

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 351
5369552

BETWEEN

REGINALD HIHA
Applicant

A N D

CRANE DISTRIBUTION NZ
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Warwick Reid and Rachel Rolston, Advocates for
Applicant
Scott Wilson, Counsel for Respondent

Investigation meeting: 14 September 2012 at Tauranga

Date of Determination: 09 October 2012

DETERMINATION OF THE AUTHORITY

A. Mr Hiha's dismissal for serious misconduct was justified.

Employment relationship problem

[1] Reginald Hiha says that his former employer, Crane Distribution NZ Limited (Crane), dismissed him unjustifiably from his position as storeperson at Mico Bathrooms, Mt Maunganui. He seeks compensation and reimbursement for lost wages.

[2] Crane says the dismissal was justified for serious misconduct, following a fair and reasonable process.

[3] The main facts in this matter are not in dispute. Mr Hiha accepts that during work hours he accessed the internet from Crane's computer system for his personal use and to view pornography. Mr Hiha was aware of Crane's policies regarding use

of the internet but did not believe his conduct fell in to the category of serious misconduct for which he could be summarily dismissed.

Background

[4] From February 2008, Mr Hiha was employed by Crane, following its take over of Zip Plumbing Limited where Mr Hiha had been employed for approximately a year. Mr Hiha's role at Crane was that of storeperson at its retail outlet Mico Bathrooms in Mt Maunganui. Mr Hiha's hours of work were 7.30am to 5.00pm Monday to Friday and 8.00am to 12.00pm on Saturday.

[5] Mr Hiha's job was to deal with inwards goods in the store, deliveries, stock control and servicing customers. Mr Hiha would use Crane's computer system to enter details regarding inwards goods, stock control, deliveries. Mr Hiha had access to the internet but it was not strictly necessary for his job.

[6] The employment agreement which applies to employees at Crane provides at page 13 that the code of conduct and other company standards apply to the employment of Crane's employees. It also provides:

Computers

The company's email and internet systems are for business use only and the use of such equipment for private purposes is strictly prohibited. Email and computer logons are for your exclusive use, they must be kept confidential and not shared by other users. The use of such systems in a manner that breaches the law, company policy, or reasonable standards of decency is also prohibited. You are advised that all internet usage is monitored and recorded by the company for security and network management reasons. ...

[7] Crane's standard practice when employing staff was to have the employment agreement and policies signed at the time of employment. Mr Hiha saw but cannot recall signing a copy of Crane's employment agreement but did receive, and probably signed Crane's policies and procedures.

[8] Crane's code of conduct provides as follows:

Crane NZ shall have the right to summarily dismiss an employee for serious misconduct. Less serious misconduct should be corrected before disciplinary action is invoked and Crane NZ agrees to, if necessary, assist employees whose conduct in relation to behaviour or performance is not acceptable. The disciplinary procedure is viewed as a last resort when positive action, feedback,

encouragement, negotiation and, where appropriate, any assistance including counselling and training has not succeeded.

[9] The code of conduct includes, as examples of serious misconduct:

- *Any material breaches of specific policy that constitutes unacceptable or serious misconduct;*
- *The misuse of or interference with company computer hardware or software.*

[10] Clause 10 of the code of conduct provides, in relation to computer and email usage that:

The company's policy on computer and email usage must be adhered to as any breach of policy will lead to disciplinary procedure.

[11] Crane's email and internet policy provides in clause 1 as follows:

General

Use of E-Mail and the Internet by Crane Distribution NZ Limited employees is permitted and encouraged where such use is in a manner that is consistent with the goals and objectives of the Company and as part of the normal job responsibilities of an employee. However, employees should be aware that use of the company's E-mail and Internet facilities contrary to the guidelines contained in this document may reduce operational efficiency, be in breach of legal requirements, be contrary to acceptable standards of behaviour, or be in breach of Crane's Code of Conduct and may result in disciplinary action.

[12] Clause 6 provides:

Unacceptable conduct

The following practices will be considered to be in breach of Crane Distribution NZ Limited's Email and Internet policy, and will result in disciplinary action:

- *Visiting internet sites that contain pornographic, obscene, hateful or other objectionable materials.*

...

- *Using company email and internet systems for excessive, inappropriate, or high volume personal use.*

...

[13] Clause 7 provides:

Consequences of unacceptable conduct

Any breaches of this policy will result in disciplinary action, which may include removing access to internet facilities, and, in serious cases, termination of employment.

