Determination Number: CA 68/05
File Number: CEA 152/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	John Coull (Applicant)
AND	Boise New Zealand Limited (Respondent)
REPRESENTATIVES	Matthew Maling, Counsel for Applicant Paul Tremewan, Advocate for Respondent
MEMBER OF AUTHORITY	Helen Doyle
INVESTIGATION MEETING	22 March 2005
DATE OF DETERMINATION	13 May 2005

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] On Friday 2 April 2004 at 4.16pm and 4.17pm another employee of the respondent Jason, sent to the applicant, John Coull, two emails with attachments. The first email had attached to it images of Rachel Hunter and the second had attached images of Paris Hilton. Mr Coull briefly opened the Paris Hilton email attachments, saw they were offensive and closed them. He did open the email again toward the end of the day for a short period but did not forward the attachments to anyone else or delete them.

[2] Mr Coull was summarily dismissed from his position of new business development manager – packaging following a disciplinary process on Thursday 8 April 2004 for having the offensive and improper email attachments of Paris Hilton on his computer. He had been employed by the respondent and its predecessor for about 13 years and had an exemplary work record.

[3] The respondent, Boise New Zealand Limited ("Boise"), say that Mr Coull was justifiably dismissed for gross misconduct for having offensive material on his computer in breach of its email policy.

[4] Mr Coull's employment agreement with Boise provided in clause 5 that he agreed to adhere to any policies made known to him by Boise in effect from time to time. Boise had an email policy dated December 1999. The golden rule in the policy was that *if you wouldn't put it in writing on your company letterhead, then you shouldn't transmit it via email.* Contained within the three page policy are four steps required to be undertaken by an employee if an email message is received that may be contrary to the policies. The steps include deletion and responding to the sender to say that the material was not welcome.

[5] In early January 2004 Boise dismissed a number of its Auckland employees for the dissemination and possession of pornographic emails. Peter Leathley, the general manager of

Human Resources at Boise asked his managers throughout the country to makes sure employees understood the policy and to advise employees that if inappropriate material was found there would be action taken.

[6] Mr Coull says that his dismissal was unjustified both procedurally and substantively. He says that he only requested the images of Rachel Hunter which were from a Playboy magazine and not the sexually explicit Paris Hilton images. Mr Coull said that whilst he knew of the email policy he did not have specific knowledge of the policy, had not signed it and had not been at the recent staff meeting when the email policy was discussed following the dismissal of the employees in Auckland.

[7] Boise say that Mr Coull admitted that he knew of the email policy and that he confirmed he had asked for the Paris Hilton attachments to be sent to him.

[8] The parties attended mediation but were unable to resolve the matter.

The issues

[9] It is accepted that Mr Coull was dismissed. The issues therefore for determination are:

a) Was the decision to dismiss Mr Coull one that was open to a fair and reasonable employer in the particular circumstances of this case? This involves consideration of whether the reasons given for dismissal were sufficient to justify dismissal and whether the investigation process involved in deciding to dismiss Mr Coull was full and fair.

b) If I find that there were unjustified actions on the part of Boise I then need to consider whether there was any contribution by Mr Coull that should be taken into account with respect to the remedies awarded.

Was the decision to dismiss Mr Coull one that was open to a fair and reasonable employer?

The reasons for dismissal

[10] The southern regional manager of Boise, Mark Eager, wrote to Mr Coull by letter dated 15 April 2004 and provided the reasons for Mr Coull's dismissal. The letter stated that the email attachments on Mr Coull's computer were offensive and improper and that Mr Coull's action has destroyed the trust and confidence Boise held in him. I accept that the email attachments were the reason for the dismissal. More specifically I find, consistent with the evidence of Mr Eager, the following was taken into account in dismissing Mr Coull;

i) That the email had been requested.

ii) That Mr Coull did not go back to Jason and tell him not to send emails of that nature again.

iii) That Mr Coull did not delete the email.

iv) That he did not inform his manager about the email

I find of these four matters the failure to delete the email and email Jason back were the main reasons for dismissal although the request was seen as an exacerbating factor.

The process

[11] On 7 April Mr Coull was requested to attend a meeting with Ian Cunningham, branch manager in Christchurch and Mark Eager.

