



# Employment Court of New Zealand

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## Williams v The Warehouse Limited AC 32/08 [2008] NZEmpC 75 (5 September 2008)

Last Updated: 12 September 2008

### IN THE EMPLOYMENT COURT

AUCKLANDAC 32/08ARC 8/08

IN THE MATTER OF a de novo challenge to a determination of the Employment Relations Authority

BETWEEN KERRY CHARLES WILLIAMS

Plaintiff

AND THE WAREHOUSE LIMITED

Defendant

Hearing: 1 and 2 September 2008

(Heard at Auckland)

Appearances: Mark Ryan, counsel for plaintiff

Penny Swarbrick and Karen Jones, counsel for defendant

Judgment: 5 September 2008

### JUDGMENT OF JUDGE A A COUCH

[1] Mr Williams was employed by The Warehouse Limited as a team leader in its Auckland Downtown store from October 2005 until he was dismissed on 27 October 2006. One of the staff reporting to Mr Williams was his partner, Sally French. The reason for Mr Williams' dismissal was that he disclosed to Ms French confidential information about her employment which he was told in a management meeting.

[2] Mr Williams believed his dismissal was unjustifiable and pursued a personal grievance to that effect through the Employment Relations Authority. In its determination dated 22 January 2008 (AA 15/08) The Authority dismissed Mr Williams' claim. Mr Williams challenged that determination and the matter proceeded before the Court by way of a hearing de novo.

### The facts

[3] Mr Williams began his employment with The Warehouse Ltd on 18 October 2005. His position was night fill team leader. This was a position of responsibility in the store and involved staff management.

[4] One of the staff who reported to Mr Williams was Sally French. Within a few weeks after he began his

employment, it became apparent that Mr Williams had established “*a romantic relationship*” with Ms French.

[5] The manager of the Downtown store was Rodney Jurgens. In late December 2005, Mr Jurgens had a discussion with Mr Williams about what was described as his “*professionalism as a manager*”. Mr Jurgens spoke to Mr Williams about two specific incidents which are not relevant to this case but also took the opportunity to counsel Mr Williams about the potential conflict between his role as a manager and his relationship with Ms French.

[6] In February 2006, Mr Jurgens and the assistant store manager conducted a routine performance review with Mr Williams. The record of that review, which Mr Williams signed at the time, contained a further statement that Mr Williams needed to maintain separation from staff members while at work. This was with particular reference to Ms French.

[7] Later in 2006, Mr Williams applied to be included in The Warehouse Store Manager Development Programme. That application was unsuccessful. On 22 August 2006, Mr Jurgens held a meeting with Mr Williams to discuss the reasons for that decision and to make him aware of complaints from other staff about his conduct. Also present at this meeting was Norman Fairweather, the company’s regional human resources manager. The issues discussed at that meeting were summarised in a memorandum to Mr Williams signed by Mr Jurgens.

[8] Three issues were discussed. The first was the reasons why Mr Williams had not been accepted for the store management development programme. It was noted:

*Kerry needs to understand his role as a part of the management team of the Downtown store – Kerry’s lack of professionalism and maturity in his outlook is hindering his development success to becoming a manager.*

[9] The second issue covered was complaints received by Mr Jurgens and Mr Fairweather about perceived favouritism of Ms French in his role as team leader. It was noted:

*The complaints received related to Sally and Kerry’s relationship. Sally seeking approval numerous times for incidents that Kerry should not be dealing with. The authority given by Kerry when Sally needs approval from a ‘1-up manager’ – Kerry should not be dealing with these incidents.*

[10] The third issue discussed was complaints received from other staff about physical expressions of affection between Mr Williams and Ms French in the workplace. It was made clear to Mr Williams that such actions were inconsistent with his role as a manager.