[14] In May/June 2011, Mr Hiha began accessing a website called *tumblr* from his work computer. By accessing that website, Mr Hiha was able to and did view pornographic images regularly over a period of at least three months prior to his dismissal in August 2011, possibly longer.

[15] Mr Hiha accepted that Crane would not be happy about his accessing the *tumblr* website and viewing pornography from its computer during work hours and he accepted that Crane would regard this behaviour as misconduct. Mr Hiha said he would be embarrassed if anyone could see the sites he was viewing and so took care not to access the website in a manner that anyone at work would be able to see him.

[16] Despite this, Mr Hiha continued viewing the *tumblr* website and the pornographic images to take his mind off work, which he was finding demanding.

[17] In the week beginning 8 August 2011, Jill Friel, a Crane employee complained to Malcolm Peden, the branch manager to whom Mr Hiha reported, that she had seen Mr Hiha viewing pornographic images on his computer at work. Upon receiving the complaint, Mr Peden discussed the matter with the human resources manager, Ruth Chapman and the regional manager Mr Peter Garden. It was decided that Mr Peden should obtain a report on Mr Hiha's internet usage from Crane's IT Team, based in Sydney. Mr Peden received 2 reports, the first listed webpages accessed by Mr Hiha and the second provided more detail about the webpage accessed and the time accessed.

[18] The reports appeared to show that Mr Hiha had been accessing the internet during work time for personal reasons and that much of that access was to view pornography. Mr Peden and Ms Chapman decided that it was necessary to speak with Mr Hiha about the matter.

[19] On 11 August 2011 Mr Peden asked Mr Hiha to come to his office. Mr Peden gave Mr Hiha a letter along with the 2 reports on his internet usage and requested a meeting with him on 16 August 2011 to discuss the letter and reports. Mr Peden encouraged Mr Hiha to bring a support person.

[20] The letter to Mr Hiha set out the purpose of the meeting as follows:

It appears that you have been using the internet excessively for personal reasons during work time and that you have been viewing

inappropriate material in breach of the Crane Distribution NZ Limited email and internet policy. I have attached a summary report on internet use under your user name during July and August to date. I would like to hear your explanation regarding the matter and I will then consider whether any further steps are appropriate.

[21] The letter goes on to explain that the meeting would not be a disciplinary meeting but rather a meeting to obtain Mr Hiha's explanation which, if accepted, would be the end of the matter but if not, the next step would be to conduct a disciplinary meeting. Mr Hiha was encouraged to bring a support person.

[22] On the day Mr Hiha received the letter, his father in law had a stroke and he had to take him to hospital. Family arrived from Australia and these events and the fact Mr Hiha did not believe the matter was serious meant he did very little about the letter or the internet reports in the days before the meeting on 16 August 2011. Mr Hiha did not tell Mr Peden about what had happened to his father in law at any time during Crane's investigation into his conduct.

[23] On 16 August 2011, Mr Hiha attended the preliminary meeting but did not bring a support person because he did not believe a support person could help him. Mr Hiha also said he was aware he was in breach of Crane's policies but did not believe the breach to be serious and that he could be dismissed.

[24] Mr Peden asked him if he was comfortable proceeding with the meeting without a support person and Mr Hiha said he was. The meeting went ahead. Mr Peden and Mr Peter Garden, the regional manager were in attendance and asked Mr Hiha about the reports on his internet usage. Mr Hiha accepted the reports on his internet use and accepted he had been viewing pornography on the internet during work hours for about 3 months. He accepted this was wrong and that he was aware of Crane's internet policy and had probably signed the policy. Mr Peden took notes of the meeting.

[25] Given Mr Hiha's acceptance that he had accessed the internet for personal reasons during work time and had accessed websites containing pornographic material, Mr Peden decided that it was necessary to initiate a disciplinary process. Mr Peden wrote to Mr Hiha requesting a formal disciplinary meeting on 22 August 2011 and says:

Reg you were also given a copy of the internet usage report prior to the investigation meeting and admitted it was an accurate proof of

inappropriate websites you had visited during work time. You confirmed you had visited the following sites and they had content of a pornographic nature: [websites listed]

You stated in the investigation meeting you knew of the Crane Distribution NZ Ltd policy and that the internet was not for personal use and that you didn't think viewing pornography was allowed. You confirmed that the pictures were of female sexual content ('adults only, not harsh and was only people'). You agreed that you had been using the internet during work time for personal use, but believed it to be less than 1 hour a day (which agreed was high use) and that it was mainly Saturdays and afterhours while waiting to be picked up to go home. You also admitted to viewing the occasional video but it was mainly pictures and that watching video was rare. Reg, we are not satisfied with your explanation in the investigation meeting and as such wish to proceed to a formal disciplinary meeting. Inappropriate internet usage potentially constitutes a breach of company policy which in terms of the Crane Distribution NZ Ltd Code of Conduct may constitute serious misconduct.

