doubt which and how many site visits resulted from keystrokes/selections actively executed by Mr Cliff.

Three minute default setting: It was argued for Mr Cliff that the employer could not show that Mr Cliff was actually engaged for three minutes in viewing the last page opened in a browser session and therefore it is possible that the duration times relied on by the employer in coming to the decision that Mr Cliff's internet use was excessive were inaccurate and the decision flawed because the employer had not carried out an investigation that was sufficiently thorough to establish the actual duration of his viewing sessions.

The fact is that this default setting automatically records three minutes viewing time regardless of how long the browser has the page open. Mr Cliff could have viewed these last pages for 3 seconds or 10 minutes. The duration time recorded would be three minutes.

Again this is a technical feature of internet use measurement and I find there was no requirement for the employer to investigate Mr Cliff's duration data beyond those steps taken by it to eliminate the double counting and to clean up the data to ensure it reflected Mr Cliff's usage. Quite apart from

⁶ See finding p.11.

⁷ The revised internet usage report relied on by the respondent records that Mr Cliff visited 4,400 internet sites in the 16 week review period.

anything else it is simply not possible to extract from the data precise viewing time information for the last page viewed.

Lastly on this point the evidence shows that at the time Mr Waite made his decision in this matter Mr Cliff was not disputing his non-work related internet use was excessive.

I dismiss this submission.

Employer didn't check what else Mr Cliff was doing during browser sessions: It was submitted for Mr Cliff that he would often be engaged on work related tasks whilst browsing the internet. During the investigation management were requested to check with Mr Cliff's work colleagues to confirm his work ethic and to confirm they had never seen a naked woman on his computer screen. It was submitted the company's investigation was flawed because it did not take this step requested by Mr Cliff.

I find there is no flaw in the process in this regard. Mr Cliff's work ethic was not the issue here. Further, there was an obligation on the company to treat Mr Cliff fairly. Maintaining a high level of confidentiality in relation to the allegations of serious misconduct against him is critical to establishing that he was treated fairly during the investigation/disciplinary process. Revealing/discussing his work/internet browser habits with work colleagues is not consistent with fair treatment.

Verification of data by reference to Brian Cliff's user data: It was Ms Roberts' evidence that there was an agreement between her and the company to verify Brian Cliff's data and apply the same process of verification to the data of other employees under investigation. It is submitted the company did not comply with this 'agreement' as to the process to be adopted. The company denies there was any such agreement although it accepts that a great deal of the analysis of internet use data was conducted with reference to Mr Cliff's data. I find there was no agreement as such to test all data against verified data for Brian Cliff, but I accept that it was Mr Cliff's data that was referred to in discussions on technical issues between Mr Motet and Ms Roberts. An agreement of the kind described by Ms Roberts could be unwise because the employer had the obligation to treat each employee as a unique individual and to examine data relating to each employee from that perspective. To apply a one size fits all approach to analysing an individual's user data could run a risk of making unfounded assumptions about that data.

There was no disadvantage to Mr Cliff in this respect. His data was subjected to careful analysis and investigation.

No opportunity to respond to revised data prior to dismissal: It was submitted for Mr Cliff that the revised internet use data relied on by the employer to dismiss him was not received by him and his representative until just before the dismissal meeting and they were denied the opportunity to address/explain this data.

The evidence shows that the employer undertook to provide the revised data to Ms Roberts by close of business on 23 November. The information was provided by the deadline agreed. Thereafter it was Ms Roberts' business to ensure she accessed it. I find there was no unfairness arising from not allowing Mr Cliff the opportunity to respond to this data. Mr Cliff had had two opportunities to provide explanations relating to the amount and content of his internet usage (20 October and 16 November). The 24 November date had been notified to the applicant as the date the company's decision would be communicated to him. The revised data which had been with the company since 22 November and which informed Mr Waite's decision was not significantly different to the data he had always had and in respect of which he had had the opportunity to explain. There had been a

downward adjustment in the number of hits/duration time but Mr Waite concluded the sites visited were the same and the amount of usage remained excessive. On the facts he was entitled to come to that conclusion in relation to the revised data.

Access to and Knowledge of the Company's internet usage policies: There was a great deal of after the event equivocation and even denial by Mr Cliff relating to his knowledge of company internet usage policies and how to access those policies. I do not accept much of Mr Cliff's evidence in this regard. More importantly, I find that Mr Waite (having inquired of Mr Cliff's knowledge of the company's policies) was entitled to conclude that Mr Cliff was fully aware of the prohibition on accessing sexually explicit material on the internet and that he knew that private use of the internet was permitted on an occasional basis only.⁸

Internet Access & Training: It appears on the evidence that Mr Cliff was given internet access because it was expected he would need it for work-related purposes. Up until his dismissal he had in fact had no need to use the internet for work-related reasons and Mr Cliff's evidence was that all his internet use was non-work related. Mr Cliff appeared to submit that it was therefore his employer's fault that he used the internet for non-work related purposes because it had given him access to the internet. I cannot accept this submission.

It was also submitted by and on Mr Cliff's behalf that that he did not receive training in the use of the internet. The employer's evidence is that it does not provide training in non-work related use of the internet but that its policies on internet use are widely promoted.

These arguments justifying Mr Cliff's internet use have no merit. It is clear on the evidence that Mr Cliff knew the rules relating to internet use when he chose to use the internet in the manner he did.

