

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 64  
5295968

BETWEEN

KELLY JOY LINNELL  
Applicant

AND

LES MILLS  
INTERNATIONAL LIMITED  
Respondent

Member of Authority: M B Loftus

Representatives: Michael Guest, Advocate for the Applicant  
Richard Harrison, Counsel for the Respondent

Investigation Meeting: 30 September 2010 at Dunedin

Submissions Received: At the investigation meeting

Determination: 13 April 2012

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**DETERMINATION OF THE AUTHORITY**

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## **Employment relationship problem**

[1] The applicant, Ms Kelly Linnell, claims she was unjustifiably dismissed from her employment with the respondent, Les Mills International Limited (Les Mills), on 2 December 2009.

[2] Les Mills accepts that it dismissed Ms Linnell but considers justified in doing so given that she distributed a pornographic email to both colleagues and external parties in contravention of Les Mills' computer security and usage policy and that according to the policy this breach constitutes serious misconduct.

### **Acknowledgement**

[3] Unfortunately a considerable period of time has passed since the investigation meeting. The situation has arisen as a result of workload issues compounded by the

file being inaccessible for a considerable period due to Christchurch's earthquakes. I appreciate the parties patience and regret any inconvenience suffered.

### **Background**

[4] Ms Linnell was initially engaged by Les Mills as a membership consultant in June 2007. She resigned approximately 18 months later to pursue another opportunity but upon the restructuring of that business returned to Les Mills in June 2009.

[5] With the exception of one discussion over her failure to meet a monthly sales target the employment was, up until the event that led to Ms Linnell's dismissal, free of difficulty or apparent tension.

[6] That event that led to the dismissal involved the receipt and dissemination of an email containing a picture that the employer considers pornographic and highly offensive. It would appear that others thought likewise as the evidence is that the employer's investigation was triggered by a complaint from a staff member to whom the email was forwarded.

[7] Ms Linnell expresses the view that she:

*... had never considered the possibility the email may be deemed as pornographic, because to me (again perhaps naively) what I considered to be pornographic would be images of 2 people engaged in an offensive sexual act or some other image designed to blatantly offend on purpose or someone involved in a lurid act...*

[8] Ms Linnell does not consider the photograph to be pornographic given her definition and the fact it shows a single male contortionist. She does, however, fail to comment on what she considers to constitute a *lurid act* which some may, indeed did, consider this to be.

[9] The chain of addressees on the emails appended to various statements of evidence leaves me unable to identify who forwarded the email to Ms Linnell. There can, however, be no doubt that she received it. There can also be no doubt, given her own evidence and admissions, that she showed it to various colleagues before forwarding a copy to at least 28 recipients both within, and external to, Les Mills.

[10] Ms Linnell says:

*I did not receive any complaints at all from any staff members that I had forwarded it to. Those working on the ground floor of Les Mills*

*with me commented on its hilarity and in fact I was contacted by a few other staff members who had not received it asking me to forward it to them. One staff member in particular kept asking other staff members if they had seen it, and if they had not, he brought them over to my computer and asked me to show them.*

[11] While Ms Linnell may not have received any complaints, management did. One staff member, clearly disaffected, complained though Ms Linnell would not be aware of her identity until some time after the dismissal which eventuated.

[12] Ms Linnell did, however, find out about the complaint soon after it was made. A summary of her oral evidence is that the following day, Mr Peter Lee, the Club Manager of Les Mills' Dunedin establishment, approached and asked Ms Linnell to *come upstairs*. She did and found a Mr Phil Shaw also present. According to Ms Lee, Mr Shaw's presence meant that the outcome *would not be good*. Ms Linnell states that Mr Lee advised that he wished to discuss his belief that she had been distributing pornographic images; that he had viewed it as serious and that he had decided to suspend her so that she could get a support person to discuss the matter further. Ms Linnell states that she then asked whether she could cancel her appointments for the day and was advised *no, leave now*.

[13] Mr Lee essentially agrees with Ms Linnell's evidence but adds that he felt justified in suspending without consultation as, at some point during the discussion, Ms Linnell had admitted sending the email in question.

[14] Subsequently, and in response to the fact she had been given two days to obtain assistance and continue with the discussion, Ms Linnell sent a message advising that, due to the absence of her chosen representative, she would be unable to meet until the following week. As a result, the second meeting occurred on Wednesday, 2 December 2009.

[15] The meeting was attended by Ms Linnell and her then lawyer, Mr Lovely, with Mr Lee and his wife Karen representing Les Mills.

