New Zealand Employment Relations Authority Decisions

Machen v RD1 Limited (Auckland) [2011] NZERA 918; [2011] NZERA Auckland 523 (9 December 2011)

Last Updated: 23 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 523
5324994

BETWEEN WILLIAM NICHOLAS MACHEN

Applicant

AND RD1 LIMITED Respondent

Member of Authority: Rachel Larmer

Representatives: Paul Fisher, Counsel for Applicant

Andrea Twaddle, Counsel for Respondent

Investigation Meeting: 25 July and 8 August 2011 at Rotorua

Submissions Received 16 August 2011 from Applicant

26 August 2011 from Respondent

30 August 2011 from Applicant

Determination: 09 December 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Mr William Nicholas Machen (known as Nick) commenced employment with RD1 Limited ("RD1") on 12 May 2007 as a sales assistant. He was dismissed for serious misconduct on 22 July 2010 due to breaches of RD1's Acceptable Use – IT policy ("the policy").

[2] Mr Machen claimed his dismissal was substantively and procedurally unjustified. He sought reinstatement to his former position, lost remuneration,

$25,000 distress compensation.

[3] RD1 stated Mr Machen's dismissal was justified because he had used its computer system to retain material which was abusive, discriminatory, offensive, obscene, racist, pornographic, and sexist which was contrary to its policy.

Justification test

[4] Justification falls to be determined under the old (i.e. pre 1 April 2011 amendment) justification test in s.103A of the Employment Relations Act 2000 ("the Act").

[5] Justification must be determined by the Authority on an objective basis, by considering whether RD1's actions, and how it

acted, were what a fair and reasonable employer would have done in all the circumstances at the time Mr Machen was dismissed. All aspects of the disciplinary process and outcome are subject to scrutiny.

Employment Agreement

[6] Mr Machen was employed on an individual employment agreement which he signed on 14 March 2007. Clause 1 of the agreement contained the mutual obligations of the parties. Clause 1.2 stated that the employee agreed to:

"[...]

(d) Conform to the operating policies and quality control guidelines set from time to time by the company; and

(e) Refrain from acting in a manner that brings, or could bring, the company into disrepute"

[7] Clause 15 dealt with company policies and it stated:

"Company policies apply to all employees and, until amended or revoked, the company will act in accordance with all current company policies. You must ensure you know and observe all company policies. The company reserves the right to amend all or any of the policies from time to time at its discretion on reasonable notice to you."

[8] Clause 8 dealt with termination of employment. Clause 8.3 stated:

"Nothing in the above clause [notice provisions] *will prevent your dismissal without notice at any time in the case of serious misconduct, serious breach (including substantial non-performance), or other cause justifying summary dismissal. In this instance you will not be entitled to any incentive and other payments other than those required by law."*

Relevant policies

[9] RD1's Performance Management Procedure contained a clause relating to summary termination and gross misconduct which identified "*Non adherence to RD1's acceptable use policy"* as an example of conduct which would be viewed as serious misconduct warranting summary dismissal.

2007 Acceptable Use Policy

[10] When Mr Machen commenced employment, he was provided with a copy of the RD1 Information Systems Acceptable Use Policy 1.6 which was dated 2 March

2007. The stated purpose of the policy was:

"To ensure you are aware of:

RD1 Limited policies, standards and guidelines relating to use of the network, electronic communications and information systems and services.

Your obligations to RD1 Limited when conducting any form of electronic communication.

The consequences of inappropriate use of information systems and services."

[11] The policy contained *"a prohibited use of information technology"* section which stated:

"The following activities constitute misconduct and are likely to lead to disciplinary action.

Downloading, requesting, transmitting or retaining material that is illegal or which may be considered abusive, discriminatory, defamatory or offensive. This includes, but is not limited to, obscene, racist, pornographic and sexist material."

[12] Mr Machen agreed he had been provided with a copy of the policy and had signed it in 2007 (as had his then manager). The sign off section of the policy stated:

"I acknowledge that I have read and understood this policy and agree to abide by this and all other policies and standards and that it is part of the terms and conditions of my employment agreement, or contract for services, with RD1 Limited.

Contravention of any part of this policy will constitute a breach of

RD1 Limited code of conduct. RD1 Limited may decide to take action

against me which may result in disciplinary action including dismissal."

