Employment Court of New Zealand

Cliff v Air New Zealand Ltd AC47/06 [2006] NZEmpC 82; [2006] ERNZ 694; (2006) 7 NZELC 98,369 (23 August 2006)

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Last Updated: 3 May 2011

IN THE EMPLOYMENT COURT AUCKLAND

ARC 50/05
ARC 51/05

AC47/06

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN ARC 50/05 BRIAN CLIFF

ARC 51/05 ALLAN WILLIAM GROOM Plaintiffs

AND AIR NEW ZEALAND LIMITED Defendant

Hearing: 27, 28, 29, 30 and 31 March 2006, 3, 4 and 5 April 2006 (Heard at Auckland)

Appearances: Jim Roberts and Gennise Luen, Counsel for the Plaintiffs

Kevin Thompson, Counsel for the Defendant

Judgment: 23 August 2006

JUDGMENT OF JUDGE C M SHAW

[1] In 2004, Air New Zealand engineering services division (ANZES) conducted an audit into Internet usage by all of its employees. The Internet usage data was downloaded from the company's computer system.

[2] Analysis of this data revealed that a number of employees appeared to use the Internet for excessive times and inappropriate reasons. These included Mr Cliff and Mr Groom who were eventually dismissed from their positions with Air New Zealand because of their time spent on the Internet during work time for non-work related purposes, and the nature and the content of the sites visited by them.

[3] The dismissals of both men were found to be justified by the Employment Relations Authority. Their challenges to that determination were heard together. The hearing covered all of the evidence considered by the Authority although extra

evidence and analysis of data since the Authority meeting was also presented to the

Court.

The issues

[4] Both men have denied deliberately accessing any pornographic or offensive sites, both challenge the accuracy of the data relied upon by Air New Zealand to support their dismissals, and both believe that the process of investigation into their employment was unfair. The issues which arise in this case flow from the fundamental question of whether Air New Zealand carried out a full and fair investigation into the Internet usage of Mr Cliff and Mr Groom, and whether it could have justifiably dismissed them on the basis of its findings of serious misconduct against both of them. These issues are:

(a) The extent of knowledge by the employees of the company's Internet policies.

(b) Whether the investigation meetings were conducted fairly and in accordance with Air New Zealand's policies. An important aspect of this inquiry relates to the reliability of the data relied upon by Air New Zealand.

(c) Whether, on the basis of its investigation, Air New Zealand could have come to a conclusion that the allegations had been made out and therefore amounted to serious misconduct which justified dismissal.

The facts

[5] Richard Motet, a human resources consultant but not an IT expert, was engaged by Air New Zealand in early September 2004 on a 3-month contract to assist its ANZES managers who had been delegated to investigate the Internet usage. Individual activity reports for each of about 1,000 employees with Internet access were downloaded. These showed all of their Internet activities for the period 31

March to 24 July 2004. Some of the data revealed a high usage and/or significant access to offensive sites. The data for the thirteen highest users, who included Mr Cliff and Mr Groom, was given for analysis to GEN-I, a division of Telecom which provides IT services to Air New Zealand.

The data

[6] Mr Motet wanted the raw data in the activity reports to be put in a more understandable format to be discussed with the individuals concerned so GEN-I produced individual Internet usage reports for the high users which showed the Internet sites visited or hit, dates and numbers of visits or attempted visits.

[7] There were therefore two sources of information about Internet usage: the Internet activity reports and the Internet usage reports. These differed in the detail of information provided.

[8] The Internet usage report for each individual grouped the visits into categories such as adult/sexually explicit, personal interests, arts and entertainment and listed the data as in the following example:

Visit Date Site Address/URL Number visits

28/04/2004 www.allsitesaccess.com 3

[9] In comparison, the Internet activity data contained more detailed information as can be seen in this example:

www.trademe.co.nz

[10] In order to follow the matters raised in the investigation, it was necessary to understand some technical matters about the programming of Air New Zealand's Internet system. Mr Filkin, the application service manager for GEN-I, was called by Air New Zealand for his expertise in IT applications and on-line Internet activity. He was not working for GEN-I when the Air New Zealand Internet data was analysed but is familiar with the processes, the data, and its analysis.

[11] He gave a demonstration of Internet searching and discussed three issues which related to the way Air New Zealand assessed its employees' use of the Internet and which became the focus of much evidence in the course of the hearing.

1. Three minute defaults

[12] "Browse time" is the period during which a user is browsing the Internet. A number of activities can be performed in a short period of browse time by a user clicking on different sites. The Windows environment at Air New Zealand is set up to log computer use. It records the start time for a browse session by the first

navigation step taken by a user, but there is no certain way to show the end-time for a browse session unless the user closes the browser by shutting down the Internet explorer.

2. Measurement of Internet activity

[13] Air New Zealand has a system called SurfControl to monitor Internet use by employees. To measure time spent on the Internet, SurfControl applies a 3 minute default for each hit because it has been found that, on average, a user takes no longer than 3 minutes to read a site. The first time an Internet page is "hit" by a user 3 minutes is given as a browse time. If the user straight away browses to another web page additional time is not added until the time exceeds 3 minutes.

[14] Although SurfControl records hits, it is not possible to deduce from each hit what an employee was doing during the browse time, for example, whether or not the page was minimised or closed. Mr Filkin said that timing using SurfControl was based on averages. It is not possible to know definitively how long somebody has spent on a page or whether they moved around within a page.

[15] The Internet activity data records everything a user does as a hit, apart from shutting down the browser. This includes pressing the "back" button and putting in another web address. Sometimes hits are registered without the user doing anything. An example is the National Geographic site recorded in Mr Cliff's activity data. This showed that the site was entered on 27/4/2004 at 8:36:48 am. Between then and 9 minutes later at 8:45:48 am, 95 hits were recorded. Mr Filkin said that

these hits came from the unattended site repeating itself. During the browse time, web pages or websites may “pop up” automatically as a result of hidden instructions in the web page which has been selected and these are also counted as hits.

[16] Air New Zealand also counted site counters as hits. These are attached to websites or pages and automatically count the number of visits to a page.

3. Blocked user activity

[17] SurfControl is also programmed to block access to web pages or objects within a page. An employer such as Air New Zealand can choose the level of activity it wants to have monitored by SurfControl thereby controlling access to material it deems inappropriate or unrelated to work or wasteful of bandwidth or time. It categorises websites and web pages. Blocked activity is monitored and is

recorded in a blocked user report. This report only shows the domain name in which the blocked page or object appears rather than the full URL or web addresses of the blocked activity.

[18] Mr Filkin said that all the blocked user activity shows is that a page or object within a particular domain name was blocked. It could have been an entire website linked to the domain name itself which was blocked or it could have been a single page within tens or hundreds of pages within the domain name. The blocked user activity data cannot be used to say whether a user did or did not view anything on the domain name or on the website associated with the domain name including access to a particular page. It shows that something within the website associated with the domain name in which the accessed page is located was marked as blocked.

[19] The relevance of this evidence is that both Mr Cliff and Mr Groom acknowledged accessing certain domains but denied accessing particular parts of those domains which were regarded as objectionable.

[20] Although SurfControl logs Internet activity use and categorises each activity at the time it is logged, this categorisation is an ongoing process and sometimes it is possible to access prohibited sites before it can be categorised and blocked.

4. Minimising screens

[21] When a user minimises a screen the browse time cuts out at 3 minutes as long as there is nothing active on the minimised page.

The disciplinary investigations

[22] Mr Cliff and Mr Groom’s Internet activities were investigated separately. The process followed for both was very similar including these common features: Mr Motet prepared a letter to each which referred to the review of Internet activity and said that Air New Zealand was concerned about the high levels of personal usage and the content of the material accessed. Each letter included the relevant Internet usage report prepared by GEN-I which comprised a first page summary and a list of the sites visited grouped according to the SurfControl categories.

[23] Meetings were then held with each individual at which they were represented by Jackie Roberts, their union representative. Mr Motet attended all meetings either with Malcolm Waite, Mr Cliff’s manager; or Mr Fiechter, Mr Groom’s manager.

Before the first meetings on 20 and 22 October 2004 and between the subsequent meetings, Mr Motet and Ms Roberts had

informal contact to discuss issues relating to the investigations. There was another meeting for each individual on 16

November and on 24 November 2004 a final meeting was held at which each of them was dismissed.

[24] Both Mr Motet and the relevant manager made notes at the meetings. Later, Mr Motet transcribed his notes and added to them from his memory. He checked this record with the relevant manager to confirm them before distributing them and then destroyed his original notes because, in his view, the transcribed notes became the point of reference. The resulting notes were not a verbatim record but set out key points which, in Mr Motet's view, were a good summary and which showed linkages.

Brian Cliff

[25] Mr Cliff was a materials and logistic engineer with Air New Zealand. He had worked a total of 28½ years with the company with a break between 1982 and

1985 when he took voluntary redundancy. He was then invited to return and remained for the next 19 years.

[26] In his work which involved the supply of parts to air forces, he used a secure DOS based computer system to track engine parts for use on air force aircraft which was not Internet based. He communicated with the Australian Defence Force about the supply of parts to it through a messaging system on the computer.

[27] In 2003, he was provided with an Air New Zealand computer with Internet access for which he had no real use apart from the Excel spreadsheet on which he recorded the movement and location of engine parts.

[28] Although he had received some relevant training on the defence supply system computer, he received none for the Air New Zealand computer. He was not shown the Internet policies at the time he got the computer but knew of them by word of mouth. He taught himself how to use the Internet search engines and frankly said that he often used the Internet as a doodling tool during his busy work schedule. He does not deny accessing the Internet for personal use.

