

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

<b>BETWEEN</b>	Jessica Wood (applicant)
<b>AND</b>	Arthur D Riley & Co Limited (respondent)
<b>REPRESENTATIVES</b>	Daniel Vincent & Ankit Bhasin for Ms Wood Karen Sagaga for the Company
<b>MEMBER OF THE AUTHORITY</b>	Denis Asher
<b>INVESTIGATION</b>	Wellington, 21 June 2007
<b>SUBMISSIONS RECEIVED BY</b>	2 July 2007
<b>DATE OF DETERMINATION</b>	9 July 2007

**DETERMINATION OF AUTHORITY**

**Employment Relationship Problem**

1. In her statement of problem filed on 23 April 2007, Ms Wood said her summary dismissal on 18 September 2006 was unjustified because the email sent by her from the workplace to others, including employees of the Company, was not objectionable, pornographic or offensive, because personal use of the Company email was accepted by the respondent and because she had been unfairly singled out for dismissal. Ms Wood claimed lost wages from 18 September, compensation of \$12,000 for humiliation, etc and costs. Ms Wood is legally aided.

2. In its statement in reply received on 8 May the Company says the applicant was justifiably dismissed as the email sent by Ms Wood was objectively sexual, pornographic, obscene, offensive and/or inappropriate.
3. Mediation and efforts by the parties with the facilitation of the Authority, to settle their employment relationship problem, have been unsuccessful.
4. By agreement an investigation was scheduled for 21 June in Wellington. Witness statements and an agreed bundle of documents were usefully provided by the parties. The investigation effectively took half a day.

## **Background**

5. Much of the relevant background detail is either not in dispute or can be readily set out by way of the following summary.
6. The Company operates a electricity and water metering business.
7. Ms Wood was employed by the Company as an administrative assistant in July 2005.
8. At the commencement of her employment she was provided with a copy of the respondent's company policies and house rules.
9. The policies and house rules provide for various matters including the following:

### ***Misconduct***

2. *The following are examples of the type of actions and behaviour that the Company considers as misconduct. They are likely to result in formal warnings and, if repeated, dismissal:*
  - ...
  - *Posting offensive written or visual material on notice boards, computer systems or elsewhere on the premises.*

(page 5)

### ***Serious Misconduct***

3. *The following are examples of the type of actions/behaviour that the Company considers as serious misconduct, and are likely to lead to summary dismissal without notice or formal warning:*

- ...
- *Breach of the Internet and Email Policy*

(page 6)

**15. E-mail, Intranet and Internet**

1. ...

4. *E-mail, Intranet and the Internet are business resources and are to be used for business purposes only. The Internet is not available for private/personal use and is not to be used for recreation or 'surfing' during either work time or outside working hours.*

5. *Employees are not authorised to access, download, upload, save, request, transmit, store or purposely view material, software or files, that are not for work or associated research purposes.*

6. *Employees are not authorised to access, download, upload, save, request, transmit, store or purposely view sexual, pornographic, obscene, racist, profane or other offensive or inappropriate material.*

7. ...

8. *Inappropriate or unauthorised use of E-mail, the Internet or Intranet may lead to disciplinary action being taken, including dismissal. What constitutes "offensive", "unauthorised" or "inappropriate" is to be determined by the Company in its sole discretion.*

9. ...

10. ...

11. *Failure to comply with the provisions of this clause may be treated as serious misconduct.*

(pages 14 &amp; 15)

10. The Company says that, in December 2005, Ms Wood was issued with a verbal warning, recorded in writing, for breach of the Company internet and email policy, the high number of her forwards and joke emails, including questionable content contained in her emails, and professionalism in the workplace (document 17). While recalling some of the circumstances of the warning, Ms Wood could not recall the warning itself, the issue of questionable email content or of signing the warning: she could not say there had not

been a warning but clearly did not recall signing it and had some doubt as to its genuineness.