Delay: It was submitted for the applicant that there had been undue delay in commencing and concluding the investigation. As I understand the evidence the investigation covered the internet use of large number of staff entailing a major IT exercise. The report relating to Mr Cliff's internet use was not available to the company until early October 2004. The investigation commenced immediately. Between then and 24 November significant work was undertaken including a full audit of Mr Cliff's internet usage report (along with the internet usage reports of other employees). The respondent also carried out a separate investigation into the data after hearing Mr Cliff's explanations. Given the forensic nature of much of the material in question the investigation and disciplinary process was far from prolonged. I note on this point that there is always a balance to be achieved between maintaining a timely pace and ensuring a thorough inquiry. The respondent has achieved the right balance in this case.

Misleading Conduct: It was submitted that during the investigation the company misled Ms Roberts/Mr Cliff into believing he would not be dismissed. I find the company did not mislead the applicant into believing dismissal was off the table. The allegations against Mr Cliff were viewed very seriously by the company and he was told this on more than one occasion. This submission is simply contrary to the weight of the evidence on this point.

EAP Assistance: It was submitted by and for Mr Cliff that he was not offered EAP assistance until the day he was dismissed. The evidence reveals that Mr Cliff found the investigation and disciplinary process very stressful. The evidence shows to that the respondent's managers were concerned about his welfare and inquired of his welfare during the process. I find that Mr Cliff was informed of the availability of EAP at the first meeting held with him on 20 October 2004.

⁸ Mr Cliff confirmed at the investigation meeting that at the time of the period under review he was aware of the prohibition on accessing sexually explicit sites on the internet and that private use was permitted on an occasional basis only.

Report to Management: Mr Motet advised Mr Cliff's representative early in the investigation process that a report on the investigation findings would be submitted for senior management prior to any decision being taken in respect of Mr Cliff. Mr Motet agreed to show the report to Ms Roberts prior to submitting it to senior management. Mr Motet's evidence was that subsequent information he received meant that he was not required to prepare and submit a report to senior management. His evidence was that he told Ms Roberts this.

Ms Robert's evidence was that she was never told there was to be no report. It was submitted that the failure to allow Ms Roberts the opportunity to make submissions on the findings of the investigation through the proposed report had disadvantaged Mr Cliff.

Both Mr Motet and Ms Roberts presented as truthful witnesses on this point. It may be that Mr Motet advised Ms Roberts that no report was necessary and she failed to register this information. Anyway there can be no disadvantage to Mr Cliff arising from a failure to allow Ms Roberts the opportunity to influence a non-existent report. I note, too, that Mr Cliff was ably represented throughout the investigation/disciplinary process and that Ms Roberts made robust representations on his behalf. This submission is dismissed.

Disparity of Treatment: Issues of disparity of treatment were raised at the investigation meeting. Disparity of treatment is claimed in respect of the disciplinary outcomes meted out to other workers who have themselves been the focus of inquiry into their own internet usage.

I am satisfied on the evidence that the outcomes for others (that fell short of dismissal) have been satisfactorily explained by the respondent as arising from personal internet usage that was qualitatively and quantitatively of a lesser order of misconduct to that of Mr Cliff.

3. Was the decision that serious misconduct occurred a reasonable decision open to the employer on the basis of the investigation undertaken?

In concluding my findings on this point I have reminded myself that an employer considering allegations of serious misconduct is not required to conduct a criminal or civil trial or to employ a judicial process (*The Warehouse Ltd v Cooper* [2000] 2 ERNZ 351). Nor does the employer have to show beyond reasonable doubt that serious misconduct occurred. As noted, it must show that following a thorough and substantially fair investigation it has reason to believe there has been serious misconduct on the part of the worker.

Having received the internet user reports from the IT provider the company concluded following a preliminary assessment of the data relating to Mr Cliff's internet use that further investigation of his use was justified both as to the amount and content of his internet usage. It put its concerns to Mr Cliff and commenced an investigation. When the investigation revealed anomalies in the data a full edit of the data was carried out. It was the audited data that was factored into the employer's decision making. In arriving at a decision in the matter Mr Waite considered the revised data, Mr Cliff's explanations for his internet usage and the information revealed as a result of further inquiries following consideration of Mr Cliff's explanations. The company's zero tolerance position in respect to deliberate access to prohibited material was a factor considered. Mr Waite had also inquired of Mr Cliff's knowledge regarding internet usage and was satisfied that Mr Cliff knew of the prohibition on accessing offensive sites. The end result was that Mr Waite concluded that Mr Cliff had attempted to access offensive sites and succeeded in accessing a number of those sites. He also turned his mind to the amount of non-work related internet usage revealed in the Mr Cliff's data user report and concluded that use was excessive. Finally Mr Waite had regard to the

considerations (contained in the company's disciplinary policies) that are required to be weighed up in such situations.

I find the investigation, taken overall, was thorough and fair and disclosed conduct by Mr Cliff that was capable of being seen as serious misconduct. Having reasonably arrived at this conclusion the employer was entitled to conclude that Mr Cliff was in breach of his duty to the company and that the trust and confidence essential to the relationship had been destroyed - a state of affairs that allowed it to exercise the option of dismissing Mr Cliff.

Lastly on this point I note the two grounds in respect of which Mr Waite concluded this dismissal was warranted. I find the employer has established that dismissal was open to it on the grounds cited taken separately and together. *Poolle v Horticulture and Food Research Institute of NZ Ltd* [2002 2 ERNZ 869.

Determination

The respondent has demonstrated that dismissal was an option open to it following a thorough and fair investigation. I must decline Mr Cliff's application. Accordingly he is not entitled to the remedies he seeks.

Costs

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Janet Scott
Member of Employment Relations Authority