[16] In the interim, and prior to the meeting, Mr Lee had forwarded a copy of the applicable computer policy to Mr Lovely. Pertinent in its provisions are requirements that:

*You must not under any circumstances:*

- *Open any incoming email messages or attachments or computer files whatsoever that are not work related without the express authorisation of your manager.*
- ...
- *View or download material of pornographic nature, or other offensive material. If you do this, you are committing serious misconduct. If you are a contractor you may have your contract terminated. If you are an employee you may be instantly dismissed...*

[17] Here it should be noted that not long before this incident the Lees had had concerns about the computers, though these related to the volume of private use and not the content. As a result, and on 4 September, they had distributed a copy of the policy to all staff along with a covering memo which advised:

*Please read again and take note that your internet privileges will be revoked if this is not adhered to.*

[18] Returning to the meeting of 2 December. In written evidence which fails to distinguish between the two meetings but appears, given oral answers provided during the investigation meeting, to refer to 2 December, Ms Linnell says:

*I sincerely apologised at once and indicated that I did not mean to offend anyone. I explained that I had simply found the email to be very humorous and thought my other friends would also. ... I also pointed out, honestly, that I could not recall the exact terms of the internet policy which had been sent to me as an attachment in an email on 4 September 2009 due to the length and depth of the information contained in the document.*

[19] In his evidence, Mr Lee states that the discussion initially focussed on whether or not Ms Linnell had received the internet policy. Mr Lee states that Ms Linnell acknowledged that she had before confirming that she had sent the email as she *thought it was a joke*. Ms Linnell, when giving oral evidence, accepted this as accurate.

[20] Mr Lee then goes on to say:

*When I received this response from Kelly, I recall turning to Mr Lovely and asking him whether he thought this was funny and I recall him grimacing. I also stated that I had discussed this with Les Mills Head Office HR and their view was that it was one of the worst cases of offensive material that they had seen in the work that they do. I said that we thought it was really serious and also talked about the fact that our logo was on Kelly's email that she had circulated with this photograph, potentially bringing Less Mills' reputation into disrepute and that this could be very damaging to our business.*

*Mr Lovely's response during this conversation was that he thought it was not a case that was deserving of instant dismissal. Mr Lovely said that he had a lot of experience and thought that a final warning*

*would be more appropriate. I responded that we disagreed with his view about the seriousness of Kelly's actions, Mr Lovely then said that we should go away and think about this before making a final decision about whether to dismiss or not.*

[21] Mr Lee then goes on to record his view that Ms Linnell never apologised but simply reiterated her view that she had forwarded the email as she considered it humorous and inoffensive.

[22] For her part, Ms Linnell denies that Mr Lee asked Mr Lovely whether or not he thought the email funny and when answering questions stated that she did not recall the issue of the logo and company image. She went on to say that if the issue was raised it was not emphasised the way it has been subsequently. There is, however, her written evidence which, when talking about the meetings, states *I admitted that I didn't realise the context in which the email could be viewed nor that it may be construed as a reflection on Les Mills itself and After they spoke to me I could understand the employer's point of view how the email could possibly reflect badly on Les Mills should someone outside the club see it.* In my mind, these evidential statements appear to confirm the issue was discussed. Ms Linnell accepts that Mr Lovely advised Mr Lee to think about matters and give subsequent advice of his decision.

[23] Mr Lee states that after the meeting he gave consideration to what was said and consulted with both his wife and Head Office HR. He says that he was satisfied that the image was offensive and that others had the same view. He also says that he was concerned that it had been circulated *under our brand* which was *potentially very damaging to our business reputation* before concluding:

*I was very concerned that Kelly did not seem to have any appreciation of the possible impact of her actions on some of these people or the risk that she put the business in. There was no acknowledgment of this from Kelly who seemed to think that her explanation was sufficient, that is she saw it as a joke and we did not. I saw little prospect of Kelly genuinely learning from this experience and I could not take the risk of a repetition further down the line. I simply did not have any trust and confidence in her and decided that dismissal was the appropriate outcome.*

[24] That decision was conveyed in a letter later that day which, as its pertinent point, advises:

*Your suspension ceases at midday today on notice of termination of contract.*

## Determination

[25] As has already been said, Les Mills accepts that it dismissed Ms Linnell. In doing so, it also accepts that it is required to justify the dismissal.

[26] Section 103A of the Employment Relations Act 2000 (the Act) states, or at least used to state, that the question of whether a dismissal is justifiable

*... must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred.*

[27] The above test is used as the cause of action arose prior to the present version coming into force on 1 April 2011. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect.* Section 4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless they specifically provide otherwise. Given there is no suggestion in the Act that the new s.103A has retrospective effect, it is the earlier test that must apply.