[11] The memorandum concluded with the following statement to Mr Williams:

*The company doesn’t hold any views against relationships, as these things cannot be helped – but while you are working and getting paid to do a job role – you need to do what is expected of the role you are getting paid for.*

*The company does not expect to have to keep revisiting the same underlying issues with you Kerry – your relationship with Sally and the effect this has with the Downtown team. Be professional – keep yourself and matters on a professional level.*

*The company considers this type of conduct as very serious and if we have to keep revisiting the underlying issue on an ongoing basis – it may be in a formal disciplinary meeting.*

[12] When cross-examined about the cumulative effect of these three discussions, Mr Williams agreed that he was in no doubt that the company disapproved of the way he had been conducting himself in the workplace. He also accepted that the way he behaved in relation to other employees, and Ms French in particular, was a matter of great importance to the company.

[13] In late September 2006, management of the company became aware of apparent irregularities in sales transactions by four staff members at the Downtown store. These were investigated by Mr Jurgens and the assistant store manager, Paul Young. They arranged meetings with the four staff concerned at intervals throughout the day on 27 September 2006. One of the staff suspected of misconduct was Ms French. The others were named Maria, Janice and Nicole.

[14] As a team leader, Mr Williams was part of the store management team and attended management team meetings. Such a meeting was scheduled for 1pm on 27 September 2006. As he and Mr Young were both involved in the disciplinary meetings with staff, Mr Jurgens asked another manager in the store, Edwin Prasad, to take the meeting.

[15] Shortly before the meeting, Mr Jurgens gave specific instructions to Mr Prasad about what he was to say regarding the disciplinary investigations then getting underway. Mr Prasad was to tell the management team that two of the four staff members involved had already been suspended and that it was very likely the other two would be suspended that day. Managers needed to know this in order to make staffing arrangements to cover for their absence. Mr Jurgens instructed Mr Prasad to make it clear to the meeting that the information regarding the four staff members in question was to be kept completely confidential.

[16] The management team meeting which then took place was attended by five people, including Mr Prasad and

Mr Williams who both gave evidence about what took place. It was common ground that Mr Prasad told those present that four staff were under investigation for suspected serious misconduct and who they were. It was also common ground that Mr Prasad referred to the suspension of those staff. In his evidence, Mr Prasad said that he presented this information to the meeting exactly as Mr Jurgens had asked him to. Specifically, he said that he told the meeting two of the four had already been suspended and that it was likely the other two would be suspended. Mr Prasad was also clear in his evidence that he said five or six times that the information was strictly confidential. Mr Williams' evidence was that Mr Prasad mentioned the four staff members names and said that they had been suspended but not why. According to Mr Williams Mr Prasad did not say that this information was confidential or should be kept confidential.

[17] In addition to that direct evidence of what occurred at the meeting, Mr Jurgens gave evidence of what those present told him about it. He said that, later in the afternoon, he spoke with Mr Prasad who confirmed that he had told the meeting exactly what Mr Jurgens had asked him to say. Mr Jurgens also said that, following Mr Williams' dismissal, he asked the other three managers present at the meeting what had been said about the staff under investigation. They told him that Mr Prasad had said that two of those staff had been suspended, that the other two were likely to be suspended and that Mr Prasad had stressed the need for confidentiality.

[18] Following the management team meeting on 27 September 2006, Mr Williams returned to work in the store. Ms French was still working, apparently as normal. Mr Williams said that, because he understood Mr Prasad to have said that Ms French had already been suspended, he was puzzled by this but he took no steps to clarify the position with senior management.

[19] Later in the afternoon, Mr Williams and Ms French took a break. They met in a food court close to the store. While they were there, Janice joined them and showed Ms French a letter that she had just been given. Ms French's name was mentioned in this letter which also included notice to Janice that she had been suspended. At that point, Mr Williams told Ms French that, as far as he knew, she also had been suspended and suggested she go to see Mr Jurgens.

[20] By that time, disciplinary meetings had been held with three of the four staff under investigation but not with Ms French. Mr Jurgens had planned to hold a meeting with Ms French later that afternoon but, before he could do so, she came to see him. She said that Mr Williams had told her she had been suspended and demanded to know what was happening. Mr Jurgens or Mr Young then had a meeting with Ms French at which she was informed of the allegations against her and suspended.

