

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Harry John Waterman (Applicant)

**AND** Copytech (NZ) Limited (Respondent)

**REPRESENTATIVES:** Paul May, for Applicant  
Garry Pollak, for Respondent

**MEMBER OF AUTHORITY:** P R Stapp

**INVESTIGATION MEETING:** Wellington, 17 May 2004

**AFFIDAVIT AND  
SUBMISSIONS:** 19, 20 and 24 May 2004

**DATE OF DETERMINATION:** 10 June 2004

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

1. This problem was originally filed by Mr Waterman (the applicant) with a statement of problem for interim reinstatement and for urgency. The matter was filed in the Authority with an undertaking for damages (s.127 (2)) of the Employment Relations Act 2000) and an affidavit on 8 April 2004. During a conference call the parties' representatives agreed that the matter go to mediation services provided by the Department of Labour and the respondent would lodge its statement in reply and affidavits. In the meantime arrangements were made for an investigation meeting for the interim reinstatement matter on 23 April 2004. Subsequently it was agreed to have a full investigation meeting on 17 May 2004 and the application for interim reinstatement was withdrawn (23 April 2004).
2. Mr Waterman claims that his dismissal on 8 March 2004 was unjustified. He is seeking to be reinstated. He is claiming lost wages, compensation and costs. The company has accepted

that Mr Waterman was dismissed, but claims it had reason and grounds to dismiss him for serious misconduct. It is resisting Mr Waterman's reinstatement.

### **The facts**

3. Harry Waterman was employed as a PABX Engineer with Copytech (NZ) Limited t/a Connect (Copytech or Connect) from August 2002. He was employed under the terms and conditions of an individual employment agreement (the agreement) agreed on 17 July 2002. The agreement made provision for his remuneration of \$24.04 per hour, the provision of a company car, Shell card and cell phone with 203 free minutes per month. Under the terms of the agreement there was provision for the use of company property and systems and services. This clause read as follows:

*“21. It is agreed that the use of the company property, systems and services will at all times be for employment related business purposes. Private use is prohibited unless cleared in advance by the Directors. Further it is agreed that you will utilise the company's equipment including computers (internet, email) in a cost efficient and professional manner. The employer reserves the right at all times to inspect any data held by the employee whether that be physical or electronic, such as email or other electronic files. The employee agrees not to solicit or distribute unwanted electronic and other communications that do not relate to the employer's business or objectives. The employee also agrees not to use such equipment and devices for private purposes, including the communication with friends and associates in or outside the company. Such activities could constitute a breach of this agreement.”*

4. The terms of the individual employment agreement also made provision for the house rules of Copytech including serious misconduct and at clause 9 provided a list of items that are examples of what constitute serious misconduct resulting in instant dismissal.

5. In the background to Mr Waterman's employment he had been issued with a formal written warning dated 4 July 2003 as a result of complaints received from customers regarding his attitude and professionalism (Williams Affidavit appendix 2). Mr Waterman was issued with a second formal written warning dated 31 July 2003 in regard to matters relating to company procedures and instructions from his manager (Williams affidavit Appendix 3). Both these warnings put Mr Waterman on notice that the failure to improve could lead to the company terminating his employment and any further breach of company policy could lead to his instant dismissal.

6. On 3 September 2003 Mr Waterman was issued with a third and final written warning in regard to a matter involving his attendance at work (Williams affidavit Appendix 4). This

warning put Mr Waterman on clear notice that any further “*digression*” would result in his instant dismissal.