Cliff investigation

[29] After Mr Motet had received and reviewed all of Mr Cliff's activity data, Mr

Waite reviewed it and confirmed that none of the sites listed were work-related.

[30] On 14 October 2004, Mr Cliff received a letter and some documents by Mr

Waite and Mr Motet. The letter said:

We have recently completed an extensive review of internet activity and are concerned to note both the high levels of personal usage and the content of material on sites accessed by some employees which is in breach of company policy.

Your usage history in terms of levels and content during the review period is of concern to us and we need to schedule a meeting to discuss these concerns. A record of your usage history is attached for your reference.

We would like to meet with you 2:00pm 20th October 2004 in Conference Room 4 to discuss our concerns, and we encourage you to have a representative present. Should 2:00pm 20th October be unsuitable, please suggest a time that would be more suitable. If we do not hear from you before 12.30pm Tuesday 19th October we will assume the meeting is confirmed.

At this meeting you will be given every opportunity to give your explanation on the extent of the usage and the material accessed. Full consideration will be given to your explanation before any decision is taken.

We must advise that if an allegation of misconduct is established, this may lead to disciplinary action up to and including dismissal.

[31] The summary of the Internet usage report showed that of Mr Cliff's visits to the Internet over the 4 month period 48 were classified as adult/sexually explicit. The rest of the visits totalled 4,806 and were grouped under the heading "*Personal Interests*" sites which included 27 categories. The total usage time recorded for these visits was recorded as 81 hours 28 minutes. At an hourly rate of $42.24 this equated to a cost of $3,428.62 to Air New Zealand.

[32] The summary was accompanied by the Internet usage report which contained a more detailed breakdown of the sites visited under each category as previously described.

[33] Mr Cliff was very upset, particularly by the allegation that he had accessed pornography sites. He denied this from the beginning to the end of the subsequent investigation. He met first with his union site representative, Charlie Douglas, and later with Ms Roberts who represented him throughout the investigation. He had difficulty in understanding the information he had been provided with.

[34] On 20 October 2004 Mr Cliff, Mr Douglas, and Ms Roberts went to the first investigation meeting with Mr Motet and Mr Waite. At this stage Mr Motet had

personally investigated some of the sites listed in the data on his own computer and he and Mr Waite had a full set of Mr Cliff's Internet activity data which was not shown to Mr Cliff. Mr Motet was also in possession of a "blocked user report" but neither Mr Cliff nor Mr Waite was aware of that.

[35] This meeting took 40 to 45 minutes however Air New Zealand's minutes are very short, only one and a quarter pages. Although Mr Cliff acknowledged that the minutes touched on matters discussed, he does not think they are accurate and alleges that they have been distorted in favour of Air New Zealand's position on his case. Because there was no verbatim record of the meeting and because the accounts of what was actually said differed from each of the witnesses, it is almost impossible to reconstruct the precise details of the meeting. To a certain extent the outline of the minutes differ from Mr Motet's account to the Court of what happened at the meeting.

[36] He said he opened the meeting by providing copies of all Air New Zealand's policies and got a response to that.

[37] The minutes recorded that Mr Cliff told the meeting he understood the Internet could be used during breaks but not during working hours. It also recorded that Mr Cliff "*confirmed he fully understood company policy pertaining to Internet usage*" and that "*on no account could any sexual site be visited on the Internet.*" He was reported as having said "*it was most unlikely anyone in his area could be unaware of the internet rules*."

[38] In Court, Mr Cliff denied that he accepted that he fully understood the policy. Although Ms Roberts's scant notes of the meeting state "*Fully aware of co policy*", her recollection was that he did not say he fully understood the policy but that he said he was aware of it by word of mouth and knew that you could not look at nude ladies. The discrepancy between these accounts can be explained, I believe, by Mr Motet's evidence that at the first meeting he went through the Air New Zealand

policies and then started questioning Mr Cliff. It seems that one of the main questions in his mind was Mr Cliff's knowledge and understanding of the Internet policy. The policy was put to Mr Cliff who responded to that. This part of the meeting is not recorded in the minutes.

[39] I find that it is most probable that, in saying he fully understood the policy, Mr Cliff was responding to the statement of policy that had just been read to him rather than his actual knowledge of the Internet policy at the time of his use of the Internet. I accept his and Ms Roberts's evidence that he did not fully understand the policy, that he had not been shown it, and did not know where to look for it except generally on Air New Zealand's intranet. At best, he had a general understanding of Air New Zealand's attitude to the use of the Internet picked up by word of mouth.

[40] Next, the meeting focused on sites considered to be inappropriate including adult sexually offensive and hate or weapon sites. Using the Internet activity data material, Mr Motet asked Mr Cliff whether he had gone into specific and named sites. Mr Motet's notes record that Mr Cliff said he was a Freemason and he had accessed a site called "Geordie Girls" to get information for a historical Geordie presentation he was to make. He had accessed an offensive site in error. Although the minutes of the meeting refer to Mr Cliff accessing the site, Ms Roberts's notes do not use the word "access" in the context of Mr Cliff's explanation given at the meeting.

[41] In his evidence to the Court, Mr Cliff said that what he had said in the meeting was that he was preparing something on Grace Darling and looked to see from the area of England he came from what other Geordie ladies had similar histories to Grace Darling. "W*hat happened was I got this Geordie Girl site*." He couldn't remember whether he had put in "Geordie Ladies", "Geordie Girls" or just "Geordie". He said he tried to explain to the company what he was doing to explain how he could have got to the site. He denied saying he was on the site or had accessed the site. Mr Motet believes he admitted visiting the site.

[42] In relation to a site about female stars, Mr Cliff denied that he ever said that he had accessed anything. He said they asked him to explain the female star site and he said that would probably be a site he had entered looking for the lead star in the film "The Body Guard" to resolve an argument with a friend. He thought the lead had been Britney Spears. He had entered the name Britney Spears in the computer but had never seen any offensive sites come up on his computer. When he was asked by the Court what he meant by the word "accessed" he said "*getting in there and seeing*". He denied wanting to view inappropriate sites and particularly said he

did not wish to look at nude women. He was adamant in this and repeated it several times.

[43] In relation to sites about hate/violence and weapons, he explained to the meeting that he was doing historical research on Auschwitz and on medieval weapons as part of his Masonic interests. He had no memory of any of the other sites he was referred to and made it very clear that he had not seen a nude on his computer.

[44] On the basis of the evidence, I find that it is very probable that, while Mr Motet believed that Mr Cliff was agreeing that he had accessed these particular sites, in fact Mr Cliff was providing an explanation about what he had been looking for at the time the hits were recorded.

[45] Mr Cliff was also asked about the amount of his usage. He said that having opened the Internet, it was his habit to minimise the screen. During work he didn't take formal breaks and used the Internet when he got a free moment. He was constantly being interrupted and left the Internet screens open or minimised them while he did other things such as thinking about logistics or while he was waiting for the Defence computer to complete a process. He invited Mr Motet and Mr Waite to check his work habits with his co-workers to see what he was doing on his work computer at the same time as he was using the Internet. He also told them that he understood that sexual sites could not be visited because they were blocked, but, if you got into a sexual site, you got out of it immediately.

[46] Ms Roberts asked whether a final warning rather than dismissal could be considered. Mr Motet said that this could not be assessed until they had had a chance to assess Mr Cliff's explanation in light of all the other information available. Mr Motet said that he was to make a recommendation to senior Air New Zealand managers and this could be seen by Ms Roberts.

[47] After this meeting, Mr Waite started his own investigation into Mr Cliff's Internet use by conducting searches on his home computer. He looked at three of the Internet sites listed in the Internet usage report (Mature Women, Linda Lovelace, and vnconnect). He could not remember exactly how he had conducted the searches, what he had entered into Google searches to get the results he did, or whether he used the activity data as well as the usage report. He said he satisfied himself that

the sites had been correctly categorised as pornographic or offensive. Next, he tried to follow the stages that Mr Cliff appeared to have taken in order to understand how he had got to the sites. On the basis of his searches, Mr Waite rejected Mr Cliff's explanation that he had got to the offensive sites by mistake. He concluded that it was necessary to make positive choices in order to get there.

[48] In relation to the visits to the hate and violent sites, Mr Waite accepted that Mr Cliff's explanation was reasonable and these were to be put to one side of the investigation.

[49] Mr Motet also did his own searches. Although he had taken the explanations given at the meeting by Mr Cliff at face value, when he and Mr Waite examined the usage reports he did not think the accidental explanations were consistent with other sites visited. Mr Motet used the addresses in the summary report to conduct a Google search. When he got to the site which appeared, he went further into the searches.

[50] Because they were concerned at the possibility that other offensive sites could have been deliberately accessed, a further meeting with Mr Cliff was required. This was set up for 16 November 2004.

[51] In the intervening time during informal discussions with Mr Motet about the data, Mrs Roberts raised doubts about the accuracy of the data being relied on by Air New Zealand. She suggested to Mr Motet that they should concentrate on establishing the accuracy of the information in Mr Cliff's Internet usage and then apply the same methodology to all those being investigated. Mr Motet says he did not agree to this but wanted to treat each of the employees separately. Ms Roberts believed he did agree and continued to act on this basis by concentrating on a close analysis of Mr Cliff's data.

[52] On 5 November Ms Roberts asked Mr Motet three questions about the data.

• What constituted a hit?

• How long was Mr Cliff on inappropriate sites?

• What searches had Mr Cliff initiated?

[53] Ms Roberts also asked Mr Motet for further data in order to understand and justify the Internet usage report. He then gave her a browse time report and Mr

Cliff's Internet activity data for April. This was not all the information that the company had relating to Mr Cliff.