[21] Over the next two weeks, a series of further meetings were held with the four female staff suspected of misconduct. Arising out of that investigation, three issues emerged involving Mr Williams. The first was that he had apparently authorised Maria to complete a sale under Ms French's logon in the computer system. Such conduct was contrary to company policy. The second issue was that Mr Williams had allowed Ms French to conduct a sale to him, it being contrary to company policy to complete a sale involving a friend or family member.

[22] The third issue was the disclosure by Mr Williams of information conveyed to him at the management team meeting on 27 September 2006. There had been difficulty formulating what this issue was. Although Ms French had told Mr Jurgens on the day in question that Mr Williams had disclosed information to her about her suspension, this had not been discussed in any detail with Ms French and there had been a great deal of difficulty in arranging a further meeting with Ms French following her suspension. She said that she was unwell and supported this assertion with medical certificates. At the same time, she complained that her privacy and other rights had been breached when the fact that she was subject to investigation and likely to be suspended was mentioned at the management team meeting on 27 September 2006. Another factor was that Maria also said that Mr Williams had told her about her suspension prior to her meeting with Mr Jurgens on 27 September 2006.

[23] Although the situation was still not entirely clear, Mr Jurgens believed by 10 October 2006 that he was sufficiently informed to raise the issues with Mr Williams. He met with Mr Williams that day and gave him a letter setting out the three allegations and requiring him to attend a further meeting the following Friday 13 September 2006. In the meantime, Mr Williams was suspended.

[24] That meeting took place as planned on 13 October 2006. Detailed notes of the meeting were taken at the time, including a verbatim transcript of questions asked by Mr Jurgens and the answers to those questions provided by Mr Williams. Both men reviewed the notes afterwards and signed them to indicate that they accepted their accuracy.

[25] The notes show that the three issues outlined in Mr Jurgens' letter of 10 October 2006 were discussed. Mr Williams denied authorising Maria to conduct a transaction using Ms French's logon and this issue was put to one side for further investigation. Mr Williams admitted that Ms French had conducted the sale of a power drill to him and that it was wrong for him to have allowed this to have happened. He agreed that this was contrary to the company's house rules and said in explanation "*I just didn't think*".

[26] There followed an extended discussion about the allegation that Mr Williams had breached confidentiality by disclosing what had been discussed at the management team meeting on 27 September 2006. In the course of this discussion, Mr Williams confirmed that he knew that what was discussed at management team meetings was confidential and that Mr Jurgens had talked about confidentially on a number of occasions. With respect to the particular meeting on 27 September 2006, Mr Williams denied that Mr Prasad had mentioned the need for confidentiality but agreed that it was obvious that the matters discussed should be kept confidential. Mr Williams

admitted telling Ms French that she was suspended but denied giving Maria the same information.

[27] In the course of this discussion, Mr Williams was insistent that Mr Prasad had told the management team meeting that all four staff members in question had been suspended prior to the meeting. This led to the following exchange, the questions being asked by Mr Jurgens and the answers being given by Mr Williams:

*Q. When a person is suspended – what normally happens to them?*

*A. They normally are asked to leave the building straight away.*

*Q. So where did you meet Sally after that meeting?*

*A. At her desk.*

*Q. She was working?*

*A. I assumed so – she didn't have a customer.*

*Q. If suspended you are off the shop floor and don't work?*

*A. Yes that's why I was confused. I didn't even think of going to get clarification. I was just concerned to see how Sally was.*

*Q. So do you agree that you as a Manager released confidential information to Sally about the others?*

*A. Yes I should not have said anything.*

*Q. Why didn't you seek clarity off me (Rodney) before speaking to Sally?*

*A. I just didn't even think about it.*

[28] At the conclusion of the discussion on 13 October 2006, the meeting was adjourned to enable Mr Jurgens to make further enquiries and to consider what Mr Williams had said. On Tuesday, 17 October 2006, Mr Jurgens tried to telephone Mr Williams. He was unavailable and so Mr Jurgens left a message that he wished to have a follow up meeting the next day. Mr Williams later returned the telephone call, saying that he wished to seek legal advice and that the meeting would have to be postponed to enable him to do so. The matter was left on the basis that Mr Williams would contact Mr Jurgens as soon as he had taken that advice.

[29] When a further week passed without hearing from Mr Williams, Mr Jurgens wrote to him on 25 October 2006 requiring him to attend a further meeting on 27 October 2006. Mr Williams denied receiving that letter but, coincidentally, telephoned Mr Jurgens the following day and the meeting took place as planned on 27 October 2006. Present at that meeting were Mr Williams, Mr Jurgens, Mr Fairweather and Mr Williams' support person.

[30] In the time since the meeting on 13 October 2006, Mr Jurgens had been able to resolve the two matters requiring further investigation. He was satisfied that Mr Williams was not responsible for Maria using Ms French's logon and that allegation was put to one side.

[31] By that time, Maria had also withdrawn the statement she had made earlier that Mr Williams had told her about her suspension before she met with Mr Jurgens on 27 September 2006. That aspect of the breach of confidentiality allegation was also put aside.

[32] At the meeting, Mr Jurgens told Mr Williams the result of his further investigations. They then reviewed what had been discussed at the first meeting and Mr Williams was given an opportunity to provide further information. He presented a letter written and signed by Ms French. In this letter, Ms French expressed her views in forceful terms but provided no new information relevant to the remaining issues concerning Mr Williams. After this letter was presented, there was an adjournment during which Mr Jurgens and Mr Fairweather read the letter and consulted by telephone with Mary Marshall, the company human resources manager and Kathy Kramer, the company's regional manager.

[33] Mr Jurgens' evidence was that, prior to this final meeting on 27 October 2006, he felt that the appropriate outcome was that Mr Williams should be dismissed. He said, however, that he only made a final decision during the adjournment in the course of that meeting. Having made that decision, Mr Jurgens retrieved a template for a dismissal letter available to him on the company's computer system, inserted details relating to Mr Williams and by this means quickly produced a personalised dismissal letter. In that letter, Mr Jurgens recorded that the reason for dismissal was Mr Williams' disclosure of confidential information. Mr Jurgens said in evidence that, although he was satisfied Mr Williams had also been guilty of serious misconduct in the purchase of the power drill, he did not rely on that as a reason for dismissal. He added that, had that been the sole issue, he would probably have given Mr Williams a final written warning rather than dismissing him.

[34] When the meeting reconvened, Mr Jurgens told Mr Williams that his explanation in relation to the confidential information issue was not accepted and that he was dismissed. Mr Jurgens then gave Mr Williams the letter confirming this. The dismissal was effective immediately.

[35] An issue which arose in relation to this aspect of the matter was that Mr Williams said that when he first went into the room, there was a piece of paper on the table which was not there when he returned after the

adjournment and was given the dismissal letter. Mr Williams said this led him to believe that the dismissal letter had been prepared prior to the meeting and the letter had been sitting face down on the table from the outset. Having heard the evidence of Mr Jurgens, confirmed by Mr Fairweather, I am satisfied that Mr Williams was wrong to draw this inference.

## The issue

[36] Mr Williams' claim is that his dismissal was unjustifiable. That issue must be decided in accordance with the test set out in [s103A](#) of the [Employment Relations Act 2000](#), which provides:

### **103A Test of justification**

*For the purposes of section [103\(1\)\(a\)](#) and [\(b\)](#), the question of whether a dismissal or an action was 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 or action occurred.*

[37] In his statement of claim, Mr Williams alleged that his dismissal was unjustifiable both substantively and on several procedural grounds. In opening the case for Mr Williams, Mr Ryan narrowed the issue to whether the decision to dismiss Mr Williams was what a fair and reasonable employer would have done in all the circumstances. In closing the case for Mr Williams, Mr Ryan confirmed that the case for Mr Williams was solely that his dismissal was substantively unjustifiable and abandoned the claim that the procedure leading to Mr Williams' dismissal was in any way deficient.

[38] Having heard and seen all of the evidence, it seems to me that it was appropriate and responsible on Mr Ryan's part to narrow the focus of the plaintiff's case in this way.

[39] The issue I must decide therefore is whether, on an objective basis, Mr Jurgens' decision to dismiss Mr Williams was what a fair and reasonable employer would have done in all the circumstances at the time.

## Discussion and decision

[40] There was only one issue of any significance on which there was a conflict of evidence. That was what Mr Prasad told the management team meeting on 27 September 2006. On this issue, I prefer the evidence of Mr Prasad and Mr Jurgens. I do so for several reasons.

[41] Firstly, the preponderance of evidence favoured the version of events given by Mr Prasad. Although vigorously cross examined on the point, Mr Prasad remained clear and consistent in his recollection of what he said at the meeting.

[42] Mr Prasad's account of what he said at the meeting was also more consistent with logic and human nature than that given by Mr Williams. As a matter of fact, only two of the four staff concerned had been suspended at the time the meeting took place. That is what Mr Jurgens told Mr Prasad immediately before the meeting, impressing on him at the same time the need for confidentiality. In such circumstances, it is more likely than not that Mr Prasad would have complied with Mr Jurgens' instructions. It was certainly not suggested in evidence that Mr Prasad had any reason not to comply with those instructions.

[43] I had good reason to doubt the accuracy of Mr Williams' recollection. In the course of cross examination, Mr Williams conceded that significant aspects of his evidence in chief were incorrect. It was also established that aspects of Mr Williams' sworn evidence before the Authority had been inaccurate. The most striking example of this was that he told the Authority in the course of the investigation meeting that he had first applied for employment with Air New Zealand a week or so after his dismissal. When asked to provide verification of this following the meeting, Mr Williams claimed Air New Zealand kept no record of it and maintained the impression he had given in his evidence. When the Authority itself asked Air New Zealand for the information, it was immediately forthcoming and was that Mr Williams had made his application on 26 October 2006, the day before his dismissal. In evidence to the Court, Mr Williams explained this as a mistake. I find that unconvincing.

[44] Although I have a clear view on this issue of reliability, it is of little consequence in the resolution of the matter before the Court. The misconduct which led to Mr Williams' dismissal was the disclosure of confidential information provided to him at the management team meeting. What Mr Williams' exact perception of that information was does not alter the fact that he disclosed information which he knew was confidential and ought not to have disclosed.

[45] It was clear from the documents produced that Mr Williams' disclosure of confidential information was a breach of his individual employment agreement. Clause 8 of that agreement contained a definition of "*Confidential Information*" wide enough to include what Mr Williams was told at the management team meeting on 27 September 2006. It then forbade the use of this information for any purpose other than the business of the company and required Mr Williams to take all reasonable steps to prevent its disclosure.

[46] It was equally clear that what Mr Williams did was covered by the company's house rules which defined "*unauthorised disclosure of confidential information*" as serious misconduct and provided that: "*A team member may be dismissed without notice for serious misconduct, following a fair enquiry.*"

[47] In presenting the case for Mr Williams, Mr Ryan began by drawing my attention to several of the decisions of

the Court in which the application of [s103A](#) has been discussed. These included *Air New Zealand Limited v Hudson* [2006] NZEmpC 46; [2006] ERNZ 415, *X v Auckland District Health Board* [2007] 1 ERNZ 66, *Housham v Juken New Zealand Limited* [2007] 1 ERNZ 183 and *Fuiava v Air New Zealand Limited* [2006] ERNZ 806. What was said in those cases is of assistance to me but, as Ms Swarbrick said in her submissions, what emerges clearly from them is that the application of [s103A](#) depends very much on the particular facts of each case. What must be taken into account are “*all the circumstances*” of the case.