2009 Acceptable Use Policy (policy 2.0)

[13] The company updated the 2007 policy in May 2009. The first page of the

2009 policy which was marked as "*Company policy 2.0*" stated:

"Each staff member must ensure that they are aware of the contents of this manual and any subsequent amendments. Managers must take full responsibility for ensuring that their staff have read and acknowledged this manual and any subsequent amendments."

[14] Although the policy made a number of amendments to the 1.6 version, the material changes included the introduction of a *"prohibited use"* section which stated:

"The following activities constitute misconduct and are likely to lead to disciplinary action:

Downloading, requesting, transmitting or retaining material that

:

Is illegal or which may be considered abusive, discriminatory, defamatory or offensive. This includes, but is not limited to, obscene, racist, pornographic and sexist material.

Is likely to be perceived by the recipient as harassment, intimidation or an unwarranted invasion of privacy.

May bring RD1 Limited or [name of associated company] *into dispute.*

Infringes on the rights of others (e.g. copyrighted pictures, pirated software etc)."

[15] It also introduced a new *"disciplinary process"* section which stated:

"Violations and penalties

Penalties for violating RD1 Limited acceptable use policy will vary depending on the nature and severity of the specific violation. Any user who violates the acceptable use policy may be subject to:

Disciplinary action, including but not limited to reprimand, suspension, and/or termination of employment.

Civil or criminal prosecution under the law of the country in which the violation occurred"

[16] The policy also contained a clause entitled *"RD1 acceptable use policy acknowledgment"* which stated:

"TO BE EMAILED TO USER

By accepting this email you are acknowledging that you have read and understood this policy and agree to abide by this and all other policies and standards, and that it is part of the terms and conditions of your employment agreement, or contract for services, with RD1.

Contravention of any part of this policy will constitute a breach of RD1 Limited code of conduct. RD1 Limited may decide to take action against you which may result in disciplinary action including dismissal."

Knowledge of policies

[17] Mr Machen said he did not know the 2007 policy had been amended. Even if I had accepted Mr Machen did not know about the 2009 policy, that would not have made a difference to my view on justification because;

a. The 2007 and 2009 policies did not vary in material respects and the essence of the provisions RD1 relied on to dismiss Mr Machen were the same; and

b. it was self evident that abusive, discriminatory, offensive, obscene, racist, pornographic, and sexist material should not have been brought into the workplace. I find that Mr Machen did not need to review a policy before he would have known that.

[18] I do not accept Mr Machen's evidence that he was never told about the 2009 policy and therefore did not know about it. Even if he had not actually known about the 2009 policy, I find that he ought to have because it had been properly and appropriately communicated to him.

[19] I accept Ms Clare van der Most's evidence about the implementation of the

2009 policy. Ms van der Most is the Human Resources/Organisational Development Manager and she told me that employees were notified about the amended acceptable use policy via the company's daily report, which all staff are expected to read. Employees do not require internet access in order to be able to read and access the report.

[20] I accept Mr Andrew Mitchell's evidence that during a staff meeting in March

2010 he discussed the need for staff to be aware of their obligations under the 2009 policy. This discussion arose because (as a result of a disciplinary investigation Mr Mitchell had conducted in February 2010) he had become aware that there was non compliance with the log on, security requirements, and password confidentiality provisions as per the 2009 policy.

[21] Mr Mitchell said he reintroduced the 2009 policy to all Tokoroa Branch staff by going through the policy with all staff both collectively and individually. He asked staff to read the policy and to come back to him if they had any questions. Mr Mitchell said that after he went through the 2009 policy with Mr Machen, he signed it. A copy was not available because it had apparently been lost between the branch and HR's centralised files.

[22] The 2009 policy was readily available to Mr Machen. He had been emailed a copy of it, it was stored on the company's intranet which could be accessed by all employees, and a hard copy in the branch manager's office was available to staff.

[23] I accept Mr Mitchell's evidence that during Mr Machen's performance review in early June 2010 he expressed concern about his internet and computer use and again went through his obligations under the 2009 policy. Mr Machen disputed this discussion occurred, but I consider the performance review notes support Mr Mitchell's version of this discussion so I have preferred Mr Andrew's evidence.

Discovery of emails

[24] On 8 July 2010 one of Mr Machen's female colleagues found an email on the company printer which appeared to have been printed by Mr Machen and which she considered was weird and of a sexual nature. She brought this to Mr Mitchell's attention.