[28] Having just said that the test of justification applicable as of 1 April 2011 is not that to be applied here, I believe it appropriate that it be referred to. I do so as its content, or at least subsections (b) to (d) inclusive, succinctly codify that which case law has, for many years, considered the basic requirements of a fair process. The test now requires that:

*(3) In applying the test in subsection (2), the Authority or the court must consider—*

*...*

*(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*

*(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*

*(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*

[29] Mr Lee essentially states that there were three factors that influenced his decision to dismiss (see paragraph 15 of his written brief). They are:

- i. Ms Linnell's dissemination of what he (Mr Lee) considered a pornographic image in contravention of the Computer Security and Usage Policy;

- ii. Ms Linnell's failure to appreciate and acknowledge the possible impact of her actions; and
- iii. His belief that she would not learn from the experience and a resulting conclusion that he no longer had *any trust and confidence in her*.

[30] The prime accusation is that Ms Linnell received and disseminated the picture in contravention of a policy of which she either was, or should have been, aware. That she received and disseminated the picture had been admitted when the decision to dismiss was made. That she had received the policy was also admitted, though Ms Linnell claims that she had not really taken much notice of it and/or comprehended its significance. That, if correct, can not be visited upon the employer per-se but surely an inquiry should be made as to why such she had such a blasé attitude to a company policy. It wasn't and this raises the issues upon which Ms Linnell relies in arguing that dismissal was an inappropriate sanction in the circumstances.

[31] She argues that the meeting which resulted in her dismissal was short (some 5 to 7 minutes) which is not disputed and that the outcome was predetermined.

[32] With respect to the accusation of predetermination I note Mr Lee's evidence that he responded to Mr Lovely's suggestion that dismissal was inappropriate and a warning should be given by stating that he disagreed. This, to me, appears a fairly definitive statement after only a few minutes of investigation and, along with other answers Mr Lee gave (such as one that indicates he was also influenced by the fact his wife was highly offended by the image), leads me to conclude that the accusation of predetermination has substance.

[33] There is also a claim that dismissal was unfair given a culture within Les Mills and, in particular, its Dunedin branch that saw staff frequently receiving and sending e-mails that some could consider offensive and inappropriate. Suffice to say this argument was supported by various examples of material from colleagues that I easily conclude could be considered offensive by some.

[34] Mr Lee claims to have been unaware of this culture but his claim is contradicted by some of the answers he gave to questions from Mr Guest. For example he was asked if he was aware of such material circulating within the workplace and answered *I delete them*. This was followed by the question *So you get them?* The answer given was *Of course I do – I delete it*.

[35] In other words there was an issue of which Mr Lee was, or at least should have been, aware, yet he did nothing until suddenly deciding to dismiss someone after a short meeting at which he advised he had a strong view about the issue and the appropriate outcome. To me this reinforces the conclusion that the outcome was preordained.

[36] Ms Linnell also refers to an inconsistency regarding the penalty for a breach of the internet policy. On one hand the policy states that one possibility is dismissal, yet the e-mail under which the policy was redistributed on 4 September limits the penalty for abuse to removal of internet access. I have some sympathy with this criticism. An employer is under a duty to make its rules clear and unambiguous. Les Mills appears to have failed in this respect.

[37] There is also the fact that Ms Linnell did not know the identity of her accuser. This would be another factor that, according to case law, may undermine the process and the resulting decision to dismiss (see for example *Dallas v Wellington Newspapers Ltd* [1998] 2 ERNZ 456) though Ms Linnell did not pursue this issue.

[38] When I consider the above I conclude that the approach taken was superficial, predetermined and further undermined by other factors such as conflicting advice as to the consequences of malfeasance. I therefore conclude that dismissal was not an outcome that would have been reached by a fair and reasonable employer who had conducted a full enquiry.

[39] There are further factors that would render this dismissal unjustified given there were two other conclusions that influenced Mr Lee's decision (see 29 above). One was that Ms Linnell would be incapable of learning from the experience and that, as a result, Mr Lee had lost all trust and confidence in her. Mr Lee has a problem with advising that this was a consideration. The problem is that he never put this to Ms Linnell. Today that would be in clear contravention of the provisions of s.103A(3) and render the dismissal unjustified. Prior to enactment of that provision case law made it clear that a failure to put pertinent considerations and allow a response is a denial of natural justice that would similarly render a dismissal unjustified.

[40] The other factor was an alleged failure to understand the issues / impact and acknowledge the extent of the problem. A discussion of this requires reference to one

of the main factual disagreements and gave rise to an issue over the way in which evidence was produced.

[41] Ms Linnell is adamant that while she struggled to see the picture as pornographic she could understand that it may offend some and had therefore offered an apology. Mr Lee is equally adamant that she did not recognise the significance of her wrongdoing or otherwise show remorse and that was a factor in his decision to dismiss. He is supported in his assertion about Ms Linnell's response by the evidence of his wife who claims Ms Linnell exhibited absolutely no remorse.