7. During November/December 2003 the company experienced a significant spike in internet usage. This prompted Ron Broome, Copytech’s Service Manager to issue an email to all staff on 22 January 2004. The subject of the email was in regard to internet use and reads as follows:

*“We have had a huge spike in our internet use in November/December which has cost the company \$3,000 (11 gigabyte over our five GIG cap) more than we normally spend in any given month.*

*Can I take this opportunity to remind everyone that the internet should only be used for company use only and care should be exercised with up/downloads as to whether they are really necessary.*

*We will be rebuilding part of the network to guard against further misuse/attacks. We will also be reassessing VPN access and conditions of use.*

*Thanks,*

*Ron.”*

8. This was not challenged.
9. Despite the warning the internet usage was still found to be high in January/February resulting in the company advising all staff that due to the large internet bill for January and February there would be a formal investigation carried out. Subsequently it has been found that that any issue on extra cost to the company was a charge by way of a mistake made by Telecom and that the charge has been reversed. The cost may well have been the catalyst for an investigation but as an issue any “significant cost to the company” was not levelled at Mr. Waterman as a particular complaint. The issue was his personal use of the computer.
10. This involved Paul Williams, the Managing Director, requesting Dan Taylor (Connects IT support technician) to provide him with details from the computer logs of the computer usage of all employees. In this regard Mr Williams received a summary of computer usage of all staff and a summary of the most active users (for example Copytech/Harry W) and the most visited sites. Armed with this information Mr Williams decided to meet with Mr Waterman and requested that he attend a meeting at 2.00pm on Friday 5 March to explain what had been found. Mr Waterman says that he was not told in advance what the meeting was to be about. He says that he was not told of the issues that were to be discussed and nor

was he told that he could take a representative or support person along to the meeting. Ron Broome and Paul Williams say that the meeting was organised to get an explanation from Mr Waterman. They all agree that at the meeting Mr Waterman was shown printouts of the internet use and a copy of a summary of the information was given to Mr Waterman.

11. Mr Waterman was asked to explain the internet usage on the list and he was asked to explain highlighted items including a number of alleged pornographic websites. Mr Waterman says that he was able to explain a number of the items that he looked at in the morning prior to beginning work that included news, sport and weather. It is common ground that he used the internet upon arriving at work between 7.00am and 8.00am and that he would use the computer for approximately half an hour before beginning work at 8 o'clock. Mr Broome and Mr Williams say that at first Mr Waterman denied using the internet for non work related sites. But when he was confronted with the printouts he changed his position and upon admitting that he accessed the internet told them that he was just looking at the weather reports, funny jokes and personal emails. Mr Waterman says that he disagreed with Mr. Broome saying that he adamantly denied using the internet at all. He says he always admitted that he used the internet in the morning to check news, sport, weather, etc (funny jokes).
12. Following this meeting Mr Williams requested Mr Broome to organise a formal disciplinary meeting for Monday afternoon (8 March). It is common ground that Mr Broome requested Mr Waterman to attend a meeting to take place at 2.00pm Monday 8 March and that Mr Waterman replied "*what the boss wants the boss gets*". It is common ground that Mr Broome suggested to Mr Waterman that he take a support person to the meeting. However Mr Broome did not tell him the seriousness of the matter and that it could result in his dismissal. There is an issue about whether Mr. Broome told Mr. Waterman that the meeting was a formal disciplinary meeting. Mr. Waterman says he was not told.
13. On 8 March 2004 Mr Waterman took Frank Tararo as a support person to the meeting. Mr Tararo had previously represented Mr Waterman when he was given a final written warning on 3 September 2003. Mr Williams gave Mr Waterman a printout showing Mr Waterman's internet use during the months of February and March (tabled at the investigation meeting). There was a discussion about the amount of internet usage attributed to Mr Waterman's computer and password number. Mr Waterman admitted accessing a number of the sites identified though he denied accessing other sites, particularly any pornographic sites being referred to. Mr Williams' concern about Mr Waterman's usage of the computer was that it

was eight times that of other employees (assessed from Mr. Taylor's investigation). Mr Williams says that other staff internet usage was checked and that included Mr Tararo's usage (tabled at the investigation meeting). Mr Williams and Mr Broome say that from the information available at the time they were able to assess that other staff had been using the computers for the internet primarily for work related issues. It so happened that a number of the sites referred to on the summary and the logs were of a sexual nature, whether or not they had been accessed. I accept that this is an issue that has emerged but hold that it is not directly relevant.

