IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

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AA 84/08

	BETWEEN	JOHN CHRISTIANSEN Applicant
	AND	SOAR PRINTING COMPANY LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Simon Mitchell, Counsel for Applicant John Armstrong, Counsel for Respondent
Investigation Meeting:	24 October 2007
Determination:	11 March 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr John Christiansen was an employee of Soar Printing Company Limited ("Soar") until he was dismissed on 19 February 2007.

[2] A letter from Soar confirming the dismissal referred to an allegation that had been made against Mr Christiansen of unauthorised use of a company computer in breach of the House Rules incorporated into his employment agreement. The letter, written by the General Manager of Soar, Mr Wayne Daverne, advised that his explanation given in answer to the allegation was found to be unacceptable and that his misconduct was regarded as being so serious that Mr Christiansen's services were to be terminated without notice on 19 February.

[3] Mr Christiansen challenged the justification for his dismissal by raising a personal grievance. Mediation was undertaken but the grievance remained unresolved and became the subject of an investigation by the Authority.

[4] Mr Christiansen has readily acknowledged that he was at fault in his actions that led to his dismissal. His own words to describe his conduct were that it was dumb, stupid and wrong. He readily admitted his conduct when questioned about it and he apologised to Soar for his actions. He said that he had not expected to be dismissed and was stunned when Mr Daverne advised him of that decision.

[5] In submissions counsel for Mr Christiansen, Mr Mitchell, contended that the dismissal was unjustified but conceded some reduction in the remedies sought by Mr Christiansen was appropriate to account for his contribution to the personal grievance. The remedies sought are compensation for humiliation, loss of dignity and injury to feelings; and reimbursement of lost wages and other remuneration.

[6] Mr Christiansen regards himself as being fortunate to have found new employment after only a week without work following his dismissal. He did not seek reinstatement.

[7] The conclusion of the Authority from the evidence presented to it and examined on 24 October 2007 at the investigation meeting is that the dismissal of Mr Christiansen was unjustified. The reasons for this determination are as follows.

[8] There is no dispute about Mr Christiansen's actions. On Sunday 11 February 2007, while he was with his teenage son in Soar's offices where he worked, Mr Christiansen opened the back of a computer box and connected its hard drive to his son's laptop computer. His purpose in doing this was to download Photoshop software from the Soar computer onto the hard drive of his son's computer.

[9] Early the following week Mr Daverne heard what Mr Christiansen had done and gave him written notice of a meeting to be held on Friday, 16 February. The notice advised Mr Christiansen that he was welcome to have a support person or representative at the meeting and that he was encouraged to do so. The notice also advised that his employment could be placed in jeopardy if it was found that his actions constituted serious misconduct.

[10] The letter from Mr Daverne advising of the meeting included the following:

> *If you need more time or otherwise have a problem with the date, time or place please contact me, otherwise I will assume that the meeting is confirmed.*

[11] On Tuesday, 13 February, after Mr Daverne had spoken to Mr Christiansen about the inquiry that was going to be held into his actions, Mr Christiansen had a discussion with his manager, Mr Stephen Hurdley. Mr Hurdley told Mr Christiansen it was a stupid thing he had done and expressed his view that Soar would treat his action seriously but give him only a warning. Mr Daverne was not present when this discussion was taking place between Mr Christiansen and Mr Hurdley.

[12] Mr Christiansen had been unwell since the beginning of the week, suffering from shingles. He took Tuesday afternoon off and also the next day and a half until Thursday afternoon 15 February.

[13] On the Thursday, Mr Christiansen rang Mr Daverne and advised that he was feeling unwell and would like to have the meeting scheduled for the following day deferred. Mr Daverne told him that he would prefer the meeting to proceed as notified so that the matter could be cleared up. In response Mr Christiansen said he understood and made no further request to postpone the meeting.

[14] The next day, 16 February, Mr Christiansen drove with Mr Hurdley to the premises where the meeting was to be held with Mr Daverne. On the way there Mr Hurdley said that he regarded the meeting as a formality and repeated his view given earlier to Mr Christiansen that Soar would give him only a warning for his actions.

[15] Mr Christiansen did not take a representative or support person with him to the meeting on 16 February. Mr Hurdley attended in the capacity of a representative of Soar. The minutes of the meeting taken by Mr Hurdley were typewritten up and signed by Mr Christiansen. They describe Mr Hurdley as "Representative/ Support Person (for management)."