[26] The letter refers to the relevant sections of the Code and then states that Mr Hiha would have the opportunity to provide a further explanation which would be considered before any final decision was made.

[27] The letter further states that Mr Hiha's conduct may constitute serious misconduct and that an outcome of the meeting may include termination of his employment. Mr Hiha was encouraged to bring a support person to the meeting. Mr Hiha accepted the letter made reference to serious misconduct and a possible outcome might be his dismissal but disregarded it on the basis he believed the clause to be standard.

[28] The disciplinary meeting was held on 22 August 2011. Mr Peden and Mr David Milne attended on behalf of Crane. Mr Hiha attended but did not bring a support person. Mr Hiha confirmed at the meeting that he knew what Crane's policy was on internet usage and that he knew accessing pornography on the internet was contrary to company policy. Mr Hiha was informed by Mr Peden that Crane considered his conduct in viewing pornography at work constituted a serious breach of company policy and that Crane would now have to make a decision on appropriate disciplinary action.

[29] On 23 August 2011, Mr Peden wrote to Mr Hiha recording details of the meeting with Mr Hiha on 22 August and stating that his preliminary decision was to terminate Mr Hiha's employment. Mr Hiha was informed that before a final decision

was made, Mr Hiha could comment either verbally or in writing. If there was no response from Mr Hiha a decision would be made by 4pm on 24 August 2011.

[30] Mr Hiha told Mr Peden that he had no feedback to provide. Mr Peden was of the view that Mr Hiha's actions had damaged the trust and confidence that existed between them and which underpinned the employment relationship. It was Mr Peden's view that dismissal was the only option. In a letter dated 24 August 2011 Mr Peden confirmed his preliminary decision that Mr Hiha's employment was to terminate immediately on the grounds of serious misconduct. Despite the dismissal being immediate, Crane paid Mr Hiha one month's wages in lieu of notice.

[31] At the investigation meeting Mr Hiha sought to argue that he had been treated differently from other employees. In support of this argument, he referred to Jason Brake who had misused the internet and had received a warning. He also referred to an email that Mr Peden had sent out to staff on the day Mr Hiha was requested to explain his internet usage which he described as offensive and for which Mr Peden was not disciplined. Neither Mr Brake's nor Mr Peden's conduct involved accessing Crane's computer to view pornography.

[32] Mr Hiha also sought to argue that Crane's policies should have set out which type of pornography was serious and could result in dismissal and which was less serious and could result in rights to internet access being removed. A similar argument was raised in respect of what amount of personal use would be regarded as serious.

[33] I do not accept this argument. Crane's policies set out the categories of conduct which Crane considers unacceptable:

Visiting internet sites that contain pornographic, obscene, hateful or other objectionable materials.

Using company email and internet systems for excessive, inappropriate, or high volume personal use.

...

[34] Visiting internet sites that contain pornographic materials and using company email for excessive, inappropriate or high volume personal use are unacceptable. It is for the employer to investigate and determine whether the conduct is at a level it

considers amounts to serious misconduct and then to decide the range of disciplinary responses.

[35] Mr Hiha was prepared to engage in a course of conduct during his employment with Crane knowing it to be unacceptable and to constitute misconduct. He also knew his conduct was in breach of Crane's policies. Nevertheless he continued engaging in such conduct. His claim that he did not believe his conduct to be so serious as to warrant dismissal is not credible. Following investigation, Crane decided the conduct was serious and that Mr Hiha may be dismissed.