14. Mr. Waterman says that Mr. Williams' focus was on the use of the computer for accessing pornographic sites and not the reason advanced for the dismissal in the letter of dismissal dated 9 March 2004 that I will return to shortly. Mr. Tararo supported this claim. Messrs Williams and Broome denied it. Nothing turns on their difference suffice to say that there was an issue about the use of the computer supported by the request made to Mr. Taylor to investigate it and the summary details of the computer usage that was provided.
15. It does seem that Messrs Williams and Broome's conclusions about Mr. Waterman's credibility were reached on 5 March and were a factor in their consideration during the recess on 8 March. There is a conflict therefore about what was at issue - credibility or unauthorised use of the computer or accessing the computer in regard to certain unacceptable sites.
16. During a recess Mr Broome and Mr Williams discussed the situation. Mr Williams sought advice from the company's advocate on the telephone. Mr. Williams decided that Mr Waterman would be dismissed from his position with the company. The decision was because he had admitted using the computer for non work related activities when all staff had been warned in January about the use of the company's computers and the private use of the computers was prohibited under the terms of Mr Waterman's individual employment agreement. Upon returning to the meeting Mr Williams dismissed Mr Waterman.
17. It is accepted that Mr Waterman was not put on notice by Mr. Broome that there was the possibility of his employment being terminated. Mr. Broome conceded that he did not tell Mr. Waterman that there was the possibility of being dismissed. Also, it is probable that Mr. Broome did not tell him that the meeting was a serious disciplinary meeting given that he could not confirm that his evidence was what he actually said at the time. This would account for the shock expressed by both Mr Waterman and Mr Tararo when Mr. Waterman

was told that he was dismissed. Indeed even Mr Broome accepted that the look on his own face might well have been an expression of surprise at the development too. Mr. Williams accepted that factors taken into account in the decision to dismiss Mr Waterman were not put to him for the opportunity to mitigate the possibility of being dismissed. This included the conclusions reached on 5 March that Mr. Waterman lacked credibility and was blatantly untruthful, his past employment history taking into account the matters associated with the three warnings he had received and that Mr Broome had come to the conclusion that Mr Waterman failed to follow instructions. Mr Broome took Mr Waterman home.

18. The next day Mr Williams sent a letter of dismissal to Mr Waterman. The letter of dismissal read as follows:

*“(9 March 2004):*

*This letter is to confirm our advice to you that your employment with Copytech New Zealand Limited has been terminated with effect from 8 March 2004.*

*As relayed to you at the disciplinary meeting held yesterday, the reasons for your summary dismissal relate to the misuse of company property, associated with your use of the company’s computer equipment to access non-work related material.*

*Your actions by themselves constitute serious misconduct, and upon consideration of all the information available to us and your explanations, as well as your previous work history and disciplinary record, we felt the matters at hand warranted termination of your employment.”*

19. After the dismissal there was some contact between Mrs Waterman and Mr. Broome about the matter. Mr. Broome raised the matter again with Mr. Williams but Mr. Williams would not change his mind. In the meantime Mr. Waterman decided to follow up the matter with Mr. Fergusson, his daughter’s partner and who has a computer/IT background, for help.
20. The parties attended mediation but were unable to resolve the matter. Upon the completion of written submissions from the parties, including the furnishing of an affidavit to complete the record from Mr Dan Taylor, I am required to determine the matter.

### **Determination**

21. There were a number of issues in this matter. They relate to factual matters relating to both meetings on 5 and 8 March 2004.
22. Mr Williams decided to meet with Mr Waterman and requested that he attend a meeting at 2.00pm on Friday 5 March to explain what had been found. Mr Waterman says that he was not told in advance what the meeting was to be about. He says that he was not told of the

issues that were to be discussed and nor was he told that he could take a representative or support person along to the meeting. The fact is that such considerations would be unnecessary for an opportunity to provide an explanation and that it was not called as a disciplinary meeting. It is unfortunate that there is an issue about the conclusion reached in regard to Mr. Waterman's credibility without any other witnesses at this meeting. It seems that this conclusion was later linked to Mr. Waterman's denial on accessing certain sites that Mr. Waterman says were of a concern to Mr. Williams.