[25] Mr Mitchell was going on a three day company conference the next day so he arranged with IT to freeze Mr Machen's email account so material could not be deleted. When he returned from the company conference, IT identified 18 emails, including the one that had been found by Mr Machen's colleague on the printer, which were of concern.

[26] All of the emails had been sent from Mr Machen's private email address to his work address. One of the emails of concern had been forwarded to one of Mr Machen's friends who worked for a local authority and one had been forwarded to Mr Machen's father (also named William Machen, but who is known as Bill).

Preliminary investigation

[27] Mr Mitchell said he considered the 18 emails to be offensive, racist, sexist, and degrading to women. However, before deciding how to deal with his concerns he thought it appropriate to conduct a preliminary investigation to determine whether or not Mr Machen accepted responsibility for the emails.

[28] Mr Mitchell wrote to Mr Machen on 16 July 2010 asking him to attend an:

"... investigation interview regarding a recent allegation of misconduct. The allegation is that your use of email, internet and its content which could contravene our acceptable use IT policy."

[29] Mr Machen was advised of his right to be accompanied and the meeting was arranged for 19 July 2010. Mr Machen attended that investigation meeting with his father, Bill Machen.

[30] Mr Mitchell had difficulty printing off the emails of concern so he showed them to Mr Machen on the computer screen. I find that during the investigation meeting, Mr Machen stated that:

a. He was aware that RD1 had an acceptable use policy;

b. He thought he was aware of the content and detail of the policy;

c. His internet access had been removed previously because of concerns about his high usage;

d. He had sent the 18 emails of concern from home to his work email address because it was "*just weird stuff that I like*".

e. He agreed that the emails breached the company's policy.

[31] Subsequent to that preliminary meeting, IT uncovered four more Word documents which had been stored on Mr Machen's desktop. This new material generated a greater level of concern than the first batch of 18 emails.

[32] Some of the four word documents had been stored/saved directly on to Mr Machen's work desktop, whilst other word documents consisted of different email content which had been cut and pasted into one Word document, which had then been saved on the desktop. The documents stored/saved on the desktop had been accessed and printed by Mr Machen while at work.

Disciplinary concerns

[33] After speaking to Mr Machen and reviewing the 22 items of concern (18 emails and 4 word documents) Mr Mitchell decided a formal disciplinary process was necessary.

[34] He wrote to Mr Machen on 20 July 2010 calling him to a disciplinary meeting on 22 July 2010. The letter stated:

"[...] The purpose of this meeting is to address the issue of breaching RD1 IT acceptable use policies. Should this be found to be true, further action may be taken which could include a written warning, final warning or dismissal. At this meeting you will be provided with the opportunity to state your case.

Please find enclosed a copy of the documentation we will be referring to in the meeting.

You have the right to be accompanied by a support person at this meeting. [...]

Encl: RD1 IT Acceptable Use Policy, emails x 18".

[35] I find that the policy enclosed was the 2009 policy and that the reference to 18 emails should have been to the 22 items of concern.

[36] Mr Machen disputed he received email 18. I find that he did receive it with the disciplinary letter.

[37] Five of the 22 items contained pictures (email 3 - naked woman in body painted clothes; email 4 – bestiality article; email 5 - man with two penises; email 18 - album covers with sexual connotations; and email 19 - picking the right car and Disney cartoons).

[38] I accept Mr Mitchell's evidence that he specifically recalled discussing email

18 during the disciplinary meeting on 22 July 2011 because it was one of the few items that contained pictures and it was the item which had contained the most

number of sexual images. Bill Machen's statement also confirmed that his son had brought 22 emails home on the night of 20 June 2011. I consider it unlikely Bill Machen would have let Mr O'Flaherty and Mr Mitchell discuss and refer to a document he (Bill) had not previously seen.

[39] Although Mr Machen was given the option of delaying the disciplinary meeting if his representative or support person wanted to consider the material, he decided to proceed as scheduled.

Disciplinary meeting

[40] The disciplinary meeting was held on 22 July 2010. Mr Machen was again accompanied by his father, Bill Machen who is an experienced manager with a leading blue chip New Zealand corporation, and who is experienced in running disciplinary processes. Mr Nigel O'Flaherty, Regional Operations Manager – Eastern, was the company decision-maker and Mr Mitchell attended as a note taker.