[12] Mr Coull was advised in Mr Eager's office that there was a serious matter to discuss about the email policy. Mr Coull said, when asked, that he did not want a representative and wanted to have the matter dealt with *there and then*. He accepted that he was advised of the serious nature of the matter and cautioned that it may result in dismissal.

[13] Boise House Rules formed part of Mr Coull's employment agreement. They required a clear statement of misconduct be provided to an employee before the meeting in the event of a belief that an employee has committed a gross misconduct. No specific detail of the allegation Mr Coull was required to answer was provided to him before the meeting commenced. The allegation was serious. Mr Eager had a hard copy of the email with him and if he had provided the email to Mr Coull it would have removed any element of surprise leaving Mr Coull in no doubt about the reason for the meeting and in a far better position to decide whether he needed representation.

[14] Mr Coull accepted during the meeting that the email had been sent to him. Mr Coull believed that he said what was recorded in Mr Eager's notes; *John asked to pass onto him.* Mr Coull said that at this time of the meeting he was *spinning out of control*. He told Mr Eager that he was shocked by the email and did not pass it on. There was discussion about the email policy. Mr Coull told Mr Eager he was aware of the email policy and that there had been discussion at a sales meeting recently about the policy. I conclude that it is likely that Mr Coull was in fact at a staff meeting in late January. Ms Parr who was the then sales manager said, and I accept her evidence, that she particularly remembered Mr Coull asking a question about what was classified inappropriate email. Ms Parr said that she checked this with the general manager human resources and informed employees at the next sales meeting that it was inappropriate if you wouldn't put it on company letterhead. That I find also satisfied Mr Eager that Mr Coull knew of the policy. Mr Coull confirmed that he had not deleted the email or emailed Jason back to ask him not to send other material of that type. Mr Coull said at the meeting that he was honest and not hiding anything and that the situation was most regrettable. He indicated that he understood the gravity of the situation.

[15] The meeting ended with Mr Eager advising that Mr Coull would be advised of the decision.

[16] After the meeting Mr Coull was very upset and worried. He spoke during the late afternoon with Mr Cunningham and asked him what was happening. Mr Cunningham was worried for Mr Coull's well being. He told Mr Coull that he thought he would receive a final written warning. I accept Mr Cunningham's evidence that he was not speaking on behalf of the company and made that clear to Mr Coull. Mr Coull though, I find, placed reliance on the conversation in terms of the likely penalty.

[17] On Thursday 8 April Mr Coull was asked to attend a meeting with Ms Parr and Mr Eager. I am not satisfied that Mr Coull was asked to bring a representative to the meeting. The attempt by Ms Parr to arrange a support person for Mr Coull was I find at her own initiative. Mr Coull was told at the meeting that he was dismissed. The notes reflect that after Mr Coull was advised that he was dismissed there was some further discussion including a question from Mr Coull as to where he signed the email policy. The response to that question was to the effect that Mr Coull knew it was against the policy and he was shown an email from Mr Leathley dated 26 July 2001 about inappropriate material on the computer network. I find it is more likely that this memorandum was

not previously shown to Mr Coull at the meeting on 7 April. I accept that Mr Eager made the decision to dismiss Mr Coull although the notes taken by Ms Parr are confusing particularly the final comment by Mr Eager – *process lawyers decision on our behalf.* It is apparent there was real concern by the company that Mr Coull was treated in a similar way to other employees dismissed for possessing and/or forwarding inappropriate material and that not treating him any differently played a significant part in Mr Eager's decision to dismiss.

[18] Other employees were dismissed in the Christchurch office over the Paris Hilton images. One employee dismissed had had a previous warning and Jason had forwarded the email on to Mr Coull.

[19] Ms Parr then took Mr Coull home. He was permitted to continue with some further sessions of life coaching and EAP counselling was offered. There were also pro-active steps by Mr Eager, Ms Parr and Mr Cunningham to assist Mr Coull in getting alternative employment by speaking to others in the industry.

[20] Mr Coull said that he was devastated and embarrassed by the dismissal and that he felt an overwhelming stigma as a result of the dismissal. On 25 May 2004 Mr Coull took up an offer of employment but did not commence that employment for a further four week until 22 June 2003. His remuneration with his new employer is commensurate with that he was receiving from Boise.