23. That meeting was organised to get an explanation from Mr Waterman. There is common ground that at the meeting Mr Waterman was shown printouts of the internet use and a copy of a summary of the information was given to Mr Waterman. Mr. Waterman was not disadvantaged because there was a disciplinary meeting that followed where Mr. Waterman was able to take a representative in regard to the employer's concerns about Mr. Waterman's use of the computer.
24. There are two concerns that emerged from this for Messrs Williams and Broome. First Mr Williams was concerned about the extent of Mr Waterman's use of the computer before starting work each day. Secondly he was concerned that Mr Waterman started his explanations by denying even accessing the internet and continued to deny accessing sites that had sexual related images. He concluded that Mr Waterman's explanations lacked credibility and that he was being blatantly untruthful. Mr. Broome says that he reached the same conclusion. How they determined this was unclear without witnesses and that the meeting was to get an explanation only. It seems that the focus of the meeting was very much on the summary provided on the internet usage that included sites that Mr. Williams took exception to (considering Mr. Waterman sought Mr. Fergusson's advice later) and the amount of Mr. Waterman's computer usage was also an issue (Broome and investigation summary).
25. As to the substantive cause I am satisfied that it was open to Mr. Williams to conclude that Mr. Waterman was misusing the computer for personal use before commencing work by using the computer to look at the news, sport, weather and at least one other site ("wicked weasel" referred to). What is important is that Mr. Waterman's use of the computer was not work related and notwithstanding that different views were held about the images. Mr. Williams undoubtedly had his own views about the content of at least the "wicked weasel" site. This issue has caused a distraction that Mr. Waterman says was the focus of the

meeting. This has happened because of the way in which the meetings have been conducted and the issues emerged without any record other than the dismissal letter.

26. The information relied upon came from an internal investigation of the computer logs involving Mr. Waterman's computer usage that Mr. Williams says was eight times that of other employees. There was a check made on the employees' use of the computer. Mr. Williams was able to explain that Mr. Tararo's use of the computer was to clear personal e-mails and that was permitted and he was required to use the internet in his work. The employees along with Mr. Waterman were warned in January about the use of the computers. Mr. Waterman's admission of using the computer was enough for the employer to act on it. This is despite Messrs Williams and Broome reaching other conclusions about Mr. Waterman's credibility.
27. An understanding of the reasons that put Mr. Waterman's job in jeopardy is affected by the different evidence from Messrs Williams and Broome and Messrs Waterman and Tararo about the meeting on 8 March. Mr. Tararo supported Mr. Waterman about the issues on 8 March and that in his belief the dismissal was for looking at pornographic sites. Mr. Broome says that the pornographic nature of some of the sites was not the issue. It was mainly the breach of company policy and the "sheer" amount of the internet usage and it was not work related and that he did not follow instructions (a factor added in his evidence).
28. Mr. Williams talked about his conclusions for dismissing Mr. Waterman in his evidence (paragraph 22) but not what was actually put to Mr. Waterman that was being relied upon although Mr. Williams relied on his letter of 9 March 2004. He says that it was Mr. Waterman who focussed on pornographic websites and that he considered that Mr. Waterman had accessed a number of sites that were not work related. Because of the nature of the summary of information available from an internal investigation on the staff computer use and Mr. Waterman's admission of using the computer for non work related matters that was enough for the employer to satisfy its reasons given on 9 March 2004 that are sufficiently consistent with the disciplinary meeting and information being relied upon. The witnesses have their own opinions on the focus that the discussion took and beliefs about the pornographic nature of the sites and just what sites Mr. Waterman accessed. But they are not the real issues; which was about Mr. Waterman's computer usage for non work matters. Mr. Waterman although he denied accessing objectionable internet web sites had two days to get assistance and approached Mr. Fergusson.

29. In any event there was nothing to prevent the employer attempting to scrutinise the information further including what sites had been accessed if that is what started to happen in the meeting. However, if the argument between them was on the access a fair and reasonable employer would have provided more time to get more information and clarity from the computer investigator and deal in more detail with the issue than what happened.
30. But in this situation I accept in the circumstances that Mr. Williams on obtaining advice from his advocate (during the recess on 8 March 2004) decided to limit the matter to Mr. Waterman's admission of using the computer and the dismissal letter makes it clear the employer was not relying on either credibility or any objectionable sites that Mr. Waterman might or might not have accessed to justify the reason for dismissal.
31. The reasons being relied upon are distinguishable in regard to people in the workplace being allowed to clear personal e-mails and different access existing for personal and technical use of the computer and Messrs Waterman and Mr. Tararo and Broome playing a downloaded computer game. The different access for personal and technical use of the computer and playing a downloaded game were never the issues at the time and only emerged during the Authority's investigation particularly that playing a game had happened. The evidence did not establish who down loaded the game. The permission for clearing e-mails makes it probable that other employees using the computer had reason to and Mr. Waterman has not been able to establish that there were other instances being condoned like his use of the computer before work to the extent of something like half an hour a day.
32. Nothing turns on the subsequent analysis of the logs because Mr. Waterman admitted using the computer for personal use before starting work. I accept that any discussion over what the issues were at the meeting on 8 March is in dispute but the real issue remains related to Mr. Waterman using the computer for personal use before starting work. The fact that Mr. Waterman was not told in advance that the meeting was a disciplinary meeting and that he faced the possibility of being dismissed before having an opportunity to mitigate the factors being taken into account by his employer was unfair. He was not told the factors and not told that consideration was going to be given to dismiss him. The factors taken into account for the penalty would have been open to Mr. Williams but he had an obligation to permit Mr. Waterman the opportunity to comment on them and attempt to mitigate including any adverse finding on his credibility. That did not happen before the decision was taken to terminate Mr. Waterman's employment and thus was unfair (even although the outcome may not have been any different).

33. Given the previous warnings Mr. Waterman must have known the seriousness of his situation if he offended in his employment again. However the matter in this instance was a separate enquiry to the previous warnings and it required the employer to put Mr. Waterman on proper notice instead of believing that Mr. Waterman should have understood himself what the outcome could have involved.
34. The way this was handled has cast the matters discussed including the reasons being relied upon into doubt and created issues of distraction; except for Mr. Waterman's admission and that his action was clearly contrary to the rules. The letter of dismissal was consistent with the employer's approach in this regard.
35. It was open to the employer to categorise the conduct as serious misconduct given the separate provision made in the employment agreement for clause 21 Use of Company Property Systems and Services and that the employer had issued a notice in January that the internet should only be used for company use.
36. It is my decision that Mr. Waterman has a personal grievance that related to the procedure followed by the employer. However the employer has produced enough evidence to support that it could come to a decision that there was serious misconduct by Mr. Waterman with his unauthorised use of the computer. Mr. Williams' use of the list and summary of information provided on the internet usage instead of the detailed logs did not disadvantage Mr. Waterman, especially since Mr. Waterman admitted using the computer to access the internet before work and where it was contrary to the company's rules and instructions (January notice and clause 21 of the employment agreement).

### **Resolution of the Problem**

37. Mr. Waterman has a personal grievance. Therefore consideration can be given to remedies available under the Employment Relations Act 2000. However these must be considered in terms of any contribution (applying s 124 of the Act) and as a matter for discretion and in equity and good conscience.
38. Mr. Waterman has contributed to his personal grievance. His actions amounted to serious misconduct as determined by his employer to dismiss him having regard to the terms of the contract and the notice on computer usage issued in January.