Determination

[36] Mr Hiha claims his dismissal was unjustified. It is for Crane to establish that the dismissal was justified pursuant to s.103A of the Employment Relations Act 2000 (the Act). Section 103 A(2) states:

103A Test of justification

- (1) *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred."*

[37] Section 103 A was considered by a Full Court of the Employment Court in *Angus v Ports of Auckland*¹. The following findings of the Full Court are relevant:

[36] *The most important change to former s 103A is that by use of the word "could" in substitution for the former "would", Parliament has indicated that there may be more than one justified sanction available to an employer in any given situation in employment which might result in the employee's dismissal or in disadvantage to the employee in his or her employment.*

[37] *The effect of new s103A is that so long as what happened (and how it happened) is one of those outcomes that a fair and reasonable employer in all the circumstances could have decided upon, then the Authority and the Court will find that justified."*

¹ [2011] NZEmpC 160

[38] The test requires the Authority in this matter, to determine whether on an objective basis dismissal is within the range of responses open to a fair and reasonable employer. If dismissal is within the range then it will be justified.

[39] Mr Hiha has admitted the conduct in question. Therefore the question to be determined by the Authority is whether such conduct constitutes serious misconduct. The admitted conduct is accessing the internet from Crane's computer during work hours and viewing pornography. Mr Hiha also admitted personal use of his computer during work hours.

[40] A key factor in this matter is the nature of the pornography accessed by Mr Hiha.

[41] I have viewed the two reports of Mr Hiha's internet usage which Mr Hiha accepted as accurate. One of the reports I viewed contains 164 images depicting images of naked women, naked women and men in lewd poses and performing sex acts. The images are graphic and objectionable.

[42] In *Safe Air Limited v Walker*² Judge Couch in deciding whether Mr Walker's conduct was capable of amounting to serious misconduct considered the nature of the emails he sent. Judge Couch observed:

[40] ... the standard to be applied is that of a fair and reasonable employer. That objective standard requires the Court to reflect the generally accepted values of our society in matters such as this. On that basis, I find that a significant number of the emails sent by Mr Walker were seriously offensive and that Mr Price was therefore justified in regarding them as such. Overall, I find Mr Walker's conduct was capable of being regarded as serious misconduct.

[43] The pornography viewed by Mr Hiha was seriously offensive and destroyed the trust and confidence that Mr Peden had in Mr Hiha. As such it was capable of being regarded as serious misconduct; *Northern Distribution Union v BP Oil NZ Ltd*³.

[44] Mr Hiha also accessed the internet for personal use during work time. It was accepted by Mr Peden that excessive personal use of the internet would not be sufficient in itself to constitute serious misconduct for which Crane could terminate Mr Hiha's employment.

² (Unreported), Ch Ch 9/09 7 August 2009

³ [1992] 3 ERNZ 483

[45] The question is now whether Crane's decision to dismiss was one open to a fair and reasonable employer in the circumstances.

[46] In support of that proposition, Mr Wilson for Crane, cited *Beazley v. Telecom New Zealand Ltd*⁴. In that case, a sales assistant was summarily dismissed for serious misconduct after viewing pornography in the workplace. The Authority was satisfied that the decision to dismiss Mr Beazley was one that the employer, Telecom New Zealand Ltd, could fairly and reasonably take even though Mr Beazley denied having accessed the pornographic material.

[47] Mr Hiha says he was not aware that his conduct could be regarded as serious misconduct despite what, he agreed, is set out in the code of conduct, employment agreement and internet and email policy. I find this hard to believe.

[48] Mr Hiha knew about and agreed he probably signed Crane's email and internet policy. Mr Hiha was aware that using Crane's computer to access pornography was not allowed. Mr Hiha knew his behaviour to be inappropriate and unacceptable. Dismissal was a decision open to a fair and reasonable employer in the circumstances.

[49] Section 103A(3) of the Act requires consideration by the Authority of a number of factors in determining whether a dismissal has been implemented in a procedurally fair manner. Factors include whether the employer:

- Sufficiently investigated the allegations, having regard to available resources;
- Raised its concerns with the employee before dismissal;
- Gave the employee a reasonable opportunity to respond to the employer's concerns before dismissal; and
- Whether the employer genuinely considered the employee's explanation before dismissal.

[50] Crane complied with these obligations. Accordingly, I find that Mr Hiha's dismissal was justified.

⁴ (Unreported), Employment Relations Authority, Auckland, 26 March 2003

Costs

[51] Costs are reserved. The parties are invited to reach agreement on the matter. If they seek a determination from the Authority they are to file and serve memoranda on the matter within 28 days from the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority