Determination Number: AA 1/05
File Number: AEA 1210/04
AEA 1216/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Brian Cliff (First Applicant) **AND** Allan Groom (Second Applicant)
AND	Air New Zealand Limited (Respondent)
REPRESENTATIVES	Jim Roberts, for the applicants Kevin Thompson, for the respondent
MEMBER OF AUTHORITY	Janet Scott
DATE OF DETERMINATION	10 January 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Mr Cliff and Mr Groom were dismissed from their employment with the respondent on 24 November 2004. Both applicants have filed personal grievance claims and submit they have been unjustifiably dismissed and that they were subject to unjustifiable actions by the respondent leading to their dismissals.

Both applicants have made application for interim reinstatement to their positions with Air New Zealand. This determination addresses the applications for interim reinstatement. Both applicants have provided the Authority with a signed undertaking that they will abide by any order the Authority may make in respect of damages sustained by Air New Zealand through the granting of orders for interim reinstatement.

Note (1): By agreement this determination has been decided on papers – the applications, affidavits and submissions made on behalf of the respective parties.

Note (2): In conferencing with the parties prior to Christmas I indicated my availability to hear the substantive matters in the week beginning 21 February 2005. I now indicate that if these dates are not suitable to the parties I am also available to conduct an investigation meeting on 2-3 March or 9-11 March 2005.

Background

Prior to his dismissal Mr Cliff was employed by Air New Zealand in the position of Materials Logistics Engineer within the Engine Maintenance Materials section of Engineering Services. He was a long serving employee with some 28 years service.

Mr Groom was employed (prior to his dismissal) as Forward Planner (Engines) in the Maintenance Planning section of Engineering Services. He too was a long serving employee with 28 years service over two engagements.

Both employees were provided with internet access for work purposes. The respondent has extensive policies governing the access to and use of the internet which it submits are widely circulated and known to employees including the applicants.[1] These materials, it is submitted, make it very clear what is and is not acceptable internet use. These policies also make it clear the employer can review employees' internet usage.

An extensive review of internet activity was conducted within the respondent's Engineering Services division. The review canvassed internet use of all employees with internet access and covered the period April – July 2004.

In October 2004 both employees were provided with letters which noted concern regarding their usage of the internet both as to the high level of non - work related use and the content of the material accessed. A record of internet use was attached to each letter.

Over an ensuing period of approximately six weeks the applicants and their representative each met separately with their managers on more than one occasion to discuss their respective internet use and to explain that usage. These meetings proceeded in the form of disciplinary meetings and were concurrent with ongoing investigations into each worker's use of the internet.

At the conclusion of the company's inquiries the applicants were dismissed on 24 November (separate meetings). The reasons given (in both cases) were:

- The time spent on the internet during work time for non-work related purposes.
- The nature and content of the sites visited.

Legal Principles

The legal principles to be applied to claims for interim reinstatement have been clearly set out in a number of Court decisions. In *Baker v Armourgard Security Ltd* [1998] 1 ERNZ, 436 the Court described the criteria:

- Is there an arguable case?
- Is there another adequate alternative remedy available to the applicant?
- Where does the balance of convenience lie?
- What is the overall justice of the case?

[1] Denied by the applicants.

Discussion

This discussion and my determination in this matter reflect my consideration of the affidavits and submissions made by and on behalf of the parties and my own review of relevant case law. My determination focuses only on those submissions I find to be particularly relevant. I have, however, considered all the submissions made.

Arguable Case

While I do not at this stage have access to the full evidence relating to the content of the sites visited by the applicants there is objective evidence (site records) that both applicants are recorded as having accessed numerous sites it might be hard to claim are work related and sites with dubious names which the records reveal contain adult/sexually explicit material. However, the applicants are challenging the accuracy of the information relating to the sites alleged to have been visited by them and the timeliness and quality of the information provided to them. They submit that inaccuracies in the material provided and the delay in providing it seriously prejudiced their ability to provide meaningful responses to the allegations made against them.

The threshold for meeting this criterion is low and I find the applicants have established an arguable case

Is there a Suitable Alternative Remedy?[2]

While the applicant's have received substantial sums by way of their final pays and will face (given early dates are available for the substantive hearing) a relatively short period without their respective incomes pending determination of their substantive applications, I find that damages cannot adequately compensate such long serving applicants for the loss of the opportunity to continue in their chosen careers in the interim.