[54] On 10 November Mr Motet told Ms Roberts that Air New Zealand could not determine how long Mr Cliff had accessed the sites for. He explained that times were estimated by applying the 3 minute default time at the end of each browse session.

[55] The question about hits was not answered until 11 November after Mr Motet had consulted with GEN-I. He explained to

her that a hit recorded not just each time an Internet page was opened but also any graphics which appeared on that site.

[56] An unfortunate aspect of the informal meetings between Ms Roberts and Mr Motet was that misunderstandings arose between them about how the inquiry was going. Ms Roberts believed, for example, that Mr Motet thought that Mr Cliff's employment would be safe. Mr Motet denies saying this or meaning that Mr Cliff would not be dismissed but whatever he said was enough to enable Ms Roberts to tell Mr Cliff that he would be okay. Another example is Ms Roberts's understanding that the methodology of the investigation would be trialled by using Mr Cliff's data and then applied to the other people being investigated. While she undoubtedly did receive this impression, Mr Motet denied that this was the methodology he was proposing to follow.

[57] In early November 2004 Mr Motet told Ms Roberts that he would be giving a full report to Graeme Norton of Corporate Human Relations. Ms Roberts thought she was going to get an opportunity to make submissions on this report however Mr Motet did not end up making any formal report.

[58] Perhaps the most serious of these misunderstandings relates to the extent to which Mr Motet made data available to Ms Roberts. During their meetings on 10 and 11 November when they discussed the data and how it was recorded, Ms Roberts said that he made reference to a large folder of documents which he did not show her. Mr Motet says that he did not show Ms Roberts that information which was the Internet activity data because she didn't ask for it. He did not show her the blocked user reports.

[59] Between meetings Mr Motet did provide some data which he regarded as very serious against Mr Cliff because it established a pattern of use of the Internet.

This included a "link dump" site which required a password to access pornography sites.

[60] When Ms Roberts showed him this material Mr Cliff denied seeing that site and questioned how he could have seen it when it had been accessed outside his work hours. Ms Roberts said he was so distressed at this new allegation that he effectively closed down for the rest of the investigation. However, by 15 November

2004 Mr Motet told Ms Roberts to disregard that information because it belonged to another person and had been incorrectly filed as relating to Mr Cliff.

[61] On 12 November Mr Waite wrote to Mr Cliff to record where the investigation was up to. The letter said that documentation provided to Mr Cliff showed a total Internet usage of 81 hours 28 minutes of non-work related material. In relation to whether his habit of minimising the screen could have led to the usage time, Mr Waite said that there was a time-out feature on inactive or minimised screens.

[62] The letter also referred to visits to offensive sites. It recorded Mr Cliff's explanations for visits to Geordie Girls and Britney Spears's sites and said that they had eliminated sites containing reference to these. However, a sample check of three other sites showed that he had visited mature-women-mature.com, completelindalovelace.com and vnconnect.com each of which had sexual and pornographic images on them.

[63] Mr Cliff and Ms Roberts believed from this that Air New Zealand's concerns about the Geordie Girls and Brittney Spears sites were no longer the subject of inquiry.

[64] At the 16 November meetings, Ms Roberts continued to question the reliability of the data. She pointed out that:

• One hit was recorded as three.

- A default setting was recorded as 3 minutes even if the site was accessed for less than 1 second.
- Because the company could not identify when someone logged off a site, the data exaggerated the number of hits and the time spent on the Internet.

[65] At the meeting on 16 November Mr Cliff said he made some corrections to the minutes of the 20 October meeting. This included an incorrect reference to

Britney Spears. He explained that he was looking for female stars generally, including Britney Spears, and was not admitting to entering any particular site. He explained he was searching generally for Geordie ladies not that he accepted that he had entered any particular site. He explained that he had not said he fully understood the policies but that he had heard them by word of mouth, all he knew was you could not view pornography on the computer.

[66] I accept that these are the corrections that Mr Cliff and Ms Roberts recollect. Mr Motet and Mr Waite were less certain but they have no written record of this aspect of the meeting and no formal minute of the meeting was kept and therefore their evidence was less reliable on this point.

[67] On 16 November, Mr Cliff was asked about the "mature-women-mature", "completelindalovelace" and "vnconnect" sites. Mr Cliff's explanations for the mature women site was that he was looking for information about his wife's health particularly her osteoporosis and liver condition. He was searching for information about Linda Lovelace for a speech to the Masons about how a person's life can be turned around. In evidence, he produced a sample of a page relating to Linda Lovelace which gave an outline of her life story and how this once porn star had turned into a crusader against the adult entertainment industry. Mr Cliff had no memory at all of vnconnect.com.

[68] What Mr Cliff did not know at that time was that each or part of the sites which Mr Motet and/or Mr Waite had investigated on their personal computers had in fact been blocked from his view by SurfControl. Mr Filkin said that the Air New Zealand investigators must have accessed a completely different site for Linda Lovelace and that Mr Cliff's version of the search was correct. He agreed that it was critical for Mr Cliff to have seen the blocked user site document which Air New Zealand had in order to explain what he had been doing.

[69] The only record of the 16 November meeting provided by Air New Zealand was a document dated 24 November 2004 which begins:

INTRODUCTION

At our meeting on 16th November 2004, we invited you to provide any further explanations into matters raised by you.

These explanations have been thoroughly considered and I will now provide you with details of my consideration.

[70] Each issue raised by Mr Cliff or Ms Roberts is then set out in two or three lines in tabulated form and is followed by a section headed "***Consideration***." This document amounts to a brief summary of the issues raised and the company's response. It is not an accurate record of the meeting. This is most regrettable as again there was considerable dispute about what was said at the 16 November meeting and about what assumptions Air New Zealand drew about Mr Cliff's explanations. These notes were not provided to Mr Cliff until 26 November when they accompanied his letter of dismissal.

[71] The final disciplinary meeting was set for 24 November 2004. On 22

November, Ms Roberts met with Mr Motet. No doubt as a result of Ms Roberts's questions to him, Mr Motet had realised that there was a possibility of multiple counting of the data and had asked GEN-I to re-examine the data.

[72] GEN-I discovered:

• One of the spreadsheets included data on a date which was also included in another spreadsheet.

• June data in one of the July spreadsheets.

• Browse time for May was already in the database when the final load and report was run.

• Some of the data in the “personal activity”, “other activity”, and “prohibited activity” categories had been duplicated and apparently caught in several categories.

[73] On 23 November Mr Motet told Ms Roberts that he had the revised data from GEN-I which he would e-mail to her shortly. The information had not arrived when her office closed at 4.30pm. She had discussed with him the possibility of reviewing all the data for Mr Cliff and Mr Groom before the final meetings but this had not occurred.

[74] Mr Motet also explained to her that there had been a delay in the decision making because the managers were taking a different view of what Air New Zealand corporate office was telling them to do as they did not want to lose the skills of valuable employees. Mr Norton had reviewed the data and told Mr Motet and the managers that one pornographic hit was one too many and that there was to be zero

tolerance in relation to Internet abuse. He confirmed that in the past other employees had been dismissed in similar situations.

[75] Having obtained Mr Norton’s input before he firmed up his position on the investigation, Mr Waite concluded that the employees’ use of the Internet was not only time wasting but the patterns of their visits indicated that they were wilfully going into offensive sites.

[76] The next day, on 24 November, on her way to the first of several final disciplinary meetings at 8.45am, Ms Roberts learned that the revised information from GEN-I had arrived at her office after hours on the previous day. She asked Mr Motet for a copy of this information at 8.45am. He provided her with summary sheets for Mr Cliff and Mr Groom. Mr Cliff’s recounted Internet usage report now showed that the total visits for Mr Cliff were 4,400 and amounted to a usage total of

50 hours and 24 minutes compared with the original estimate of time of 81 hours and

28 minutes. Significantly, the adult/sexually explicit sites visited were reduced from

48 to 17.

[77] Mr Motet said that Air New Zealand investigators had considered this revised data but decided that it made no difference to the outcome because, even though the number of visits reduced, the number of sites accessed or attempted to access remained constant. In contrast, Ms Roberts was so concerned about the new data that she wanted to engage her own experts to review the information to ensure that it was accurate. She asked for an adjournment of the 24 November meetings to allow time to review the new information. That request was refused by Mr Motet.

[78] At Mr Cliff’s dismissal meeting, Mr Waite read from the tabulated summary of the 16 November meeting. The reasons for his dismissal were later set out in a letter to Mr Cliff. These were:

1. The time spent on the Internet during work time for non-work related purposes.

2. The nature and contents of the sites visited.

[79] The letter said that the explanations given at the meetings on 20 October and

16 November had been thoroughly considered and that Mr Waite did not believe Mr Cliff's explanations were acceptable. His actions were regarded as serious misconduct and his employment was terminated effective from 24 November 2004.

[80] Elaborating on these reasons in evidence, Mr Waite said that misconduct was very obvious from the summary of the material obtained and the detail of the sites visited. He regarded the non-work use of the Internet as being extreme and that a number of the pornographic or offensive sites had been systematically accessed or attempted to be accessed.

[81] He did not accept Mr Cliff's accessing of adult/sexually explicit sites was an accident because of the need for manual intervention to move from a search result to a website. In that regard, he relied on the "Mature Women" and "Linda Lovelace" sites. Whether Mr Cliff actually got access to all of the offensive sites was not of particular relevance to him. Attempting to access an offensive site is, in his view, in a similar category to accessing the site itself. He said that he gave consideration to Mr Cliff's work history and the level of initial contrition shown by him but still felt that dismissal was the appropriate outcome.

