Determination Number: AA 1B/05
File Number: AEA 1216/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Allan Groom (Applicant)
AND	Air New Zealand Limited (Respondent)
REPRESENTATIVES	Jim Roberts, for Applicant Kevin Thompson, for Respondent
MEMBER OF AUTHORITY	Janet Scott
INVESTIGATION MEETING	2 March 2005 3 March 2005 21 March 2005 22 March 2005 23 March 2005
DATE OF DETERMINATION	2 June 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

On 24 November 2004 the respondent dismissed Mr Groom from his employment following an investigation into his internet usage. As a result of that investigation the company concluded that Mr Groom'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 Groom had been employed by the company since 1986. He held the position of Forward Planner Engines in the Maintenance Planning section of the company's engineering division (ANZES).

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

Mr Groom 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 Groom 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 Brian Cliff who was dismissed by the company in similar circumstances. (AEA 1210/04). I have also viewed a selection of the sites which the applicants accessed 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 Groom'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 Groom 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 Groom'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 Groom was open to the company.

There were a large number of wide ranging challenges to Mr Groom'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 Groom. 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 Groom
- Hits overstated
- Three minute default setting
- Employer didn't check what else Mr Groom was doing during browser sessions
- Verification of data by reference to Brian Cliff's user data
- Failure to advise of 24 November meeting
- 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
- 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 Groom'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 Groom's immediate manager (Mr Fiechter) 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.

As a result Mr Fiechter wrote to Mr Groom on 18 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 22 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 Groom's information was a record of his internet usage for the period in question.

At the meeting on 22 October Mr Groom 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 Groom advised he was not familiar with all of the company's internet policies but that he was aware of the IT Strategy and Architecture Policy**.** He also stated he was aware of the 2002 Staff Update-Inappropriate Use of Computers. He acknowledged internet should be used privately on a strictly limited basis.

Mr Groom explained that he is a keen photographer and he visited amateur photography sites. He admitted visiting the sites (sexually explicit/glamour & intimate apparel) and said he visited those sites with a view to identifying lingerie that he could purchase from a store. He stated that the contents of the sites visited equated with those images found in widely distributed brochures. He also explained that he used the internet to 'chill out' and that he played internet radio music as a background to his working activities. He suggested his habit of listening to radio stations on the internet might explain his high time on figures.

Mr Groom expressed remorse and said he had not intentionally accessed inappropriate sites – he thought such sites were accessed barred by Surf Control software. He stated it would not happen again.

There was a discussion about a planned trip to Germany by Mr Groom. He was advised his performance was not in question and he would be allowed to undertake the trip. However, it was noted that the alleged misconduct remained under review and that disciplinary consequences remained on the table if misconduct was established.

Following this meeting and having regard to Mr Groom's explanations and other matters the company carried out further inquiries in relation to Mr Groom's internet usage. Mr Groom'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 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 session[1].

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 Groom'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); 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. The sites accessed remained the same.

In addition to the technical review undertaken by Gen-i in respect to Mr Groom's user history, Mr Fiechter undertook his own inquiry into Mr Groom's internet usage. His inquiries followed up on Mr Groom's explanations given at the 22 October meeting and Mr Fiechter sampled another site in the sexually explicit category recorded as having been accessed by Mr Groom i.e. www.the-bikini.com. (The evidence reveals that Mr Groom repeatedly navigated within this site on 7 April 2004 and that he also visited this site on 8 April). Mr Fiechter's assessment was that it contained sexually explicit pornographic material. He also considered the pattern of access to certain sites. There he found, for example, that Mr Groom used the Yahoo search engine on 6 April and went on to select a series of sexually explicit web sites.

[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 open/viewed.

On 12 November the company wrote to Mr Groom 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 Groom's explanations offered in respect to the 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. The www.the-bikini.com site was cited (together with two dates this site was visited and a description of the sexually explicit contents of that site) and Mr Groom 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 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 this meeting shows there was a wide ranging discussion between the parties relating to Mr Groom's internet use including questions as to the accuracy of the time on data and numbers of hits recorded against his user ID. The thrust of these concerns was 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. Mr Groom clarified the record of the meeting of 22 October in respect of the explanation he gave in respect of his access to 'lingerie" sites'. Ms Roberts made a strong plea in mitigation for Mr Groom and submitted that his dismissal would be too harsh a penalty.

Following this meeting Mr Fiechter, the decision maker in this case, considered all the information available including his own research into the sites visited by Mr Groom, Mr Groom's explanations and the revised internet user data for Mr Groom. That record shows that Mr Groom was engaged on non-work related internet activity for a period in excess of 68 hours over the review period of 16 weeks. Mr Fiechter 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 Groom shows too that the company was satisfied that Mr Groom had endeavoured to access and had succeeded in accessing multiple sites containing offensive material.

Mr Groom 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. I find specifically that Mr Groom was provided with copies of relevant policies at the meeting held with him on 22 October.

It was submitted for Mr Groom that the respondent did not keep accurate notes of the disciplinary meetings it held with Mr Groom on 22 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 Fiechter wrongly assumed that Mr Groom admitted accessing certain sites. I do not accept this submission. My reasoning is set out below (p 6/7).

Note: 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 Groom I am dealing with them under the following head.

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

For Mr Groom 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 Groom that the company had not provided all relevant data to Mr Groom at the first meeting because it did not provide full duration (time on) data to Mr Groom when that data was available to the respondent. As a result Mr Groom 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 Groom 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, glamour & intimate apparel and personal interest e.g. travel, arts and entertainment etc. It also included a statement summarising the total duration of his internet activity – being 11,875 site visits for a total duration of 96 hours/56 minutes[2]. I note too that some duration data was provided to Mr Groom subsequent to the 22 October meeting.

I find that the duration data relating to Mr Groom's internet usage was available for the asking by Mr Groom or his representative and that this information was otherwise available to Mr Groom's representative through her discussions with Mr Motet. I also find that it was considered by the participants, including Mr Groom and his representative, at the 16 November meeting between the parties. That this was the case is confirmed by the fact that during the investigation, Ms Roberts (Mr Groom's representative), herself questioned the accuracy of the time on information relating to Mr Groom's internet use.

Summarizing, I find that Mr Groom 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 Groom that the process adopted by the employer in investigating this matter was fundamentally flawed because the blocked user data relating to Mr Groom's internet use was not made available to Mr Groom along with other relevant information put to him for explanation.

In Mr Groom's case access was in fact denied to a number of sites (12 out of 29 sexually explicit recorded against his user ID). It was submitted that the respondent's failure to provide him with the blocked user report relating to his internet use amounted to ambushing him.

I have considered this submission but for the following reasons I do not find the investigation flawed in this respect

- A significant number of sexually explicit sites were accessed by Mr Groom and it is clear given the reasons stated for his dismissal that attempted access (sites blocked) was an understood feature of his user profile.

[2] This information was contained in the initial internet user report relating to Mr Groom'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. The sites visited remained the same. See explanation p.4.

- Mr Groom admitted accessing the sites in question albeit he sought to downplay their content. In this regard I have noted the submissions for Mr Groom that inaccuracies in the respondent's note taking at the meetings of 20 October and 16 November led Mr Fiechter to assume that Mr Groom admitted accessing certain sites. This submission on behalf of Mr Groom has no merit whatsoever. The evidence points without question to the fact that Mr Groom admitted accessing sites in the sexually explicit category and in the glamour & intimate apparel categories. He explained he visited those sites to identify lingerie he could subsequently purchase and that the content of the sites in question equated with material seen in widely available brochures. I note too, in respect of the explanations given by Mr Groom, that I do not accept his evidence that by 16 November the only issue of concern to the respondent was the visit to www.the-bikini.com . All sites listed in his user report were put to him for explanation and it was his choice to respond as he did in broad terms.

- 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. It is not the case that the blocked data information was a required to be factored into the company's consideration (and therefore to be made available to Mr Groom for explanation) because, given the company's policies, it was irrelevant – the issue being investigated being whether or not the sites in question were in fact inappropriate and whether Mr Groom's access/attempted access was to be categorised as deliberate or accidental.

- I also find that the company researched the context of Mr Groom's searches by assessing the trail taken by him to certain site selections. (Refer p.4).

- Lastly, 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 Groom accessed or attempted to access prohibited material if that access/attempted access was deliberate. I note this point was specifically made by Mr Fiechter in the matters he considered in deciding to dismiss Mr Groom.