Balance of Convenience

In X v Y Ltd and NZ Stock Exchange [1992] 1 ERNZ 863 at pp.872-3 the Court said:

> *If the plaintiff satisfies the Court that he has an arguable case, or in other words that there is a serious issue between himself and one or both of the defendants … that is not by itself the end of the enquiry. This is because the remedy of injunction is discretionary. The Court, in the exercise of its discretion to grant or withhold that remedy, had to weigh up the inconvenience to a defendant of having to bear the burden of an injunction before the substantive case is heard when the defendant may well win that case, and against the inconvenience to a plaintiff who may have a just case, of having to bear the detriment of wrongful or unjustifiable action until the case has been heard. Inconvenience in this context has a stronger meaning than colloquially; it means detriment or injury.*
>
> *The Court puts various matters in balance in arriving at a position, but having done so it recognises the risk of matters of detail overwhelming considerations of substance. It therefore stands back from the case, having arrived at a decision on the balance of convenience and considers what the overall justice of the case requires it do.*

[2] Both parties have rejected reinstatement to the payroll & garden leave as a interim solution.

I must consider here the relative detriment to the applicants and the respondent in either making or not making the orders sought.

The respondent asserts it has lost trust and confidence in the applicants. Consistent with the judgement in *Orme v Eagle Technology Corporation Ltd* (unrep. WEC 40/95) the respondent expands on this assertion to point out both employees require substantial access to the internet to do their jobs – the applicants' substantial misuse of which has led the respondent to conclude it has lost trust and confidence in the applicants. It is not feasible to deny the applicant's access to the internet because this would make them ineffective in carrying out their duties.

The effect on third parties is also canvassed. The respondent submits the investigation into internet usage in Engineering Services is ongoing and the reinstatement of the applicants would be extremely counterproductive for the completion of a fair process and would destabilise an already fragile and tense workplace.

I find the balance of convenience test favours the respondent.

The applicants will be without income and the other benefits of employment (for a relatively short period until their substantive cases are determined). Against this I consider the potential detriment to the respondent of reinstatement is greater than that to the applicants in not being reinstated. The respondent is likely to suffer detriment in terms of confusion and disruption to the workplace flowing from the reinstatement of the applicants to positions where they require access to the internet to do meaningful work in a workplace where ongoing investigations into internet use/misuse remain to be concluded. The applicants' reinstatement to such a situation would be confusing and would escalate tension in an already tense workplace.

Overall Justice of Case

The applicants have established they have an arguable case. The threshold to meet this test is a low one.

In considering the criterion[3] – overall justice of the case – the strength of the applicants' respective cases is a relevant consideration. On the information currently before me I cannot say that the applicants have a strong case. While the applicants do challenge the accuracy of the information provided to them regarding their internet usage I do not understand them to be saying they did not access at least some of the sites alleged. Their challenges seem to go to the extent of the alleged access to non-work related sites/offensive sites and also relies on their explanations that access (to offensive sites in particular) was not deliberate or the sites alleged to be offensive are not offensive.

Otherwise the applicants are arguing failures of process.

I have already noted there is a significant amount of objective information before me of visits to sites that appear to be non-work related &/or with dubious names and which are recorded as containing adult/sexually explicit material. Given the evidence before me relating to the investigation undertaken by the respondent in this matter and the revision of the material submitted to the applicants for their consideration and explanation it seems unlikely (given the amount of material the respondent has relied on in arriving at its decision to dismiss the applicants) that a challenge to the accuracy of that material will succeed totally.

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[3] *Luke v NZ Co-Op Dairy Co Ltd (Anchormilk)* [1994] 2 ERNZ 295.

If the applicants succeed only on procedural arguments any procedural failure would have to be significant to lead to a finding the employer could not have reasonably come to the decision it has arrived at.

In all, to the extent I can assess the applicants' cases at this point, my assessment is that their cases are not very strong ones and this militates against reinstating them in the interim.

Also relevant to my conclusions under this head is the likelihood, if the applicants are successful in their substantive applications, of permanent reinstatement.[4] Of course if the applicants succeed only on procedural point(s) reinstatement may not be practicable.

Contribution is also a factor to considered in deciding on an equitable remedy.

These matters remain to be decided following the hearing into the substantive matter but on this consideration of the case for interim reinstatement I find the overall justice of the case favours the respondent.

Determination

With the most important criterion[5] – the balance of convenience - favouring the respondent and with the overall justice of the case also favouring the respondent I must decline the applications for interim reinstatement brought by Mr Cliff and Mr Groom.

Mediation

I consider the claims before me would benefit from further attempts at mediation and will be contacting the parties to progress this along with confirming arrangements for an Investigation Meeting should it be necessary.

Costs

Costs are reserved and will be addressed following disposal of the substantive applications.

Janet Scott
Member of Employment Relations Authority

[4] *Mader v P & O Services (Northern)* [1992] 2 ERNZ 413; *Clarke v Attorney-General* [1997] ERNZ 600.
[5] *Kendall v Presbyterian Support Services (Northern)* [1992] 2 ERNZ 413.