39. Mr. Waterman admitted using the computer for his own personal use before commencing work. He accessed internet sites for the news, weather and sport and accessed at least one other site that has caused a difference of opinion between him and his employer about the images.
40. I consider that the focus on the type of images and the computer usage deflect attention from the real issue and that is that Mr. Waterman was using the computer and internet for his own personal use contrary to his employment agreement and the January notice.
41. Nothing turns on the attempt by Mr. Waterman to analyse the computer usage and particularly his evidence that some of the sites referred to would have been references to sites that he had not necessarily accessed. The fact is that he did access web sites for personal use. The extent is irrelevant although on the probabilities it could have been considerable given the time Mr. Waterman admitted to using the computer before work.
42. Messrs Williams and Broome say that Mr. Waterman has no credibility and can not be trusted. They made this call because they say Mr. Waterman lied about using the internet at first and then admitted using it when the information was put to him. He says that he always admitted to using it but denied accessing pornographic sites. They believe that his belated admission was a ground to not believe him when he said that he was not using the computer for more than he said. There were no other witnesses to the conversation and I conclude it would not be safe to just rely on Mr Broome to corroborate Mr. Williams, even although Mr. Broome accepted that he did not explain to Mr. Waterman that his job was in jeopardy and probably did not tell him the meeting on 8 March was a serious disciplinary meeting as he was requested to do by Mr. Williams. He may have failed in this regard but it does not mean his recollection is wrong. Mr. Tararo was also a truthful witness. So maybe it is a matter of context.
43. Mr. Waterman did admit to using the internet and that it was not work related. Mr. Waterman also said that he turned the computer off when Ms. Stevens arrived at work out of respect for her feelings when he was viewing a bikini retail web site that she could have taken offence to if she happened to see it (Waterman Reply 15). These are two factors that do not assist Mr. Waterman in his attempt for reinstatement.
44. The company wished me to consider that: (1) it had filled Mr. Waterman's position without any preconditions; (2) Mr. Waterman was on three warnings and must have understood that

any further offence would mean his dismissal; and (3) Mr. Waterman would be a considerable financial burden on the business and put the company to the risk of further losses. I have not given these any great weight. The employer was on early notice that Mr. Waterman was requesting reinstatement. The warnings related to separate matters and involved performance management. It is not exactly clear the cost involved with Mr. Waterman's personal use of the computer especially considering the Telecom mistake. There were no details produced of a financial burden that even with performance management an employer would be expected to carry having committed to a course of management of an employee on the warnings issued and accepting any need for training and counselling.

45. However there is a serious question about Mr. Waterman's contribution and his compliance with company policy (January notice) and clause 21 of the employment agreement. I have noted that he is now very remorseful but this is not enough to get his job back especially given that the employer put all the staff including him on notice in January about using the computer for personal use and he was caught. Mr. Waterman will not be welcomed back by at least Messrs Williams and Broome and possibly Ms. Stevens. His employer has strong views about him being unable to change his ways and that training and counselling (not explained) will not assist having regard to three warnings issued and failing to comply with the notice not to use the computer for personal use. These are factors that normally an employer would be expected to manage. However Mr. Waterman's breach is such that reinstatement would be impractical.
46. I decline to reinstate Mr. Waterman because of the seriousness of the breach that his employer has relied upon for dismissing him for breaching his terms of employment with regard to clause 21 of the employment agreement.
47. Mr. Waterman is eligible for consideration of compensation for lost wages. He has mitigated his losses by getting work. His final pay was on 12 March 2004. He started work elsewhere to mitigate his losses on 18 March. His earnings are recorded until 14 May 2004. His gross total earnings for the time would be \$3,275.00. This is approximately 8 weeks from the date of dismissal until the investigation meeting and taking into account the final pay from Connect. Mr. Waterman was paid \$24.04 per hour for eight hours a day 5 days per week involving approximately \$7,692.80. The difference would be \$4,417.80 loss. Taking account of the contributory factor (and that reinstatement has not been awarded) I award Mr. Waterman \$2,650.68 reimbursement of lost wages.

48. Mr. Waterman was definitely shocked by his dismissal. This was supported by Dianne Waterman and Messrs Tararo and Broome. I am satisfied Mr. Waterman's feelings were affected by his dismissal. This would rate at approximately \$5,000 but taking account of his contribution I award him the sum of \$3,000 under section 123 (c) (i) of the Act for compensation as it relates to Mr. Waterman's shock arising from the failures of the employer in the procedure.
  
49. Costs are reserved.

P R Stapp  
Member of Employment Relations Authority