[41] At the beginning of the meeting Mr O'Flaherty tried to restrict Bill Machen's ability to speak during the meeting. It was quite wrong for him to have attempted to do so, and Bill Machen quite properly resisted restrictions being put on his ability to participate. This was resolved with Bill Machen being allowed to speak on his son's behalf. Everyone agreed that he did in fact fully participate in the disciplinary meeting and the notes reflect that.

[42] I find that there was no unfairness to Nick Machen because Bill Machen's role was not limited in any way.

[43] Bill Machen had prepared some notes which he read from and which he provided to Mr O'Flaherty at the conclusion of the meeting. Bill Machen said that;

a. Nick's internet access was removed because of time wasting issues, not because of content concerns;

b. There appeared to have been a laissez faire attitude towards IT usage by the previous manager and joke emails would be exchanged between staff;

c. Nick had never been instructed in any depth or detail on appropriate internet use so expectations about appropriate use were never clearly stated or understood by Nick;

d. Nick's only warning related to a vehicle accident;

e. There were 22 emails of concern which occurred over an eleven month period;

f. He had only disseminated two of the 22 items to others (one to a friend and one to Bill);

g. Nick's music and literature tastes were relevant to modern youth;

h. Although items were of questionable content he queried who was the arbiter of good taste in this day and age;

i. The "*jokes*" (which was how Nick viewed the material of concern)

were at the extremes of humour;

j. Nick was sorry and had agreed to change;

k. Nick should not lose his job, he should be allowed to apologise and could be used as an example or trainer for other staff.

[44] I accept Mr Andrew's evidence that he had the 2009 policy in front of him at the disciplinary meeting and that the parties discussed it. I consider it significant that Mr Machen did not say Nick had not seen the 2009 policy before. I consider it likely he would have addressed that if Nick had only ever seen the 2007 policy.

[45] Bill Machen noted the date each item was created and acknowledged that accessing and storing what could be classed as objectionable material could result in legal issues from staff/customers/visitors.

[46] Bill Machen accepted that Nick had breached company policy and that emails

4, 6, 7, 9, 10, 13, 14, 15 and word documents 21 and 22 were offensive.

Nature of the material in issue

[47] There was no dispute that the content of the items identified by Bill Machen as offensive, were in fact offensive. I also find the two additional items identified by Mr O'Flaherty (see below) were also offensive because they would be likely to offend if they were found in the work environment by staff or customers.

[48] The retaining of offensive material is clearly in breach of the 2007 and 2009 policies. It is also a matter of commonsense that offensive material of the type in issue should not have been brought into or viewed at work. This should be self evident from my summary of the material which was of the most concern:

a. Email 4 – referred to bestiality.

b. Email 6 – referred to slaughter and mutilation of young girls.

c. Email 7 – referred to bestiality, castration of an underage boy, incest, sex with dwarfs, a simulated sex show with a slave boy, and sex between a man with two penises and a woman with two vaginas.

d. Email 9 (Bill identified it as email 9 but RD1 identified it as email 8) - referred to taking pleasure from sexual violence against women, oral sex, ejaculation, masturbation, and Nazis.

e. Email 10 – referred to masturbation, rape, murder, and coprophilia.

f. Email 13 – referred to anal sex, racist and sexist comments that were degrading to women and black people.

g. Email 14 – narration involving drug abuse.

h. Email 15 – referred to physical sensations of various male sex organs and to ejaculation.

i. Word document 21 - referred to bestiality, a mummified cock, and about how the author (who was not Mr Machen) liked to urinate on his mother.

j. Word document 22 – referred to sex with young children aged 5, 6, and

8 years old; rape of 5 year olds; anal sex with 6 year old; sex with baby

in a crib; sexual violence to 6 year old; father having sex with 11 year old daughter; various violent acts towards women; burning hippies; degrading racist, sexist, and homophobic comments; and oral sex performed on a small dog.

[49] Mr O'Flaherty identified two further emails which RD1 concluded were offensive and which it had relied on when deciding to dismiss Mr Machen;

a. Email 12 – This was an email Mr Machen sent to his friend (at his Council work email) which appeared to relate to a story about a sexual encounter at public toilets. Mr Machen referred to his story and asked his friend "*does that include your southern eye? Weep ye thick salty tears from your tallywhacker*?"

b. Email 18 - This is a series of pictures of album covers which had sexual connotations to which commentary, consisting of sexual comments had been added (i.e "*music to drug some women you meet at a bar so you can take her home and chain her up in your rape dungeon*".) The album covers included pictures of people naked or in various states of undress. One album

cover was of a naked woman being penetrated from behind by a snake.