Alan Groom

[82] Mr Groom had been employed by Air New Zealand for 28 years, taking a break between September 1982 and March 1986. He worked in the maintenance planning section as a forward planner, engines.

[83] He was first provided with Internet access at the end of 2003 but did not use the Internet in any meaningful way until March 2004. Although he received training on the Windows programmes, he had not received any training on the use of the Internet. Mr Groom's work was computer-based. In April 2004, he was producing technical reports called "work scope" using Microsoft Windows and a programme called SAP.

[84] The first work scope he undertook was for a substantial upgrade for a Rolls Royce engine. In early April 2004 he was in the very early stages of it, having been doing that work for only 5 weeks. Because the SAP system is an on-line live system which interfaces with the whole of Air New Zealand engineering, he said he had to be careful about changing service orders and other information otherwise he could affect the whole system. Putting together this work scope took a long time. Mr Groom would set the SAP system into motion and, while he was waiting for it, flick between the Internet and the SAP site to set it on its way again. Early on, he had a

lot of questions about his work and went on to the Internet while he was waiting for the answers from the person training him.

[85] The summary of his Internet usage showed that of Mr Groom's visits to the Internet over the 4 month period, 74 were classified as pornography-offensive sites. The rest of the visits totalled 11,875 and were grouped under 31 "Personal Interests" sites. The total usage time was 96 hours 56 minutes. At the hourly rate of $39.39 this equated to a cost of $3,795.09 to Air New Zealand.

Groom investigation

[86] Mr Groom's manager was Mr Walter Fiechter. On 18 October 2004, Mr Fiechter gave him a letter concerning his Internet usage in similar form to Mr Cliff. He was required to attend an investigation meeting. Mr Groom was concerned about the

information that he had been given. There was no detail in the Internet usage report apart from a list of Internet sites, the number of visits, and the hourly total. There was no information to show what pages had been accessed or how the time was recorded to reach the hourly total.

[87] Mr Groom attended the meeting on 22 October 2004 with Ms Roberts. It was conducted by Mr Motet and Mr Fiechter. It lasted about 40 minutes and was recorded in the same way as Mr Cliff's.

[88] Mr Groom accepted that the level of his non-work related Internet usage was high but did not agree that he had been visiting adult/sexually explicit sites.

[89] He said he had been having marital problems and had gone to Internet sites looking for lingerie for sale. He did not think that there was a problem with the sites he went to because they were much the same as could be seen in widely distributed brochures. He explained that a lot of his time on the Internet was spent with the radio on via the Internet. He would go on the Internet to chill out.

[90] Mr Motet said that all of Mr Groom's explanations about sites apparently visited were quite straightforward. Mr Groom acknowledged that he was aware of the company policy and accepted it could not be used for pornographic or adult reasons and that personal use was limited. He had seen a staff update on Internet use issued in 2002.

[91] Mr Fiechter said that Mr Groom appeared to have accessed too many of the

29 adult sites systematically. For example, on 7 April 2004 he went to many sites on the same day.

[92] Mr Groom asked about SurfControl which was supposed to block inappropriate sites. He explained that he was an amateur photographer and looked at a lot of photos on the Internet.

[93] He didn't think the Internet use impacted on his work as he was busy. He asked Mr Motet and Mr Fiechter to check his work computer programme logs to see that he was working the whole time. He also asked them to check with his co-employees who would confirm that his use was not high. These checks were not made although both Mr Motet and Mr Fiechter did searches on their home computers to try and replicate what Mr Groom had accessed.

[94] On 12 November Mr Groom was sent a letter from Mr Fiechter providing an interim response to him about the explanations he had given. His Internet usage over the relevant 4 months had been calculated at 96 hours 56 minutes.

[95] Another meeting for Mr Groom to provide any further explanations was also set for 16 November 2004. Mr Groom did not get the letter advising him of this until 16 November because he had been away on a work trip to Germany which he had been told to go on notwithstanding the investigation. Mr Motet told him that the matter would be sorted by the time he got back. He returned to New Zealand on 7

November and was on annual leave until 16 November. He got a call from Mr

Fiechter on Sunday 15 November telling him of the meeting the next day.

[96] When Mr Groom got to read the letter about the meeting the next morning, he understood it to mean that the company had reduced its inquiry to one website, the bikini.com. This was because the letter said that the company had further investigated certain claims he had made that referred to the marital problems and looking into sites to find women's lingerie. It said that the sample check had been conducted on the bikini.com which had revealed sites of bikinis and male thongs, an

image gallery with unclothed, see-through in cases, nipples, penis and vulva outlines.

[97] As a result of her meetings with Mr Motet, Ms Roberts had been provided with some further limited information about Mr Groom's usage. This included a browse time report which listed dates and times but no sites, and a very limited

Internet activity report which listed only four sites. Three of these were categorised as "Adult/Sexually Explicit" and one was categorised as "Hacking". Mr Groom had no time to cross-reference this material or prepare properly for the meeting.

[98] At the meeting on 16 November Mr Groom was asked for any further explanations. Ms Roberts raised the same questions about reliability of the data as she had for Mr Cliff. Mr Groom reiterated that he had not visited pornographic sites and gave again his reasons for visiting the lingerie site. He pointed out that the policy said that some personal use was permitted. He disputed that he had spent 96 hours on the Internet. He was assured that there was no issue with his performance.

[99] Ms Roberts made some submissions noting the lack of performance issues, that Mr Groom had been open and honest in the inquiry and, in the light of his long service, dismissal would be harsh but a warning would be appropriate.

[100] Following that meeting, the record of Mr Groom's usage was also re- calculated by GEN-I. The revised data showed that he had made 10,426 visits of which 47 were to adult/sexually explicit sites. The time involved was 68 hours and 8 minutes. This compared with the original figures of 11,875 visits for a total of 96 hours and 36 minutes and 71 visits to adult sites.

[101] Mr Groom went to the next scheduled meeting on 24 November. As for Mr Cliff, he received the revised material only shortly before this meeting and Ms Roberts's request for an adjournment to discuss the material was refused.

[102] Mr Fiechter believed that, to the extent that any time was required to look at this new information, Mr Groom and his representative had more than adequate opportunity. In any event, he said Mr Groom had already given his explanations and had accepted that he had accessed many sites. He viewed Mr Groom's conduct very seriously and decided a warning would be inappropriate in spite of Ms Roberts's submissions.

[103] Mr Groom was also dismissed for:

1. The time spent on the Internet during work time for non-work related purposes.

2. The nature and content of the sites visited.

[104] In evidence, Mr Fiechter said that Mr Groom's non-work use of the Internet was extreme and pointed to the more than 10,000 non-work related site visits during the review period. He had also conducted his own investigation by going to sites

listed in the reports. It was very clear to him that sites in the pornographic or offensive category had been systematically accessed and that the explanation of looking at lingerie for his wife was plainly not credible when Mr Fiechter looked at the content of the sites listed. He believed that they were adult/sexually explicit sites.

Events after the dismissals

[105] On 25 November, Ms Roberts carefully reviewed the revised data she had received on 24 November and was surprised to see the changes in it. She noted:

[106] The greatest change was that the data no longer recorded that Mr Cliff and Mr Groom had entered each of the sexually explicit websites three times and in fifteen of Mr Cliff's cases the data now recorded he had entered only once.

[107] 30 hours had disappeared off Mr Cliff's time and the site count had reduced.

[108] The data recorded that Mr Groom had entered 12 sites only once. This reduced the sexually explicit site counts from seventy-one to forty-seven.

[109] Ms Roberts then physically reviewed the sites on the Internet again and concluded that Mr Cliff had only got into the introductory page of a sexually explicit site warning him that if he entered further he would be accessing R18 sexually explicit material.

[110] In her view, the reductions of time meant that neither of them should have been dismissed.

[111] Up until the Employment Relations Authority investigation meeting, Ms Roberts was under the impression that Mr Cliff and Mr Groom had accessed the sites as alleged by Air New Zealand. However, a week or so before the Employment Relations Authority meeting, she discovered that the Internet activity data was critical to them being able to provide an explanation to the investigation. Having recently received 49 pages of detailed small font data, counsel for Mr Cliff and Mr Groom sought an adjournment in the Authority to have it analysed but this was denied.

[112] Ms Roberts discovered during the Employment Relations Authority meeting that:

(a) Mr Motet and the managers only ever worked off the Internet usage reports when doing their own searches except when Mr Motet had Mr Cliff's activity data in his folder when she met with him on 10 or 11

November. In their searches the investigators went to the home pages of the websites as set out in the Internet usage reports to see if pornography had been accessed. In her view, if they had used the full URL addresses on the Internet activity data, it would have shown that Mr Cliff had not entered the home pages but had apparently directly accessed other pages within those sites.

In Mr Groom's case, some of the pages in the sexually explicit category were photography sites and one was for an energy pill.

(b) She also had serious doubts about the calculation of time by using browse time reports which she believes were seriously inaccurate. Even the revised Internet usage report still added 3 minutes to every hit. As a result, she believes Air New Zealand could only prove 25 hours of Mr Cliff's activity and 34 hours for Mr Groom.

(c) The company had never investigated whether or not the personal use affected the work performance of either Mr Cliff or Mr Groom.

[113] After the Authority meeting, Air New Zealand produced the blocked user reports for Mr Cliff and Mr Groom to Ms Roberts. Mr Motet said she had not asked for them before that. In her mind they established that Mr Cliff had not entered any of the pornographic sites alleged by the company because they had been blocked and Mr Groom had not been able to access a number of them. She said the blocked user activity report had been continuously requested from the commencement of the Authority hearing and that Mr Motet was well aware that the sites were blocked. In her view, Mr Motet had deliberately withheld information vital to them defending themselves particularly relating to the pornographic websites.