[48] Turning to the application of [s103A](#) to the facts of this case, Mr Ryan acknowledged that Mr Williams’ actions were in breach of the company’s rules but submitted that this did not necessarily mean he should have been dismissed. Rather, he submitted that a fair and reasonable employer in Mr Jurgens’ position would have given Mr Williams a formal warning. In support of this primary submission, Mr Ryan made five subsidiary submissions.

[49] The first was that, although Mr Williams acknowledged he had been counselled about the impact of his relationship with Ms French on his ability to carry out his role as team leader, he had not received any prior warnings. On the evidence, that was correct and it was not suggested otherwise by the company. What the evidence of the three prior discussions established, however, was that Mr Williams was made well aware of what Ms Swarbrick aptly described as “*the boundary issue*”. He knew that he had to establish and maintain a clear separation of his role as a team leader for the company from his role as Ms French’s partner. He also knew that this was a very important issue in his employment and that a failure to do so could lead to disciplinary action. In disclosing information to Ms French which he knew to be confidential, Mr Williams demonstrated an inability to differentiate between his two roles.

[50] Next, Mr Ryan invited me to find that disclosure of confidential information was not the sole reason for Mr Williams’ dismissal. This proposition was based on answers given by Mr Jurgens to questions in cross examination where he agreed that, in making the decision to dismiss Mr Williams, he took into account the three previous discussions with Mr Williams about the boundary issue. Although Mr Ryan did not develop this submission fully, I understood it to be that Mr Jurgens ought not to have taken into account conduct which had not been the subject of disciplinary action. If that is what Mr Ryan intended to submit, it misconstrues what I find to have been Mr Jurgens’ evidence and assumes too narrow a construction of [s103A](#). In the passage of evidence relied on by Mr Ryan, Mr Jurgens was not saying that he relied on past misconduct by Mr Williams as justification for the decision to dismiss him. Rather, Mr Jurgens was saying that the context in which he took the prior discussions with Mr Williams into account was his inability or unwillingness to recognise the boundary between his roles and to change his previously unacceptable behaviour. I find that was a proper part of “*all the circumstances*” for the purposes of [s103A](#).

[51] Mr Ryan’s third submission was that Mr Williams had been candid in the disciplinary interview with Mr Jurgens on 13 October 2006 and that this ought to be taken into account in his favour. On the evidence provided to the Court, it appears that Mr Williams did indeed answer all of Mr Jurgens’ questions honestly but that was no more than the proper discharge of his duty of good faith to his employer. Regardless of how Mr Jurgens obtained the necessary information, the issue he had to decide remained the same. It follows that it does not affect the consideration for the Court under [s103A](#).

[52] Relying on the breadth of the expression “*in all the circumstances*” in [s103A](#), Mr Ryan submitted that I should take into account that Mr Williams’ motive in disclosing confidential information to Ms French on 27 September 2006 was his concern for her welfare. He noted Mr Williams’ evidence that, on seeing the company’s letter to Janice, Ms French had become upset. He submitted that, in telling her what had been said at the management team meeting, Mr Williams was reflecting his genuine affection for Ms French and that this ought to be regarded as a mitigating factor. I do not accept that submission. What it overlooks is that the issue at the heart of Mr Jurgens’ concern was Mr Williams’ failure to separate the personal and professional aspects of his life. By choosing to respond to his personal feelings when they were in conflict with his duty to his employer, Mr Williams demonstrated graphically his inability or unwillingness to discharge his duty as an employee and, in particular, his duty as a manager.