Conclusions

[21] The Paris Hilton images were not material in accordance with the Boise email policy which was suitable to be transmitted by email. What I am required to consider is whether Mr Eager could conclude following the investigation that Mr Coull's actions in failing to delete the images and failing to email Jason back destroyed the trust and confidence that Boise had in him and amounted to gross misconduct justifying summary dismissal.

[22] I consider that the failure to give Mr Coull a clear statement of the misconduct including what the offensive images actually were before the meeting as required by the Boise House Rules did disadvantage Mr Coull in his ability to provide a considered response. I do not accept Mr Coull's insistence to carry on and have the meeting can have contributed to or excused this deficiency because Mr Coull did not know at that stage the specific allegation he was facing.

[23] Mr Eager had to be in a position to honestly believe that Mr Coull had actual knowledge of the steps required to be undertaken if an offensive email was received to conclude that the misconduct was serious justifying dismissal.

[24] Mr Coull did not delete the email or email Jason back. There was no focus though in the investigation undertaken by Mr Eager as to why Mr Coull had not undertaken those steps. Mr Coull did not send the email onto anyone else internally or externally and there was no evidence that he had looked again at the images after 2 April 2004. There were no further emails of that type sent to Mr Coull by Jason or any other employee. There was no history of behaviour by Mr Coull such as storing or using his work computer to access offensive material. He had not received any previous warnings.

[25] The employer in this case had an opportunity when Mr Coull signed a remote access policy about three weeks prior to the investigation to have him read and sign the email policy. Instead the IT user form signed on 16 March 2004 for Mr Coull confirms that the box beside the email policy was not ticked as read and signed by Mr Coull. That form supports an expectation that such policies would be required to not only be read but also signed by employees. While the remote access service policy made it clear that the facility should not be used for offensive activities it did

not contain the four steps to be undertaken in the event that offensive material was received.

[26] Mr Coull said in evidence, although not during the disciplinary meeting, that he was expecting some scantily clad pictures of Rachel Hunter. These did not form part of the investigation. What Mr Coull did say to Mr Eager was that he was shocked by the Paris Hilton images. I would have expected an investigation approached on an open minded basis to have included a question about why Mr Coull was shocked to establish what type of image he was expecting.

[27] One of the steps in the policy to talk to a manager was taken into account by Mr Eager in arriving at his decision to dismiss Mr Coull. This step however was not required unless the emails continued to be sent.

[28] I do not consider that Mr Eager was in a position at the end of the meeting of 7 April where he could form an honest belief that Mr Coull had actual knowledge of the steps required within the email policy or could establish whether such failure to undertake the steps was deliberate or due to lack of knowledge or inadvertence. Mr Coull said in his evidence that he had forgotten about the email by the following Monday and clarified that it was not until the meeting with Mr Eager that he was aware of the actual steps to be undertaken in the policy. When Mr Coull questioned as to where he had signed the email policy at the meeting on 8 April at which he was dismissed he was simply shown a 2001 memorandum and told that he knew about the policy.

[29] Mr Eager did give consideration to a penalty short of dismissal. It was though the inadequacy of the investigation which led Mr Eager and no doubt his advisors to the view that dismissal was the only option and that Mr Coull's situation was no different to the other employees who had been dismissed.

[30] Mr Coull did things that were unwise. He knew, I conclude, from both the staff meeting in late January and then a few weeks prior to the investigation when he signed the remote access policy, that Boise did not want offensive material on its computers. He said he knew that there was an email policy although I consider from his evidence and the fact that the employer's own documents reflect that he had not signed and read the email policy that it was more likely than not he was unaware of the specific steps required if an offensive email was received. He should not have expressed though any interest about *checking out* images to other employees which would not have been images suitable to put on Boise letterhead. Mr Coull said that he probably would have lived with a final warning.

[31] Whilst the employer could conclude that there was misconduct in this matter I am not satisfied that the investigation enabled Mr Eager to conclude that the failure by Mr Coull to undertake the two steps in the policy was serious misconduct so as to cause a loss of trust and confidence in Mr Coull which would warrant dismissal. I am also satisfied that the circumstances in Mr Coull's case were capable of being differentiated from the other cases where the employees had been dismissed.