[114] She said that, if Mr Motet had given her the full Internet activity report for Mr Cliff and Mr Groom, she would have been able to identify that at least they had not gone to pages as alleged by the company and certainly would have been able to identify all of the data which should not have been counted.

Air New Zealand's policies

[115] Air New Zealand is a rules-based organisation with a sophisticated system of policies. Relevant to this case are its policies on Internet use, the way it communicates with its employees about Internet use, and its disciplinary policy.

Internet policy

[116] This is to be found in a number of Air New Zealand policy documents including clause 1.8 of Air New Zealand's security framework; the Internet Security Policy (ISP); the Integrit-e Guide; the Web Access Terms and Conditions; the E- mail Policy; Conditions of Internet Access; the Code of Conduct; and a 6 September

2002 News Update for staff of Air New Zealand on inappropriate use of computers.

[117] The 2002 News Update summarises the policy about pornographic and offensive material:

Inappropriate Use of Computers

From time to time the Company discovers and investigates situations where employees have been involved in using Company computers for viewing, storing or disseminating pornography and other offensive material, or material that would fall within sexual harassment guidelines.

The Company views these actions by employees very seriously. Prohibited actions involving inappropriate use of computer resources are clearly set out in the Air New Zealand Human Resources Policy manual, under the e-mail and Internet monitoring policy. This policy sets out examples of inappropriate use of computer resources, including accessing and transmitting pornography and offensive material, and also provides examples of the legal liability and other risk of exposure which the Company faces.

The e-mail and Internet monitoring policy states that inappropriate use of the Company's e-mail and Internet resources will be dealt with under the Company's code of conduct and disciplinary procedures.

The purpose of this bulletin is to emphasise and reinforce the seriousness with which the Company views employees' involvement in pornography and other offensive material in the workplace. Employees who engage in such activities place the Company at serious risk of one or more forms of legal liability and their actions will comprise serious misconduct. Those employees, who, after investigation, are found to have undertaken such activities will face serious disciplinary action up to and including dismissal.

There have been a number of instances where employment with Air New Zealand has been terminated in accordance with this policy.

[118] The Internet Security Policy deals with many issues. Relevant to this case are the sections on personal use, offensive websites, blocking sites and content types, and management review.

Personal Use

Staff who have been granted Internet access who wish to explore the Internet for personal purposes must do so on personal rather than company time. Games, news groups, and other non-business activities must be performed on personal, not company time. Use of Air NZ computing resources for these personal purposes is permissible as long as the incremental cost of the usage is negligible, no Air NZ business activity is pre-empted by the personal use, and the usage is not likely to cause either a hostile working environment or a poor behavioural example. Staff must not employ the Internet or other internal information systems in such a way that the productivity of other staff is eroded. Examples of this include chain letters and broadcast charitable solicitations. Air NZ computing resources must not be resold to other parties or used for any personal business purposes such as running a consulting business on off-hours.

Offensive Web Sites

Air NZ is not responsible for the content that staff may encounter when they use the Internet. When and if users make a connection with web sites containing objectionable content, they must promptly move to another site or terminate their session. Staff using Air NZ computers who discover they have connected with a web site that contains sexually explicit, racist, sexist, violent, or other potentially offensive material must immediately disconnect from that site.

Blocking Sites and Content Types

The ability to connect with a specific web site does not in itself imply that users of Air NZ systems are permitted to visit that site. Air NZ may, at its discretion, restrict or block the downloading of certain file types that are likely to cause network service degradation. These files include graphic and music files.

...

Management Review

At any time and without prior notice, Air NZ management reserves the right to examine electronic mail messages, files on personal computers, web browser cache files, web browser bookmarks, logs of web sites visited, computer system configurations, and other information stored on or passing through Air NZ computers.

[119] The code of conduct also includes an Internet monitoring policy. As well, Air New Zealand produced a booklet called the Integrit-e Guide which says that e- mail and Internet access is provided for effectively carrying on the business but nevertheless it is recognised that they "*will occasionally be used by you for personal reasons. This is okay, provided business productivity is not impacted and personal use is in line with our Policies and legal requirements. You can not use e-mail or internet resources to pursue private business interests or to view or forward inappropriate material*".

[120] Reading all of these together, the Air New Zealand policy in relation to private Internet use is:

• There is no prohibition on exploring the Internet for personal usage (ISP

and Integrit-e).

• Any personal use including games, newsgroups and other non-business activities must be on personal, not company time (ISP).

• Permissible personal use is limited by cost, impact on Air New Zealand's business activity, the working environment, and productivity (ISP).

• If staff encounter objectionable content, they must immediately disconnect from this site (ISP).

• The Internet cannot be used to pursue private business interests or to view or forward inappropriate material (Integrit-e).

• Where material on web pages accessed by users appears to be inappropriate and access appears to be systematic rather than accidental, particularly to pornographic material, users will be reported to the appropriate manager for their action.

• Examples of inappropriate use include accessing or attempting to access prohibited sites for the purpose of viewing pornographic or other offensive material, viewing, storing, and disseminating pornography and other materials considered to be offensive (Code of Conduct).

• Using search engines to search for non-business related topics is prohibited (Code of Conduct).

• The playing of games is inappropriate use (Code of Conduct).

• Air New Zealand will block access to an Internet website if it contains material of an objectionable nature, for example, erotica or pornography.

[121] It can be seen that while these policies overlap to a certain extent, there are inconsistencies. The ISP contemplates the use of games and other non-work related activities but the code of conduct says the use of games is inappropriate. The ISP acknowledges personal exploration of the Internet but the code of conduct says the use of search engines is inappropriate.

[122] The limits on private use as set out in the ISP are not defined and there appears to be no way of a user knowing the cost of his or her private use until he or she has been investigated. Mr Motet told the Court that 30 hours of private use over

the relevant time would be appropriate. Although that figure does not appear in the published policies, this indicates at least a tolerance of personal use.

[123] Accidental and non-systematic access to objectionable sites on the one hand seems to be tolerated in the ISP provided the user backs out of the site quickly. But the code of conduct says that accessing or attempting to access prohibited sites is inappropriate.

[124] Mr Motet's view was that it was a breach of company rules if a person was trying to access or actually got into an offensive site. He accepted that accessing once or twice might have been an accident but if there was a pattern it ceased to be an accident. To this has to be added Mr Norton's stance, as conveyed by Mr Motet, that there was a zero tolerance policy and that one visit to an offensive site was not to be tolerated.

Communications policy

[125] Standard Air New Zealand procedures are to be used to communicate Internet policies and ensure user awareness. These procedures include e-mailing them to senior managers, placing them in policy manuals and on the Intranet, as well as discussing the policies at staff meetings, formal employee training, and induction sessions. In addition, relevant Air New Zealand contracts are to include references to security principles. The principles are to be displayed to users by the computer system. For example, when users log onto the computer system a message is to be displayed detailing the restriction on authorised use of information. High level summaries of the objectives of the information security policies are to be e-mailed to all staff every 6 months and contain hyperlinks to the Air New Zealand Intranet web pages that contain the detailed policies.

[126] Although the HR department has taken various steps in relation to sexual harassment and drugs and alcohol policies which have been distributed in pamphlets and e-mails, there was no evidence about communicating Internet use policies in the manner set out in the communication policy other than the posting of it on the Koronet and the September 2002 News Update. There was no evidence of reference to the principles in the employment agreements, nor of computer displays or e-mails on these topics.

[127] Mr Cliff had never been shown the News Update. It was produced long before he was given access to the Internet. Mr Groom had been given the update but well over a year before he got access.

Air New Zealand's disciplinary policy

[128] Air New Zealand's disciplinary procedures are described as the most serious steps the company can take in relation to an employee's conduct. They are for the purpose of addressing an allegation of misconduct.

[129] The policy states that disciplinary action is a final resort in dealing with problems. It is to be handled promptly, impartially, fairly, consistently, and with an emphasis on resolution and non-recurrence of the relevant problems.

[130] Discipline is appropriate only in the most serious of cases. Reasons for disciplinary action include serious breaches of the company's policies relating to the use of e-mail and the Internet, particularly accessing and the transmission of pornography and other offensive materials, as well as undermining the trust and confidence of the employment relationship.

[131] There are six levels of disciplinary action ranging from informal counselling through to verbal and final written warnings and dismissal. Summary dismissal is to be considered only where the behaviour concerned is so serious that it destroys the very substance of the employment relationship. Dismissal should be used only after very careful consideration of alternatives.

[132] The disciplinary procedure requires careful recording of proceedings of disciplinary interviews and the provision of relevant information to the employee.

[133] In deciding on the appropriate disciplinary action to be taken, the manager must consider, inter alia:

• The costs of the employee's actions to the company.

• Whether the employee acted in a way that contravened company policies.

• Whether the employee's explanation was reasonable.

• The effect on morale if adequate disciplinary action is not taken.

- Whether the disciplinary action would be excessive in all the circumstances.

The Issues

1. Knowledge of Internet policies

[134] The plaintiffs allege that Air New Zealand has breached its policies by failing to ensure that the Internet policies were known by the employees affected.

[135] The extent to which an employee's lack of knowledge of policies may affect the finding of serious misconduct was considered by the Court of Appeal in *Chief Executive of the Department of Inland Revenue v Buchanan and Anor*1. The first question is whether on the facts there was adequate knowledge of the policy by the employee. But, even where employees do not have this knowledge, the Court of Appeal made it clear that where employees do not comply with a code of conduct because of ignorance rather than by wilful defiance, there is no presumption that this could not constitute serious misconduct.