[50] After Mr Machen was dismissed, Mr Fisher sent item 22 to the Office of Film and Literature Classification to be classified. He did so without reference to RD1, who had no input into the process and who was not aware the item had been classified until it was produced during the Authority's investigation.

[51] Item 22 was the most obviously offensive item. It was a word document which contained content from various sources but which Mr Machen had complied into one document which he said he had created for his own amusement.

[52] Item 22 was held not to be criminal and it was classified as R18. However, the Office of Film and Literature Classification made the following observations, which I agree with, about item 22:

"[eleven of] *the "jokes" involve battered women; and the sexual abuse and murder of pre pubescent girls; [..]*

The "jokes" target black people, feminists, hippies, homosexual men and prostitutes. A long series [...] target Jews. Some examples ridicule supposed ethnic traits. [...]

A large number of "jokes" are based on sexual acts. [...]

A large number of incidents mentioned in the jokes are criminal acts. [...] The impact of the jokes derive from their sadistic cruelty. [...]

It deals with [...] the exploitation of children or young persons for sexual purposes.

The targets of the nine "jokes" about child sexual abuse are young, weak, vulnerable, and predominantly female. [...] These nine jokes are not funny: they are cruel and violent scenarios that most readers or listeners would consider vile and sickening. [...] Extreme acts of cruelty and violence are directly referred to or implied in several of the items involving children and in others referring to battered women. [...] Readers are likely to find the violence and cruelty in these "jokes" repugnant, especially when it is associated with the sexual abuse of children. [...]

All of the "jokes" about the sexual abuse of children and others that target battered women and prostitutes, refer [...] to the use of cruelty and violence, including sexual violence. They do so in a degrading manner that shows a high degree of callous contempt for the victims. This material represents attitudes that contribute to the high level of abuse of women and children in New Zealand. [...]

Horror and repugnance are likely to be the most common reactions of readers or listeners confronted by these "jokes". [...] Most readers would consider the sexual abuse of children as vile and sickening.

Workplace environment

[53] I find that the RD1 was a family orientated business with many of its customers attending the branch with their families and often with young children. There was only one printer in the branch and it was not uncommon for clients to reach

over and take their order off the printer. Although a colleague found email 1 it could just as easily have been a customer.

[54] I find there was a risk that the material Mr Machen viewed and printed during normal work hours could be seen by others, who were likely to have been offended by it.

[55] Mr Fisher submitted the branch had a culture of staff exchanging email jokes which he suggested made Mr Machen unaware of the consequences of his actions. I do not accept that.

[56] There was no evidence to show that other staff had exchanged the type of material Mr Machen had been disciplined for. One of his former colleagues, who gave evidence in support of Mr Machen, agreed that she was not aware of such material being exchanged or viewed at work. She also agreed staff were aware that Mr Andrews was a "*stickler*" for ensuring compliance with RD1 policies and knew that he would take action over non compliance. Mr Machen accepted that none of the joke emails exchanged by staff were copied to management, who would have been unaware of them.

[57] I find RD1 did not have a culture where the material Mr Machen was dismissed for was seen as acceptable. Quite the contrary. The evidence satisfied me Mr Andrews took active steps to ensure staff were aware of the need to properly comply with the Acceptable Use policy and that RD1 had taken disciplinary action against staff who had breached it. One person had been dismissed and another had exited after disciplinary concerns had been raised.

Good faith

[58] Although Mr Machen had not made a breach of good faith claim, Mr Fisher in his submissions alleged RD1 had breached its s.4(1A) duty of good faith in the Act because documents referred to by Ms van der Most had not been provided to Mr Machen, namely;

a. His individual employment agreement was not produced;

b. His June 2010 performance review was not provided;

c. No performance management document was referred to.

[59] Mr Fisher also submitted that good faith had been breached because RD1 had not collated the material of concern and it had not identified what parts of the 2009 policy it considered had been breached.

[60] I find that none of the matters raised by Mr Fisher caused unfairness to Mr

Machen to the extent that his dismissal became unjustified.

[61] Mr Machen had been given a copy of his individual employment agreement when he was employed and RD1 relied on a breach of policy, not a breach of his employment agreement to justify its dismissal. His employment agreement just made it clear that he was expected to comply with company policies.

[62] The performance review occurred at the end of June 2010 and disciplinary action was commenced two weeks later. Although RD1 should have given Mr Machen a copy of his performance review as part of the disciplinary process, he was not unfairly prejudiced by that. I find there was a discussion during his performance review about keeping content acceptable and limiting his time on the computer, so these matters should still have been in Mr Machen's mind at the time he was disciplined.

[63] The performance management document is the disciplinary policy Mr O'Flaherty was applying. The relevant part of that document was that breach of the Acceptable Use policy was given as an example of serious misconduct which could warrant summary dismissal. I consider that was made clear to Mr Machen during the disciplinary process and that he was under no illusions that his job was potentially at risk.

[64] RD1 should have collated the material of concern and Mr Machen could have asked it to do so. However, instead Bill Machen collated the material. Whilst RD1 should have specifically identified what documents it said had breached what part of the policy, that discussion occurred during the disciplinary meeting and the evidence satisfied me that both Mr Machens were clear about the nature of the concerns and about the particular part of the policy RD1 alleged had been breached. That should also have been obvious due to the nature of the material in issue.

Serious misconduct

[65] I find that RD1 was justified in concluding that Mr Machen's actions amounted to serious misconduct.

[66] I do not accept Mr Fisher's submission that because Nick Machen viewed the material he was dismissed for as merely "*jokes*" his actions could not amount to serious misconduct. I also reject Mr Fisher's submission that because the Chief Censor concluded that item 22 did not involve criminal offending then RD1 was not entitled to conclude Nick had engaged in serious misconduct. It is up to RD1 to set its own standards and to assess its employee's behaviour within the context of its own workplace. Case law makes it clear that serious misconduct is not limited to instances of criminal offending.

[67] I also disagree with Mr Fisher's submission that because the material of concern was words rather than pictures it could not amount to serious misconduct. The material involved "*jokes*" involving sadist cruelty to vulnerable members of society, including children. They referred to criminal acts such as rape, torture, incest, murder and deal with the exploitation of young children for sexual purposes. I consider many people would experience horror and repugnance when faced with this material.

[68] Bill Machen conceded that if he had found the material Nick had been disciplined for stored on his work computer in his workplace, then as a manager he would have viewed it as a potential serious misconduct issue. I find that was an appropriate concession to make.

[69] Mr O'Flaherty concluded that Nick Machen's actions amounted to serious misconduct because;

a. he knew the company had a computer use policy and that he was bound by it,

b. the policy was easily accessible,

c. he knew at the time of sending/downloading/storing/retaining the emails and content that it was wrong,

d. he had clearly breached the policy,

e. the level of offence (i.e. the content of the emails) raised it to the level of serious misconduct, as well as the number of emails, particularly those sent and received after early 2010 when staff had been told about the expectations regarding adherence to the 2009 policy and subsequent to his performance appraisal which again discussed appropriate content and the IT policy;

f. because of the deliberateness of his actions.

[70] I find that RD1 was justified in concluding that Nick Machen's actions amounted to serious misconduct. I consider a fair and reasonable employer would have formed the same conclusion in all of the circumstances.

Decision to dismiss

[71] The disciplinary meeting on 22 July 2010 was adjourned for 45 minutes during which time Mr O'Flaherty called Ms van der Most to discuss his thinking regarding the outcome. Any dismissal had to be approved by a member of the RD1 leadership team to ensure the decision was compatible with its overall business. This worked as a check and balance on dismissals before they were implemented to ensure consistency across the organsiation.

[72] I find RD1 appropriately considered all of the circumstances, including Mr Machen's explanation and his proposal about an appropriate penalty before it decided to dismiss him.

[73] I reject Mr Fisher's submission that the dismissal was predetermined. The evidence satisfied me that Mr O'Flaherty approached the matter with an open mind and properly considered all relevant information. The evidence Mr Fisher relied on in support of his allegation of predetermination all had other legitimate explanations which had nothing to do with RD1 having formed a view about the outcome of its disciplinary proceeding.