The employer did not replicate the searches conducted by Mr Groom: It was also submitted for Mr Groom that the investigation into the content of sites visited by him was flawed because Mr Fiechter did not replicate the searches conducted by Mr Groom in his internet browser activity[3]. This led Mr Fiechter to the flawed belief that Mr Groom had accessed the (admittedly pornographic) homepages of certain sites. 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 Fiechter's investigation of Mr Groom's access to the sites in question was sufficiently thorough for him to come to the conclusion that Mr Groom had attempted to access and did access offensive sites. He was not required to prove beyond reasonable doubt which specific page was selected/viewed by Mr Groom within the sites he accessed.

I note another related submission made on Mr Groom'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 innocent searches. This submission too has no merit. A review of the evidence shows Mr Groom

[3] The internet user report does not record the search terms used.

was selecting sexually explicit 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 sites the selected. In making these selections Mr Groom was in breach of company rules he knew and understood[4].

Hits overstated: It was submitted for Mr Groom that the number of site visits[5] 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 Groom'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 Groom - 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 Groom'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 Groom were put to him for explanation. As I understand the evidence Mr Groom did not dispute (during the employer's investigation) that his internet use was excessive.

I note too, Mr Groom's explanation on 22 October that he knew the internet was to be used for private purposes on a 'strictly limited basis' He gave evidence at the Investigation Meeting that all of his internet use (bar one site visit) was unrelated to his work. A total of 10,426 site visits over 16 weeks is an astonishing amount of non-work related use (651 site visits per week).

Another submission was made on Mr Groom's behalf in respect of sites opening automatically and therefore being outside his control. A specific example of this problem was highlighted in respect to Mr Groom's visit on 7 April to the site www.only.bikini.com accessed at 12.30.04 pm. When Mr Groom exited this site two sites containing pornographic material opened automatically. (www.mad-clips.com and www.mad-series.com). The respondent did not accept this submission being of the view that no justification existed for accessing the original site. I accept this submission and note further that even if the visits to the pornographic mad-clips and mad-series sites were an unintended consequence of Mr Groom's access to the only bikini site at 12.30 pm that submission cannot possibly stand in respect of the second visit to that site at 1.05 pm the same day.

In all I dismiss the submissions made for Mr Groom under this head. The employer was not required to conduct an investigation such that it can show beyond reasonable doubt which and how many site visits resulted from key strokes/selections actively executed by Mr Groom.

Three minute default setting: It was argued for Mr Groom that the employer could not show that Mr Groom was actually engaged for three minutes in viewing the last page opened in an browser session and therefore it is possible that the duration times relied on by the employer in coming to the decision that Mr Groom'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.

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[4] See finding p.10.

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

The fact is that this default setting automatically records at three minutes viewing time regardless of how long the browser has the page open. Mr Groom 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 Groom's duration data beyond establishing it was his data and to take steps to ensure it accurately reflected his usage by eliminating any double counting. Quite apart from 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 Fiechter made his decision in this matter Mr Groom was not disputing his non-work related internet use was excessive.

I dismiss this submission.

Employer didn't check what else Mr Groom was doing during browser sessions: It was submitted for Mr Groom that he would often be engaged on work related tasks whilst browsing the internet and that the company did not check what other programmes Mr Groom was working on whilst he was on the internet. The company's position is that Mr Groom's misuse of resources was extreme given his admissions that he was surfing the internet and listening to internet radio at the same time.

I find no merit in this argument for Mr Groom. The extent of his surfing activity militates against a finding that he could possibly have been productively engaged on Air New Zealand business during private browser sessions.

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 including Mr Groom. 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 Brian's data that was referred to in technical discussions between Mr Motet and Ms Roberts relating to the nature and accuracy of the user data in general. An agreement in the nature of that alleged by Ms Robert's could have been unwise as giving rise to unfairness in respect of the individuals whose conduct was under review. 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 risk of making unfounded assumptions about the data in question. Mr Groom's data was carefully analysed over the period of this disciplinary investigation and he has suffered no disadvantage under this head.

Advice of the 24 November meeting: Mr Groom submits he was not advised of the dismissal meeting (24 November) until minutes beforehand. He submits it came as a shock to him. Mr Fiechter accepts he may have left the task of advising the specific date of this meeting to Ms Roberts who was representing Mr Groom.