[136] In response to claims by Mr Cliff and Mr Groom that there had been no training for the use of the Internet, Mr Motet and Mr Fiechter both said that Air New Zealand does not train for personal use because that has nothing to do with work. In the light of the tolerance by Air New Zealand of at least limited personal use of the Internet and variable policies on the issue that attitude misses the point. As misuse of the Internet can lead to dismissal, Air New Zealand's responsibility was to ensure by specified means that its policy was known to those who had access to the Internet. It could reasonably have been expected that at the time any new user is given access to the Internet they be provided with a specific reference to the policy either by a direction to the appropriate place on the Intranet or in a written document. That was not done for either Mr Cliff or Mr Groom.

[137] It was also unhelpful for Air New Zealand's Internet policies to be in several different locations and unwise for the policies not to be clearly described to any employee obtaining access to the Internet for the first time.

[138] Mr Cliff was aware there was a policy on Internet usage. He hadn't seen it but acknowledged that employees are not permitted to use the Internet to search for pornographic material and not permitted to overuse the Internet for personal matters or be wasteful of company resources.

1 [2005] NZCA 428; [2005] 1 ERNZ 767; (2006) 7 NZELC 98,153

[139] Mr Groom had previously seen the Internet security policy and recognised the 2002 News Update but had not seen any of the other policies. Before the first meeting, he was aware generally the Internet wasn't to be used for pornography but was not aware of the specific policies or where to find them.

[140] I conclude that both men knew in general that it was wrong to use the Internet to access pornographic material however neither of them understood that they could be liable for unsuccessful attempts to get into a site for example where the site was blocked by SurfControl.

[141] Similarly both men were aware that while they could use the Internet for personal use there was a limit based on reasonable use. This unfortunately is a vague term for any employee to interpret in the absence of defined guidelines.

[142] In any event, the question of the knowledge of Internet policies is not determinative in this case. The Air New Zealand investigators were reasonably sceptical of Mr Cliff and Mr Groom's claims about their lack of knowledge of their policies. As longstanding employees they were expected to be familiar with them and keep themselves up to date. That is a reasonable expectation but equally the employees are entitled to clear and unambiguous statements of the policy particularly where a breach could, as in this case, lead to the most serious consequences of dismissal.

2. Fairness of investigation

[143] In considering the conduct of its employees, Air New Zealand was obligated to carry out a full and fair investigation.2

[144] For the defendant, Mr Thompson submitted that to meet that test Air New Zealand needed to comply with the requirements laid down in *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd*3 by giving notice of the specific allegations and the possible consequences if established; giving the employee every opportunity to refute the allegation which constitutes the misconduct; and giving unbiased consideration of the employees' explanations, free from predetermination and uninfluenced by irrelevant considerations.

[145] When judging those matters, the Court is not to subject the employer's conduct to pedantic scrutiny but should focus on whether there was substantial fairness and reasonableness.

[146] To these unexceptional propositions, Mr Roberts for the plaintiffs added that in conducting its investigations an employer must comply with its own policies and contractual obligations and that the more serious the matter raised and the more serious consequences for the employee the more need for a sound case to be established. He relied on *Lawless v Comvita New Zealand Ltd4.*

[147] In the present case, the breach of the Air New Zealand policy relied on by the plaintiffs is the requirement for relevant information to be provided to the employees. This policy is consistent with the obligation of good faith as recognised by the Court of Appeal in *Coutts Cars Ltd v Baguley5*:

... starting with the provision, in all good faith, of accurate information ... the timely provision of useful information will often be decisive of the justness or lack of it of the employee's actions.

[148] The plaintiffs also complain that there were faults in the process undertaken by Air New Zealand's investigators particularly in light of the high standards required by the Air New Zealand policies and the seriousness of the allegations made against them.

[149] It is obvious that the data relied on at the beginning of the investigation by Air New Zealand was unreliable. The revised material produced by Mr Motet close to the dismissal demonstrates this. It significantly reduced the number of hits on objectionable sites as well as the time spent on the Internet and therefore the factual basis upon which the investigation was originally commenced had changed.

[150] Without an independent assessment of the revised data, Ms Roberts was entitled to continue to be sceptical of its reliability in the face of significant changes. Her earlier questions and challenges about the original data prompted Air New Zealand to have it rechecked. She was entitled to have a reasonable opportunity to reassess the new material. That was certainly not possible in the minutes that she had prior to the dismissal meetings. Her investigations since the dismissal raise serious questions about the methodology used by the Air New Zealand investigators.

[151] At no time in the inquiry did Mr Motet or the managers reveal to the employees that they were doing their own searches or what the results of their searches had been. The explicit pages shown to them during the investigation were not produced in Court.

[152] A central plank of the plaintiffs' case is that the data searches conducted by Air New Zealand were unreliable. In investigating the Internet use, Messrs Motet, Waite and Fiechter undertook searches on their home computers of the URLs listed in the Internet usage report or the summary report prepared by GEN-I. They came up with some offensive sites. Using similar search criteria but based on the URLs in the Internet activity report, Ms Roberts was able to show that access to inoffensive sites could be obtained.

[153] One example is the search for "Mature Women". The Air New Zealand searches revealed pornographic sites about older and mature women whereas Ms Roberts's search produced a list of ten sites. Of these, some titles are for obviously offensive sites but others are for sites relating to health such as the "*Mature Women's Health Program*" covering the very matters Mr Cliff said he was interested in researching for his wife. In Mr Filkin's opinion, the Internet activity data showed that Mr Cliff had accessed a mature women site as a result of a Google search but the evidence presented to Court was unclear about just which site he had accessed.

[154] Another example is the Linda Lovelace search. Mr Motet searched an URL address by entering "www.completelindalovelace.com" into Google and reached a page which contained an R18 warning. However, Mr Filkin agreed that on the basis of the address listed in the Internet activity report Mr Cliff had gone directly to a story about Linda Lovelace and had managed to navigate around the R18 site. He said it was unlikely that what Mr Motet did would have produced a complete search result.

[155] Mr Filkin also agreed that the site entitled "Jennifer Aniston naked" had been accessed by Mr Cliff by way of a Google search which took Mr Cliff to a home page but that he had not clicked any further into the site and had not searched the "Jennifer Aniston naked" site.

[156] It was also the case that the content of web pages could change over time even though the URL did not so and that what was being viewed months later could have been different from the original searches.

[157] In summary, by entering only the domain names from the Internet usage report, the Air New Zealand investigators had a fairly good chance of looking at different pages than those accessed by Mr Cliff and Mr Groom. Mr Filkin agreed that for Mr Cliff and Mr Groom to explain where they had, or had not been, on the Internet, they needed to have had access to the Internet activity data which showed precisely which site had been visited.

[158] The first time Ms Roberts was shown any activity data was 1 month's worth for Mr Cliff and when she sat down with Mr Motet on 10 November and checked three sites listed on Mr Cliff's Internet usage data against the activity data that Mr Motet had.

[159] The rest of the activity data for Mr Cliff and all of the activity data for Mr Groom was not disclosed to them or Ms Roberts until after their dismissals when Ms Roberts specifically asked for it. It was provided shortly before the Employment Relations Authority investigation. It was only when she was able to compare the Internet usage with all the Internet activity data that Ms Roberts was able to see that what was being counted by Air New Zealand was not just user activity as alleged by Mr Motet but also pop-ups, counter-sites, flash sites, and streaming data none of which requires a deliberate action by the user to have a hit recorded on their data.

[160] While I accept Mr Motet's explanation that, at no time did he deliberately withhold information from Ms Roberts, I do not accept that the onus was on Ms Roberts to specify what information was needed to assist the two employees. This was a situation where the massive amount of raw data could not be properly digested by the investigators who were in no way expert but had to grapple with the technicalities of analysing the data. They did this by relying on summaries. It is likely that it was never clear to them that a proper inquiry should have included a reference to the activity data for each of the employees.

[161] Another vital piece of information which should have been available to Ms Roberts and the employees was the record of blocked sites. Mr Motet knew of the existence of this apparently from the beginning of the investigation but neither

showed it to Ms Roberts nor referred to it even when the question of blocked sites were raised by each of the employees. He did not explain why he did not mention it except that he believed it could be unreliable as an indicator of whether a site was blocked at the time or not. I neither accept this nor the explanation that there was no need to refer to a blocked user site in Mr Groom's case where he admitted having accessed certain sites. The reliability of the blocked user data was a source of dispute in the Court hearing and if it had been provided during the investigation that dispute could have been aired and taken into account.

[162] On the information produced to the Court, each of the adult/sexually explicit sites which Mr Cliff was alleged to have visited had been listed on his blocked user report. Mr Motet and Mr Waite believed Mr Cliff had admitted that he had been into some of these sites. I find he did that on the basis of assumptions about what Mr Cliff was admitting to. If the blocked user report had been disclosed at the first meeting, Mr Motet's assumptions might not have been so readily reached.

[163] The results of the data investigations are seriously questionable in two significant ways. First, the summary of data upon which Mr Motet and the managers relied to form their suspicions that Mr Cliff and Mr Groom had deliberately and systematically accessed objectionable sites was demonstrably wrong. It wrongly inflated the number of hits threefold in many cases. Secondly, the measure of time spent on the Internet was inaccurate.

[164] While these problems were recognised by the investigators and revised by GEN-I at a late stage, there was no opportunity prior to dismissal for the plaintiffs to assess the reliability of the revised data. The evidence of Ms Roberts, supported in part by that of Mr Filkin, raised questions about the methodology used by the investigators in their private searches of the Internet outside of the interview. It is too late now to know what influence those questions would have had on Air New Zealand if it had permitted the plaintiffs an opportunity to evaluate the data.