[74] Ms van der Most and Mr OFlaherty discussed the following matters before Mr

O'Flaherty decided that dismissal was the appropriate outcome;

*a. Seriousness of the conduc*t – they decided it was very serious, some of the material was offensive, there was repeated misuse of the computer

system in circumstances where internet use had previously been removed due to excessive use. There was also potential risk to RD1's reputation.

b. Impact and significance of action – behaviour was not acceptable and Mr Machen had been given fair notice of RD1's expectation yet had continued to misuse company equipment;

c. Knowledge of rules/expectations - He had signed the 2007 policy. He had received a copy of the 2009 policy and had been told to read it. He had the policy explained at a staff meeting in March 2010 and to him individually at around that time. It had also been referred to in his performance review in June 2010 and he had been reminded to ensure content was acceptable.

d. Mitigation – The issues raised by Bill Machen were considered. Nick was also given credit for his length of service and for the fact he was honest during the investigation because he did not deny the material was his or that he had printed it out.

e. Options other than dismissal – If internet or email access was removed RD1 would be unable to maintain normal lines of communication with him, which would be inefficient and ineffective for a salesperson and which would limit his ability to work effectively. He had not responded well to previous remedial action because he had had internet access removed for a period on two occasions yet his excessive use had continued.

f. Remorse – Nick had acknowledged that his behaviour was unacceptable and would not happen again but RD1 did not have confidence that would be the case. He had not modified his internet use previously.

g. Disciplinary record - Nick had not been disciplined for similar behaviour but he did have a final written warning dated 24 December

2010 which had arisen out of a vehicle accident which recorded

"agreed actions were not to break any RD1 policies". RD1 said they

did not consider the warning relevant because it was for unrelated behaviour.

h. Personal factors – Nick appeared to have difficulty limiting his internet use despite having been counselled about it which suggested there may be a risk his behaviour would recur if action short of dismissal was taken.

i. Consistency of treatment – Employees had previously been dismissed for breaches of the Acceptable Use Policy or there had been agreed exits. Dismissal was consistent with the approach the company had adopted in other cases.

[75] Ms van der Most agreed with Mr O'Flaherty's view that Mr Machen's behaviour amounted to serious misconduct and that dismissal was appropriate.

[76] The disciplinary meeting was resumed and Mr O'Flaherty communicated the decision to Mr Machen to dismiss him. He

stated that Nick Machen's actions had breached the acceptable use policy:

"... in that you knowingly downloaded offensive emails at home and sent these to your work email address and cut and pasted these emails onto your work computer. These emails especially number 22 (as identified) were offensive and could possibly represent a commercial threat to RD1 should they come into the public domain. It should be pointed out that these actions were taken in full knowledge that they breached the said acceptable use IT policy of RD1 and also acceptance that these emails were highly offensive.

[77] Written reasons for the dismissal were communicated by letter dated 26 July

2010 which stated:

In relation to the allegation with the issue of breaching RD1 IT acceptable use policies, following due consideration of the investigation findings and your explanation, you have been dismissed from your employment with RD1 Limited as informed at this meeting.

As discussed please note that your final day was 22 July. You will be paid one month in lieu of notice. Your final pay will be processed this week and will be in your bank account by the end of next week.

Outcome

[78] I find that RD1's dismissal of Mr Machen for serious misconduct was justified.

[79] Mr Machen was aware the company had an Acceptable Use policy and he clearly breached it. RD1 put its concerns to Mr Machen and gave him a genuine opportunity to respond to them. It also approached its concerns with an open mind and properly considered his response. It was justified in concluding Mr Machen's actions amounted to serious misconduct.

[80] After concluding serious misconduct had occurred, RD1 then properly considered what outcome should be appropriate, which included considering options short of dismissal. I find RD1 was justified in concluding dismissal was appropriate in all of the circumstances.

[81] Mr Machen had previously twice had his internet access removed. He had the

2009 policy explained to him at a staff meeting in March 2010 and individually shortly after that. In June 2010 he had been reminded to ensure IT content was appropriate and was also told he had been spending too much time on his computer at the expense of his work tasks. Despite this, Mr Machen retained offensive material on his computer so he could look at it whilst at work.

[82] Mr Machen's personal grievance claim for unjustified dismissal is dismissed.

Costs

[83] RD1 is entitled to a contribution towards its legal costs. The parties are encouraged to resolve costs by agreement. If that is not possible, costs will be dealt with by exchange of memoranda. RD1 has two weeks to files its costs memorandum and Mr Machen has three weeks thereafter to file his memorandum in response.

Rachel Larmer

Member of the Employment Relations Authority