[16] At the close of the meeting Mr Daverne said that over the weekend he would consider what he had heard and meet again on Monday 19 February to present his conclusions to Mr Christiansen.

[17] Mr Christiansen went to the meeting on 19 February, again without a representative, and Mr Hurdley attended as the employer's representative and minute taker. The minutes of the 16 February meeting were presented and Mr Christiansen read them and confirmed they were a correct record of the meeting, and he signed

them as being so. Mr Christiansen said he had nothing else to add to what he had explained on 16 February.

[18] Mr Daverne then advised that the actions of Mr Christiansen were regarded as a serious breach of company policy and that Soar could no longer trust Mr Christiansen. Mr Daverne asked Mr Christiansen why he had copied the software when earlier he had been told that he was not to do that. Mr Christiansen replied that he had just wanted a copy of Photoshop and thought that what he did was the best way of getting one. Mr Christiansen was asked why he had taken a copy of Photoshop when he knew it was illegal, but he gave no answer. Mr Daverne then announced that Soar had no option but to terminate his employment immediately.

[19] It is a fact that Mr Christiansen had advised Mr Daverne before the meeting of 16 February that he was unwell and had asked if that meeting could be deferred. It is also a fact that Mr Daverne had no knowledge on 16 or 19 February that Mr Hurdley, Mr Christiansen's manager, had given his opinion on two occasions that the action likely to be taken by Soar against Mr Christiansen was no more than a warning.

[20] I consider that it was unfair and unreasonable of the employer not to accede to the request for an adjournment made by Mr Christiansen because he was feeling unwell. Mr Christiansen had consulted a doctor on Monday 12 February and had been certified unfit to resume work for five days. However, he had been at work on Tuesday morning and he did return within the five days on Thursday afternoon when he requested the adjournment.

[21] Turning down the request for an adjournment was contrary to the advice given by Mr Daverne in the notice of formal meeting that if Mr Christiansen had needed more time or had a problem with the 16 February meeting he should contact Mr Daverne. The clear implication is that any contact in this regard would be for the purpose of arranging an alternative time for the meeting. While Mr Daverne made no demand that Mr Christiansen was to go ahead with the meeting on 16 February, I am satisfied that he made it plain that he wanted no delays. Mr Christiansen was obviously not wishing to put himself in a bad light with Mr Daverne by pushing for an adjournment, and he had been given some encouragement to hope that the outcome would be only a warning form his employer.

[22] While Mr Hurdley had made no promises and was merely expressing an opinion, I am satisfied this was a compounding circumstance that played a part in Mr Christiansen's decision to proceed with the meeting on 16 February, when he had been feeling unwell, and do so without a representative.

[23] Although Mr Daverne had not been aware of the assurances given by Mr Hurdley, Soar must take responsibility for the conduct of its managers in this regard.

[24] It seems likely that if Mr Christiansen had approached the meeting knowing there was a strong possibility of being dismissed and had engaged a representative for the inquiry, advice allegedly given to Mr Christiansen by Mr Jason Young and later disputed may have been questioned in more detail. This may have led Mr Daverne to speak to Mr Young about his brief email rather than simply taking as read the contents of it. In that email sent on 13 February, Mr Young had given the following advice to Mr Daverne:

> *Hi Wayne*
> *I can't get the computer going that was tampered with. Steve spoke to me about the reasons John had for pulling it apart. I had a lengthy conversation with John a couple of weeks back regarding Copyright laws re: copying software. I explained to him that I only had Mac software and even if I did have PC software for Photoshop, he wouldn't be copying it.*
> *Cheers*
> *Jason*

[25] Mr Daverne described this advice as the "clincher" in deciding to dismiss Mr Christiansen. After the dismissal it became a matter of dispute by Mr Christiansen that Mr Young had forbidden him to copy Photoshop as stated in the latter's email. Mr Christiansen maintains that it was Acrobat he was told he could not make a copy of because of the licensing requirements for that particular software.

[26] Applying s 103A of the Employment Relations Act 2000, as the Authority is required to do in determining whether a dismissal is justified, I consider that Soar's actions, and how Soar acted, were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. As s 103A requires, justification must be determined on an objective basis or, as it has been put by the Employment Court, from the point of view of a neutral observer (see, *Air New Zealand Ltd v. Hudson* [2006] 3 NZLR 155, at para.[113]).