[165] Another major problem with the investigation is the failure of the investigators to be open about the information they had about the employees.

[166] In the first place, the failure to show Mr Cliff and Mr Groom the blocked user report was extremely serious. At the investigation meetings the Internet usage data was put to them on the basis that there was evidence that they had accessed the sites

and they were having to try and recall 6 or 7 months later precisely what they had seen and, if they had seen it, why they had accessed it.

[167] Air New Zealand's policies require that the employee be given relevant information. Apart from this policy, as a matter of fairness I find that the blocked data material was relevant and should have been provided at an early opportunity. The onus is on Air New Zealand to disclose. I do not accept its position that as they were willing to show all relevant documents if asked the fault lay with Mrs Roberts's failure to ask.

[168] I also find that the full activity data should have been offered at the first opportunity to both plaintiffs or their representatives. It was relevant and, as it turned out, critical to a proper evaluation of their Internet use.

[169] There appears to have been a genuine misunderstanding between Ms Roberts and Mr Motet about using Mr Cliff as a test case to test the data and its analysis. If Mr Motet had released all the activity data for each man earlier, such a misunderstanding would not have arisen.

[170] Second, the way the Internet usage data was presented was unfair. It originally showed multiple visits to sites which turned out to be inaccurate, such as the three hits on each sexually explicit site which supported the conclusion of systematic

searching. It also gave addresses for each Internet page that, at least in some cases, did not accurately reflect the visits actually made because the full domain name or URL as recorded in the activity report was not given. As a result, it is most likely that the Internet investigations undertaken by the managers and Mr Motet done on the basis of the Internet usage data did not accurately replicate the visits made by Mr Cliff or Mr Groom.

[171] Third, the employees were not told about these searches or shown evidence of what had been found as a result of these searches and therefore had no opportunity to refute or challenge the validity of the searches undertaken. Air New Zealand produced a number of pages to the Court to show what the investigators had discovered on their home computers. From this, it is apparent why the managers would have formed extremely negative views and understandable outrage that the Air New Zealand computers could have been used to source such material. On Mr Groom's behalf, Mr Roberts pointed out that, having visited a bikini site, Mr Motet

printed out A4 sized photos from what had been a page of small photos and showed those to Mr Fiechter (but not to Mr Groom) thereby exaggerating the images. It was critical to a fair investigation that that adverse material should have been disclosed by Air New Zealand particularly in the face of the adamant denials by both men that they had accessed objectionable sites.

[172] Mr Motet did not tell Mr Cliff what he had seen in his searches. His reason for this was that because Mr Cliff's explanation gave reasons for searching these sites, there was no need to reveal what he had found. He therefore made an assumption that the sites he had visited were the ones that Mr Cliff was talking about but Mr Cliff was not given an opportunity to refute that assumption.

[173] The questions raised by Ms Roberts, and supported in part by Mr Filkin's evidence, leaves me with a strong degree of disquiet about whether the managers had visited the same sites as those allegedly visited by Mr Cliff and Mr Groom. Even in Mr Groom's case where there were more sexually explicit sites listed on his data, he disputes strongly that the material shown in Court as the result of searches by Mr Fiechter was the same material which he had seen. The investigations of what had been accessed should have been done by people with more expertise and understanding of the subtleties of Internet data searches. Neither Mr Motet nor the managers had this expertise.

[174] Fourth, the record of what was said at the meetings fell well below the appropriate standard required by Air New Zealand's policies to take careful recordings of proceedings of disciplinary interviews. The records kept by Mr Motet could not be classed as careful. Those of the first meetings were made on the basis of notes, the originals of which had been discarded, and later reconstructed by memory and supplemented by the memories of the relevant manager. Inevitably, this type of record keeping will lead to disputes about both what was said and what was meant. There was no attempt at all to keep an accurate record of the second meetings.

[175] Fifth, there was a lack of clarity about what was being investigated. The first letters were couched in general terms but were accompanied by lists of Internet sites allegedly visited. The references in the second letters to both Mr Cliff and Mr Groom following the first meeting mentioned specific sites. In Mr Cliff's case, it

appeared that the three sites listed were going to be eliminated from the investigation and, in Mr Groom's case, he believed that the investigation was solely about the "bikini.com" site that was mentioned in the letter. This turned out not to be the case. Whatever the investigators intended, the way the letters were written gave an unfair impression that the scope of the inquiry into the offensive sites had narrowed down.

[176] Sixth, it was beholden on Air New Zealand to make the inquiries that both Mr Groom and Mr Cliff asked for about their work habits, their work computer logs, and whether their work was impacted by their Internet use. The failure to do this was excused on the basis that neither Mr Waite nor Mr Fiechter wanted to breach the privacy of Mr Cliff or Mr Groom but neither of them asked for permission to do this, permission which I have no doubt would have been granted if it meant their jobs would be saved. This is not a matter of the investigation being unduly complicated or unnecessarily prolonged. The question of whether Internet use impacted on performance was an important one. It is an essential part of Air New Zealand's policy on personal usage. To be satisfied that the personal use was inappropriate it needed to establish that Air New Zealand business activity had been prejudiced, that it was likely to cause a hostile working environment or impact on productivity. They might have also been able to check if Mr Cliff and Mr Groom did use the Internet as they alleged, switching from work to Internet

and back. None of these inquiries were made.

[177] I find that all of these matters strike at the heart of what should have been a fair investigation. None of them are matters of small detail. The investigation breached Air New Zealand's policy of providing all relevant information and, given the seriousness of the allegations, did not meet the high expectations of a sound and proper investigation. I conclude that the investigation was not fair.

3. Were Air New Zealand's conclusions about serious misconduct justified?

[178] The test applicable at the time of the dismissals was that in *W & H Newspapers v Oram*: could Air New Zealand be justified in believing that serious misconduct had occurred as a result of the investigation?

[179] The first conclusion reached by each manager was that Mr Cliff and Mr

Groom had accessed or attempted to access pornographic or offensive sites.

[180] From the evidence presented to the Court it is far from clear whether they had actually entered sites which were objectionable. In Mr Cliff's case, many, if not all of the sites or pages of the sites listed in the data had been blocked at the time. In Mr Groom's case, while he acknowledged visiting lingerie sites, the other sites he allegedly visited were also blocked.

[181] There is a serious question as to whether these sites were entered deliberately or systematically. In Mr Cliff's case Air New Zealand relied heavily on its belief that he had systematically accessed objectionable sites. However, Mr Cliff said if he saw anything that would be restricted he immediately backed out. The brief times he spent on many of the sites, often only 2 or 3 seconds, tends to support this. The three examples given by Air New Zealand were the "Mature Women" data on 3 May – 38 seconds; "Female Stars" and related topics on 19 May – 2 minutes at about 11.15 and another 2 minutes at 5.15; and another session approximately 2 minutes long on

25 May. These can properly be regarded as systematic but there are sites that Mr Cliff was able to give an explanation for. While he deliberately visited them, it is not at all certain that the sites he visited were objectionable or visited for objectionable reasons.

[182] Mr Groom accepted he had deliberately accessed some sites but for a specific and apparently innocent purpose. The other allegedly objectionable sites listed were either blocked or not investigated by Air New Zealand.

[183] At the most then, both men could properly be suspected of attempting to access the objectionable sites. The question is whether that is sufficient to justify a conclusion of serious misconduct.

[184] The published policy of Air New Zealand is equivocal on this. Only the code of conduct says that attempting to access is inappropriate. Other parts of the policy do not condone attempts but are less specific.

[185] The first letters to the employees spoke of the content of material allegedly accessed by them and other employees. The issue of attempt was not part of the original allegations and was not raised at the meetings which dealt with of the nature and content of the sites accessed. It was, however, relied on at the hearing of this matter. Mr Fiechter said for example that his view was that attempting to access prohibited sites and being blocked is in the same category of seriousness as actually

gaining access. He said that that was how the company's policies regard the situation.

[186] I find that Air New Zealand's policies in this regard were not at all clear or consistent on this point. In view of this, Air New Zealand could not rely on a finding of attempting to access to establish serious misconduct. The outcome of dismissal required that a conclusion of serious misconduct had to be based on well-established evidence that both men had deliberately accessed offensive sites in a systematic way. The evidence presented by Air New Zealand to support its conclusions was not well established therefore Air New Zealand's conclusions about serious misconduct was not justified in either case.

Conclusion

[187] I find that the flawed nature of the investigation by Mr Motet and the managers, particularly their private and unrevealed Internet searches, did not justify them in concluding that Mr Cliff and Mr Groom had actually visited objectionable sites on the Internet.

[188] Even if they were justified in reaching that conclusion, there is very real doubt that those sites were deliberately visited for the purpose of viewing pornographic material. Given the unreliability of the data used to support its conclusions, Air New Zealand was not justified in concluding that there had been systematic access. It is highly possible that much of the data deemed to be evidence of systematic access is in fact based on pop-ups and other non-manual hits.

[189] Given the seriousness of the allegations, Mr Cliff and Mr Groom were entitled to a much more rigorous and expert examination of the merits of the allegations and of their explanations.

[190] The second factor relied on was the amount of use. Here, Air New Zealand faces some serious hurdles. In the first place, its policies provide that personal use is acceptable provided it is not excessive and provided it does not impact on employees' performance. In neither Mr Cliff nor Mr Groom's case was the question of performance ever raised and, in Mr Groom's case, his performance was expressly found to be unimpeachable. He was valuable and reliable enough to be sent to Germany on behalf of Air New Zealand in spite of the investigation.