Determination

[32] I find that the decision to summarily dismiss Mr Coull was not one that was open to a fair and reasonable employer in the particular circumstances of this case. Mr Coull has a personal grievance and is entitled to remedies.

Remedies

[33] I have found that Mr Coull's conduct was blameworthy and I consider that it did in part contribute to the situation that gave rise to the grievance. Mr Tremewan submits that an award should be reduced by 100%. I do not accept that would fairly reflect that there were some procedural deficiencies on the part of the respondent. I am of the view that in all the circumstances of this case the level of contribution is fairly assessed at 40%.

Reimbursement of lost wages

[34] The applicant claims reimbursement of lost earnings for a period of ten weeks and two days. He received a base salary of $58,500.00 per annum. He also received annual commissions of about $6000 per annum. The applicant took a pre arranged holiday for a week during the Easter period with his family immediately following his dismissal. I am not of the view that the lost wages claimed should be reduced because of the fact that he took the holiday. I am satisfied that a part of the holiday was spent on job search activities. I am further satisfied that Mr Coull looked diligently for work until he was successful in obtaining his current position.

[35] Mr Coull is entitled to reimbursement of lost earnings as below :

a) Salary @ $58,500.00 per annum = $1125.00 per week x 10 weeks and 2 days = $11,700.00

b) Commission @ $6000.00 per annum (payable quarterly) = $115.38 per week x 10 weeks and 2 days = $1199.95

c) Total reimbursement = $12,899.95

[36] I reduce the amount of $12,899.95 by the contribution figure of 40% to arrive at a figure of $7739.97.

[37] I order Boise New Zealand Limited to pay to John Coull the sum of $7739.97 gross under section 123 (b) of the Employment Relations Act 2000.

Compensation for loss of benefit

[38] Mr Coull was provided with a company vehicle for his use. There is an issue about the value of the company vehicle to Mr Coull. Mr Coull relies on the Sheffield calculations and the company on the Hay vehicle cost calculations. I am of the view that the appropriate value to Mr Coull of the company supplied vehicle is that provided by the company of $14,843.00 per annum.

[39] Mr Coull is entitled to compensation for the loss of a benefit of a vehicle that he might reasonably have expected to obtain if he had not been dismissed. I have calculated that benefit on the following basis that the benefit to Mr Coull was $14,843 per annum = $285.44 per week x 10 weeks and 2 days = $2968.57

[40] I reduce the amount of $2968.57 by the contribution figure of 40% to arrive at a figure of $1781.15.

[41] I order Boise New Zealand Limited to pay to John Coull the sum of $1781.15 gross under section 123(c)(ii) of the Employment Relations Act 2000.

Compensation for humiliation and loss of dignity

[42] Mr Coull initially claimed $40,000.00 under this head. In final submission Mr Maling on his behalf submits an award in the region of $10,000 to $15,000 would be justified. I accept Mr Coull was quite devastated by his dismissal after hearing from him and his wife on this matter. He had difficulty sleeping and felt mistreated by his employer. I do take into account the supportive steps that Boise took to offer support and assistance to Mr Boise after his dismissal. The company respected Mr Coull and I find this was demonstrated by the considerable effort they put in after his dismissal to try to secure new employment for him. That must be taken into account. In all the circumstances I am of the view that an appropriate award would be $8000.00.

[43] I reduce the amount of $8000.00 by the contribution figure of 40% to arrive at a figure of $4800.00.

[44] I order Boise New Zealand Limited to pay to John Coull the sum of $4800.00 without deduction under section 123(c)(i) of the Employment Relations Act 2000.

Costs

[45] I reserve costs.

Summary of orders

[46] Boise New Zealand Limited is ordered to pay to John Coull the gross sum of $7739.97 as reimbursement under section 123(b) of the Employment Relations Act 2000.

[47] Boise New Zealand Limited is ordered to pay to John Coull the gross sum of $1781.15 as compensation for loss of benefit under section 123(c)(ii) of the Employment Relations Act 2000.

[48] Boise New Zealand Limited is ordered to pay to John Coull the sum of $4800.00 as compensation under section 123(c)(i) of the Employment Relations Act 2000.

Helen Doyle
Member of Employment Relations Authority