[53] Mr Ryan’s next submission was that there was a “*common law hierarchy of disciplinary action*” to be observed by employers, even in the absence of any such requirement in an applicable employment agreement. Mr Ryan conceded he could not point to any authority for this proposition but, as I understood the submission it was that, before taking disciplinary action, an employer must consider the range of penalties available and impose the least severe penalty appropriate in the circumstances. On this basis, Mr Ryan noted Mr Jurgens’ evidence that he would have imposed a final warning for the serious misconduct involved in Mr Williams’ purchase of the power drill and submitted that a final warning ought to have been imposed for disclosure of confidential information. I reject this submission. There is no such principle of general application and, in any event, Mr Jurgens was entitled to regard the breach of confidence as more serious in all the circumstances than the power drill issue.

[54] Mr Ryan’s final submission was based on the fact that, although Mr Jurgens first became aware of Mr Williams’ breach of confidentiality when Ms French spoke to him on 27 September 2006, he did not raise the matter with Mr Williams until 10 October 2006. When asked why he had decided to dismiss Mr Williams, Mr Jurgens said that the breach of confidentiality had destroyed his trust and confidence in Mr Williams as a manager. Mr Ryan submitted that, if that were so, he would not have allowed Mr Williams to remain on the job for two weeks after learning of the breach. Again, this was not a submission Mr Ryan developed fully but I understood

it to be that a fair and reasonable employer would not have dismissed Mr Williams after delaying for two weeks in raising the matters of concern with him.

[55] In response to this submission, Ms Swarbrick pointed to four aspects of the evidence. The first was that, during the two week period in question, Mr Jurgens was significantly engaged in pursuing the four disciplinary investigations which had already been commenced. The second was that, on 27 September 2006, Mr Jurgens had only the bare statement by Ms French which he was unable to clarify and confirm because of her inability or unwillingness to meet with him. The third factor relied on was Maria's assertion that Mr Williams had disclosed confidential information to her also and that this took time to clarify. Finally, Ms Swarbrick referred to evidence that Ms French's complaints about breach of privacy and other rights had been received during the two week period and that, as these would not have been made but for Mr Williams' breach of confidence, they emphasised the consequences of the breach.

[56] I accept that this evidence went some way to explaining why Mr Jurgens did not initiate a disciplinary inquiry earlier than he did but it was nonetheless open to him to do so and I am confident that most employers in those circumstances would have done so. As Mr Williams made no claim based on that delay, however, it is of no significance of itself. The only impact the delay could have on the issue before the Court is that it might cast doubt on Mr Jurgens' evidence that he had lost trust and confidence in Mr Williams as a manager. I am not persuaded that it does have that effect and I accept Mr Jurgens' evidence in that regard. In any event, it could have little or no effect on the objective test to be applied under [s103A](#).

[57] Having considered all the evidence, I am firmly of the view that, on an objective basis, a fair and reasonable employer would have dismissed Mr Williams in all the circumstances of this case. Mr Williams' disclosure to Ms French on 27 September 2006 of information which he knew to be confidential was plainly serious misconduct in terms of the company's rules and a substantial breach of his employment agreement. Against the background of repeated counselling about the boundary issue, it inevitably rendered it very difficult, if not impossible, for him to be trusted to observe his obligations to his employer in future. That trust lies at the heart of the employment relationship and would have been regarded by any employer as vital to the continuation of Mr Williams' employment.

## Conclusion

[58] The dismissal of Mr Williams on 27 October 2006 was justifiable.

[59] The challenge is dismissed. Pursuant to [s183](#) of the [Employment Relations Act 2000](#), the determination of the Authority is set aside and this judgment stands in its place. As I have reached the same conclusion as the Authority, however, the Authority's costs determination dated 19 May 2008 (AA 15A/08) remains in effect.

## Costs

[60] The Warehouse Ltd is entitled to a contribution to its costs of resisting Mr Williams' challenge. The parties are encouraged to agree costs but, if they are unable to do so, Ms Swarbrick should file and serve a memorandum within 21 days after the date of this judgment. Mr Ryan is then to have a further 14 days to file and serve a memorandum in reply.

AA Couch

Judge

Judgment signed at 3.35pm on 5 September 2008