Mr Groom's evidence on this point is contradicted by the information contained in the Statement of Problem that the 24 November date was notified at the meeting on 16 November. Mr Fiechter also gave evidence that at the 16 November meeting he advised Mr Groom of the expected date for the company's decision to be communicated to him – that date being 23 or 24 November. Mr Motet advised Ms Roberts of the 24 November date and the purpose of the meeting set for that day. I find it more probable than not then that Mr Groom was aware of the meeting set for 24 November. If I

am wrong on this point I have to say it would not vitiate Mr Groom's dismissal. To find that would be to visit on the respondent consequences out of kilter with the failure of process in this respect.

No opportunity to respond to revised data prior to dismissal: It was argued for Mr Groom 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 the revised 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 Groom the opportunity to respond to this data. Mr Groom had had two opportunities to provide explanations relating to the amount and content of his internet usage (22 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 Fiechter'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 Fiechter 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 Companies Internet Use Policies: There was a great deal of after the event equivocation and even denial by Mr Groom relating to his knowledge of the internet and his difficulty in accessing company policies. The company has taken substantial steps to ensure its policies are notified and available to its employees for their information and I don't accept much of Mr Groom's evidence in this regard given it contradicts his state of knowledge expressed at the 22 October meeting. At that meeting he said he was aware of the IT and Architecture Policy. This policy refers to offensive websites and it states prominently that violations of the policy may lead to disciplinary action including dismissal. Mr Groom also acknowledge receiving the 2002 staff update on inappropriate use of the internet which clearly warns against accessing offensive material on the internet and warns that doing so will lead to disciplinary action up to and including dismissal.

I find then that Mr Fiechter, having investigated Mr Groom's knowledge of the company's policies on internet use, was entitled to conclude that Mr Groom was fully aware of the prohibition on accessing sexually explicit material on the internet and the consequences of doing so. Also relevant to Mr Fiechter was the fact that Mr Groom had (in 1999) been specifically warned about an inappropriate email sent by him.

Internet Access & Training: Mr Groom gave evidence he did not require access to the internet for his work. The company strongly disputed this evidence.

It was also Mr Groom's position that he did not receive training on the use of the internet. The company confirms it does not provide training on non work-related use but is clear its usage policies are widely notified to its employees.

If it is Mr Groom's submission that it is the company's fault that he used the internet the way he did it is not a submission I accept. As already noted it is clear on the evidence that Mr Groom knew the rules relating to the use of the internet when he chose to use it the way 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 Groom'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 Groom's internet use report (along with the internet usage reports of other employees). The respondent also carried out a separate investigation into the data following consideration of Mr Groom'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 mislead Mr Groom into believing he would not be dismissed. It was alleged that Mr Motet and Mr Fiechter both advised him (at the 22 October meeting) that 'because he didn't have any porn sites he might be OK'. I find the company did not mislead the applicant into believing dismissal not a possible consequence he faced. The allegations against Mr Groom were viewed very seriously by the company and he was advised of this on more than one occasion. Mr Groom's evidence on this point is contrary to the weight of the evidence.

Report to Management: Mr Motet advised Mr Groom'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 Groom. 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 Roberts' 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 Groom.

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 Groom arising from a failure to allow Ms Roberts the opportunity to influence a non existent report. I note, too, that Mr Groom 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 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 Groom.

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 Groom'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 Groom 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 Fiechter considered the revised data, Mr Groom's explanations for his internet usage and the information revealed as a result of further inquiries following consideration of Mr Groom's explanations. The company's zero tolerance position in respect to deliberate access to prohibited material was a factor considered as was Mr Groom's stated knowledge of the company's policies including the 2002 staff update on inappropriate computer use and to the fact that Mr Groom had been previously warned with respect to inappropriate use of the email system. The end result was that Mr Fiechter concluded that Mr Groom had attempted to access and had succeeded in accessing multiple sites containing offensive material. Mr Fiechter also had regard to the amount of non-work related internet usage revealed in Mr Groom's user report and concluded that his internet use was excessive. Finally, Mr Fiechter 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 Groom that was capable of being seen as serious misconduct. Having reasonably arrived at this conclusion the employer was entitled to conclude that Mr Groom 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 Groom.

Lastly on this point I note the two grounds in respect of which Mr Fiechter 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. *Poole 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 Groom'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