[191] There was no evidence at all that their work performance was affected by their Internet use. It is not good enough for Air New Zealand to assert that there must have been an impact because of the amount of time spent on the Internet. It was accepted by Air New Zealand's witnesses that without inquiry they had no way of knowing how Mr Cliff or Mr Groom used the Internet. Mr Filkin accepted that it was possible that they kept the Internet open while they were doing their work, referring to the Internet intermittently during down-times.

[192] Another concern about the question of time was that the original decision to investigate Mr Cliff and Mr Groom was on the basis of the very high amount of time apparently spent by them on the Internet. They were amongst the 13 highest users on the original numbers provided. There was no evidence at all whether they would have still have been in the 13 top user group had the revised data been relied upon. While the cost to Air New Zealand of the Internet use was not formally relied on as a reason for dismissal, it was tangentially. There was no revision of these costs I the light of the new data.

[193] There is a concerning degree of arbitrariness in the way in which Air New Zealand chose the employees to be further investigated. Added to this, and in spite of strongly expressed views by Air New Zealand about the amount of time the employees spent on private use, there was a tolerance of about 30 hours of use over the relevant period. That figure appears to be randomly chosen and is certainly not Air New Zealand policy as published. It set a degree of tolerance of which employees had no notice. There is nothing wrong in principle with such a policy, but if it is to be relied on to justify dismissals it must be transparent.

[194] For these reasons I find that Air New Zealand was not justified in reaching the conclusion that Mr Cliff and Mr Groom were guilty of serious misconduct. Air New Zealand was entitled to investigate the Internet usage of its employees but it was bound to do so against criteria that were clear and with a degree of expertise that ensured that the complex data was properly analysed.

Remedies

Mr Cliff

[195] Following his dismissal, Mr Cliff was extremely angry at Air New Zealand's conclusion that he had deliberately accessed pornographic sites which he said was simply not true. He accepted that he had used the Internet a lot but not that it affected his performance. He could understand if he had to be counselled or even being warned for Internet use.

[196] Since his dismissal he has been doing casual work and has earned $6,000. He and his wife have been unable to make their mortgage payments on his wife's income alone and have had to sell one of their rental properties which were meant to be their retirement income.

[197] He has spent most of his time between casual jobs working on his rental properties as he could no longer afford to pay property managers. He has also been preparing one for sale.

[198] Mr Cliff has had difficulty sleeping and remembering, waking up two or three times a night. He says his stomach churns every time he thinks about his dismissal.

[199] As a result of the publicity about his case, he has been through a Freemason inquiry. He is a member of eight orders with grand ranking in four other orders. The whole structure of the Masons is based on moral virtues and he is concerned that this disciplinary matter could have an impact on his future promotions within Masonry which is the whole of his life outside of his family.

[200] He says that his ability to earn a reasonable income is dependent on his job at

Air New Zealand. He has specialised in nothing else since 1999.

[201] Although he was angry following his dismissal, Mr Cliff maintains he was not angry with his manager, Mr Waite, who he believed was always fair to him.

Reinstatement

[202] Mr Cliff is seeking reinstatement. This is opposed by Air New Zealand. Mr Waite said that the employment relationship between the company and Mr Cliff had irretrievably broken down because he thinks that Mr Cliff has a complete lack of

trust in the company and management. He believes Mr Cliff admitted some of the issues which were of concern to the company and does not think he could trust Mr Cliff with the Internet resource which would compromise his ability to do his work. If Mr Cliff were to return to work he would be returning to an extremely safety sensitive environment which with this degree of tension about the company would, in Mr Waite's view, undermine the safety imperatives of the business. He is also concerned that there would be a major customer relations difficulty in returning Mr Cliff to his work with the knowledge that he had been dismissed for Internet overuse and for accessing pornographic material.

[203] It was clear from Mr Waite's evidence that he personally would feel uncomfortable having Mr Cliff back in his department because he would have to manage his return in a small group of people who knew what had happened about the dismissal.

[204] The essential issue in reinstatement is whether it would be practicable in all the circumstances. Mr Cliff's position has been replaced by another person since his termination but beyond that fact and the personal discomfort that Mr Waite has with the prospect of Mr Cliff returning, there is no evidence to suggest that it would not be practicable. I recognise that Air New Zealand will have to make some accommodation for returning Mr Cliff to his former position, and that Mr Cliff may have to accept a different or modified position but, given Air New Zealand's size and resources, this should not be an impracticable exercise.

[205] I do not accept that Mr Waite's evidence is sufficient to establish that if Mr Cliff returned that he would not be able to become a harmonious and effective member of the employer's team were he to be reinstated.6 I therefore order that Mr Cliff be reinstated to either his former position or a comparable position for which he is suited.

Loss of earnings

[206] Mr Cliff has had the benefit of a reinstated income from 10 January 2005 until the Authority's determination. He seeks compensation for loss of wages since then. Mr Thompson submitted that there was no evidence led about Mr Cliff's loss of income since that time.

6 *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] NZCA 228; [1992] 3 ERNZ 483 at 488

[207] Mr Cliff's evidence was that he has earned only $6,000. This was unchallenged. The calculation as to his loss of income is nothing more than an arithmetical exercise of what he would have earned between the Authority determination and this decision had he been in employment, less the $6,000.

[208] The question of contribution is, however, very significant. It was accepted by Mr Roberts in submissions that a degree of contribution was acknowledged.

[209] Mr Thompson made the point that there were issues of major contributory behaviour by Mr Cliff which must reduce any remedy. In his submission, reduction can include reduction to the point of extinction.

[210] In considering contribution, I take into account the way in which Air New Zealand published its policies on Internet use at the relevant time and its failure to give its employees a succinct and accurate statement of the policy when they were given their Internet access. The fact that the data relied on to justify further investigation was not accurate is also material. As against this, Mr Cliff knew that his Internet usage was excessive. Taking both of these factors into account, I find that 25 percent contribution by Mr Cliff is appropriate and his loss of wages since the Employment Relations Authority determination should be reduced by 25 percent.

Compensation for humiliation

[211] I find that Mr Cliff was deeply hurt by the treatment he received by Air New Zealand and that he in particular found the investigation process a very stressful matter. Mr Cliff had to endure an allegation of access to an extremely pornographic site that was later retracted. Ms Roberts's description of Mr Cliff's reaction to that was particularly telling. He became so stressed at that point that he was unable to properly engage with the rest of the disciplinary process. In her words, he just turned off. To that must be added the fact that the dismissal and the inevitable publicity has had an adverse affect on his Free Masonry, plainly an extremely important part of his life.

[212] I assess the damages for stress and humiliation to Mr Cliff at $15,000 but in recognition that he is to be reinstated I

reduce this to $10,000. This is not to be reduced by way of contribution for reasons given later.

Mr Groom

[213] Mr Groom does not seek reinstatement. He has found alternative employment. His evidence as to the effect of the dismissal is that it has had a huge impact. His wife's reaction to the dismissal has put a lot of strain on him which still remains. He said most of his friends are at Air New Zealand which is where he spent most of his working life and he feels disgraced and embarrassed as his dismissal is very public within Air New Zealand. His family lives in a small community where there are a number of Air New Zealand families including at the local school.

[214] After being dismissed, he has found it difficult to sleep and has suffered from depression as detailed in a doctor's note. He remains upset when he thinks about the way he was removed from his work and thinks it unfair that there has not been equal treatment between all the employees.

Loss of earnings

[215] He has applied for other work in the aviation industry but one position with another firm could not be taken up because the work was related to Air New Zealand and Air New Zealand HR blocked his appointment. He gained work on 22 June

2005 and now earns $65,000 per annum plus a discretionary bonus compared with his average earnings at Air New Zealand of $81,931.20.

[216] There was no evidence or submissions on Mr Groom's behalf about future loss of earnings and no claim for that.

[217] As far as contribution is concerned, the same factors apply to Mr Groom as to Mr Cliff. Mr Groom's use of the Internet for private use was plainly excessive. He accepts that he contributed towards the situation. I assess his contribution also at 25 percent.

[218] Mr Groom is awarded 50 percent of his loss of earnings between the date of the Employment Relations Authority determination and the date of this judgment less his earnings from his new position since June 2005.

Compensation for humiliation

[219] Mr Groom's evidence of the stress and humiliation afforded to him as a result of the dismissal was not challenged and is accepted. The one area that differentiates his case from Mr Cliff is that he was not falsely accused of having certain material

on his computer which was later retracted. To a certain extent Mr Groom was isolated from some of the stresses of the investigation by his work related overseas trip in the middle of it. Nonetheless the impact on Mr Groom, particularly in relation to his small community, is acknowledged. He is awarded $12,000 in compensation. This will not be reduced by his contribution.

[220] In relation to contributory behaviour I have considered pursuant to s124(a) the extent to which the actions of the employees contributed towards to the situation that gave rise to the personal grievance. In both cases their contribution was the over-use of the Internet that led to them being investigated in detail and, to that extent, I find that they have contributed 25 percent towards the financial losses which they have incurred since their dismissal. However, in this case I do not consider that their actions contributed in the same way towards the stress and humiliation which they suffered as a result of the investigation.

[221] In Mr Cliff's case, Air New Zealand's actions contributed to his stress in the manner in which it relied on incorrect data against him and, in both cases, their personal circumstances, including their commitment to their work and their loyal service, were such that the hurt and humiliation was exacerbated.

[222] For these reasons I do not consider that their actions contributed towards the remedy under s123(1)(c)(i).

Costs

[223] Counsel are invited to agree the question of costs. If this cannot be agreed, counsel for the plaintiffs is to file a memorandum within 28 days of this decision.

Counsel for Air New Zealand has 14 days to respond to that.

Judgment signed at 10.15am on 23 August 2006

C M Shaw

JUDGE