[27] A fair and reasonable employer would not have proceeded with a scheduled meeting to inquire into misconduct when the employee had been given some reason to think that dismissal was unlikely and had therefore not persisted in seeking an adjournment of the meeting because he was unwell, and when the employer had encouraged him to continue with the scheduled date although earlier having implied that the date could be changed on request.

[28] I therefore determine that Mr Christiansen has a sustainable grievance claim because he was unjustifiably dismissed by Soar.

[29] In considering remedies for the grievance the Authority is required to give effect to s 124 of the Act. The nature and extent of any remedies to be awarded by the Authority must take into account any contributing behaviour by the employee.

[30] It has not been contended on behalf of Mr Christiansen that his actions on 11 February 2007 were blameless.

[31] The question of what those actions were and the circumstances surrounding them was a matter explored in evidence before the Authority. There is no dispute that Mr Christiansen downloaded Photoshop and probably the entire contents of the hard drive of Mr Young's office computer on 11 February. There is no dispute he did this without any authorisation, express or implied from his employer. His actions caused damage to Mr Young's computer which, I find, had not been decommissioned despite the dusty or grubby appearance of it and the fact that it sat on the floor of Mr Young's office. He used it several times a week as a back up computer to get access to data or material he needed.

[32] As a result of the way the hard drive of the computer had been accessed and copied, damage was caused to Mr Young's computer, disabling it from operation. Whether the damage is repairable and at what cost is not yet known, but I accept from Mr Young that a considerable amount of Soar's time had to be spent retrieving needed information from the damaged computer so that it could continue to be used.

[33] I also find as a fact from the evidence given by Mr Young that, as he said in his email of 13 February, Mr Young had told Mr Christiansen clearly that he was not permitted to download the software of Photoshop because it was illegal to do, the programme being registered in the name of Mr Christiansen's employer and, for back up purposes, with only one copy being allowed to be kept. Mr Young was clear in his

evidence that he had been specific with Mr Christiansen about Photoshop as the software.

[34] I have reached the same conclusion that Mr Daverne reached about Mr Christiansen's actions. The minutes of the 16 February meeting record that Mr Daverne asked Mr Christiansen why he had copied the software when, after asking Mr Young a couple of weeks earlier about doing it, he had been told not to. Mr Christiansen is recorded as replying that he had just wanted a copy of Photoshop. When asked by Mr Daverne why he had taken a copy when he knew it was illegal, Mr Christiansen gave no answer according to the minutes. Mr Christiansen knew he was not authorised to take a copy of Photoshop and he had been expressly told he could not take a copy. He had no excuse for his actions, as he has readily acknowledged to the Authority.

[35] The Authority also reaches the same conclusion as Mr Daverne that the actions of Mr Christiansen amounted to serious misconduct. The House Rules of Soar define serious misconduct as including unlawful access or misuse of a company computer, deliberate or wilful damage to company property and unlawful access to, or misuse of, any company files or information. The rules provide that any serious misconduct as defined constitutes grounds for dismissal. The House Rules are incorporated by reference into the individual employment agreement that Mr Christiansen signed on 31 August 2006. By doing so he declared that he would abide by those workplace rules, a copy of which he acknowledged he had received and had understood its contents.

[36] It is a question of fact and degree as to the extent to which the actions of an employee may have contributed to the situation that gave rise to a personal grievance. It is not always an easy question of fact to determine, and it cannot be done with any great precision as it may involve trying to ascertain what was in the mind of the employer during a disciplinary process that led to unjustified dismissal.

[37] Mr Daverne did not check with Mr Young as to how sure he was that it was Photoshop he had told Mr Christiansen could not be copied. It is clear that if he had checked this information, in all likelihood he would have been told that Mr Young was quite sure about that.

[38] Although there were actions or omissions on the part of Soar which led to the dismissal being unjustified, I am satisfied that Mr Christiansen's actions on 11 February contributed so overwhelmingly that his fault or blame must be assessed as total in the circumstances.

[39] I therefore determine that justly Mr Christiansen should not receive any remedies for his personal grievance. No orders are therefore made against Soar.

[40] The question of costs is reserved but I expect, given the outcome of this case, the parties, through counsel Mr Mitchell and Mr Armstrong, will able to resolve the question themselves. If not, application in writing can be made in the usual way and a timetable for a reply will be set.

A Dumbleton
Member of the Employment Relations Authority