[42] Ms Linnell had legal representation at the meeting of 2 December but Mr Lovely was not called as a witness at the investigation meeting. The issue of an apology did, however, become significant when Mr Lee conceded that Ms Linnell would have avoided dismissal if she had recognised her actions were inappropriate and apologised. Given the potential significance, and a week after the meeting, Mr Guest filed an affidavit from Mr Lovely along with a request that the investigation meeting be reopened. A key assertion in Mr Lovely's affidavit was that Ms Linnell had apologised.

[43] Mr Harrison objected to both the affidavit and the possibility of a reopening on a number of grounds. The meeting was not reopened but I note one of the grounds of objection. It is that:

*Mr Lovely's affidavit does not add anything to the evidence ... as what he says is not that inconsistent with Peter and Karen Lee's recollection and it is a matter of how the response was received and understood in terms of its genuineness, as opposed to what was actually said.*

[44] In other words, an apology was made but not considered real and this conclusion is again supported by answers Mr Lee gave at the investigation meeting. For example he answered one question from Mr Guest by making a statement to the effect that while Ms Lee may have used words of apology but he did not consider them genuine. I conclude this was for reasons already explained when discussing the substantive accusation. Mr Lee approached the investigation with various preconceptions and had effectively made a prior decision to dismiss. As a result he was oblivious to an apology which, according to his own evidence, might have seen Ms Linnell's retention.

[45] Ms Linnell's perceived lack of remorse was, according to Mr Lee, a significant factor in his decision to dismiss. Once again, case law as it existed prior to the enactment of the current s.103A(3) requires that factors likely to influence a decision be raised, and comment allowed, before a conclusion is reached. There is absolutely no evidence that Mr Lee raised his view that Ms Linnell was showing inadequate remorse and that he considered it an issue and, once again, this would render the dismissal unjustified.

[46] The conclusion that the dismissal is unjustified raises the question of remedies. Ms Linnell seeks lost wages and \$20,000 as compensation for *stress, worry and humiliation*.

[47] Ms Linnell's wage claim is minor when compared to many that come before the Authority as she obtained another job a fortnight after leaving Les Mills. The claim totals \$915.90.

[48] Section 128(2) of the Act provides that the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Obviously 2 weeks loss is the lesser sum and the fact an alternate was sourced so quickly is evidence that Ms Linnell took her duty of mitigation seriously. In such circumstances I see no reason why the amount claimed should not be awarded in full.

[49] Turning to the claim for compensation. Ms Linnell's offered considerable evidence in support of her claim. She referred to various issues including:

- a. Enquiries from ex-colleagues about what had occurred;
- b. The anguish she felt as a result of having been dismissed when there was no evidence of an enquiry into the activities of others who regularly breached Les Mills computer policy;
- c. Her exclusion from staff activities she may later have continued to attend given that her partner remained an employee of Les Mills; and
- d. Her particular abhorrence with a ruling that she was banned from entering any Les Mills establishment in New Zealand.

[50] When I consider the above evidence, which was largely unchallenged, along with the fact that Ms Linnell got alternate employment with alacrity and that will have

softened the hurt and sense of loss will have been softened to some extent, I consider an award of \$6,000 to be appropriate.

[51] The conclusion that remedies accrue means that I must, in accordance with the provisions of s.124, address whether not Ms Linnell contributed to her demise in any significant way. On one hand I have the fact that she admitted conduct that contravened her employer's policy.

[52] On the other hand I have evidence that:

- a. Shows Ms Linnell was behaving in a way that accorded with a prevalent culture within Les Mills' Dunedin operation;
- b. The local manager was, given admissions that he received similar material (see 34 above) aware of that culture or, if he wasn't, should have been; and
- c. That he did nothing about it, thereby condoning a culture with which Ms Linnell's actions complied.

[53] In such circumstances and given the superficial and predetermined nature of the investigation, I consider it difficult to conclude that Ms Linnell's behaviour is such that a reduction for contribution be applied.

[54]

### **Orders**

[55] For the forgoing reasons it is concluded the applicant has a personal grievance and the following orders are made;

- i. The respondent, Les Mills International Limited, is to pay the applicant, Ms Kelly Linnell, \$915.90 (nine hundred and fifteen dollars and ninety cents) as recompense for wages lost as a result of the dismissal; and
- ii. Les Mills is to pay Ms Linnell a further \$6,000.00 (six thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

**Costs**

[56] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event Ms Linnell wish to seek a contribution toward her costs, she is required to lodge and serve an application within 28 days of this determination. Les Mills is to file any response within 14 days of the application

M B Loftus  
Member of the Employment Relations Authority