11. Ms Wood agrees that she was given a verbal warning, also recorded in writing (document 5) and signed by her, in August 2006 for breach of Company internet and email policy regarding forwarding jokes and internet surfing and her high number of personal phone calls.
12. On Monday 28 August Ms Wood, and by way of her employer's email system, Ms Wood received an email from her father, sent from his workplace, with the subject "*Eleven Most hot People!!!!!!*" (document 11). The email contained a number of images pictures of adult men and women some of whom have little clothing on or are naked. One image is uncertain in that it may be, but is not clearly, a person wearing a gas or some other type of mask, while enclosed in a translucent, stretch material. Some of the images include pixelated treatment of the subjects' genitals. Another appears to be a woman's head transposed onto the body of a male 'body-builder': 'he' wears bathing trunks. Other images are of obese individuals: none of them could be described as rivals to Michelangelo's "David" or of any other classical image of the human male or female form. The images are instead clearly intended to shock and ridicule, as evidenced by the subject title and the phrase employed by Ms Wood when she forwarded it to two work colleagues and other acquaintances at other workplaces on the same day, namely "ewww" (document 11).
13. On 14 September Ms Wood was handed a letter inviting her to a disciplinary meeting (document 12). The letter makes clear that the disciplinary meeting concerned an allegation that Ms Wood had breached section 15 (6) of the Company's policies and house rules (see above), relating to downloading objectionable/pornographic or offensive material. The letter also raised an allegation that Ms Wood was in breach of section 15 (4) of the Company's policies and house rules, relating to personal use of the respondent's email and internet systems.
14. As is made clear in the Company's statement in reply (para 2.14), the applicant's summary dismissal was in respect of the first allegation – that she breached clause 15 (6) of her employer's policies; the respondent did not take any action regarding the alleged breach of clause 15 (4).
15. Company representatives, including Mr Garth Mickell, its general manager, met with the applicant on Friday 15 September. Ms Wood attended with her mother as her support

person. The Company kept a record of that meeting (document 13): Ms Wood disputes its accuracy and Mr Mickell's recollection. In particular she says that she was not shown the email at issue, and was not taken through each image by Mr Mickell and told by him whether and why he found it "*objectionable/pornographic or offensive*" (document 12).

16. A further meeting followed on Monday 18 September 2007 so as to allow, the Company says, Ms Wood another opportunity to provide any further explanations. The Company advised Ms Wood it was considering her summary termination: she had no further comment to make other than to again offer an apology for her actions. Ms Wood was then dismissed.
17. During the Authority's 21 June investigation counsel for the applicant, Mr Daniel Vincent, advised his client no longer claimed she had been subjected to disparate treatment.

### **Company's Position**

18. Amongst other things, the Company says it acted in good faith throughout and Ms Wood's dismissal was procedurally fair and substantively justified.
19. The legal test of justification is that set out in s. 103a of the Act, i.e. the question of whether a dismissal was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how it acted, were what a fair and reasonable employer would have done in all of the circumstances at the time of the dismissal.
20. *X v Auckland District Health Board*, AC 10/07, Colgan CJ, 23 February 2007 is cited as authority for the proposition that the test does not give the Authority unbridled licence to substitute its view for that of the employer (par 97).
21. In that decision the Employment Court recognised that the range of behaviours of people in the wider community is very broad, but that unacceptable material included pornography and certain jokes. It is common sense that these types of material are unacceptable and unprofessional, therefore employees should have reasonable expectations that communicating such material at least constitutes misconduct (pars 79 & 81).
22. Unlike the Auckland District Health Board, the Company has not set a weighty criterion for itself in proving serious misconduct: instead it can fairly and reasonably rely on its house

rules, at p. 7, which make clear that a breach of its email policy amounts to serious misconduct.

23. The Company relies on its house rules, particularly sub-clauses 15(6) & (8), and that a breach of the Company's email policy amounts to serious misconduct.
24. Having signed the house rules and been warned about breaching them, Ms Wood clearly knew of the respondent's policy.
25. Before coming to a decision to dismiss, Mr Mickell sought advice from the Company's human resources manager and its director so as to ensure, on an objective basis, that the applicant's email was objectionable, offensive or inappropriate and therefore amounted to serious misconduct.
26. The Company relied on Ms Wood's term, "ewww" (above) as evidence her email was not humorous but instead was objectionable, offensive or inappropriate.
27. The recipients of the applicant's email were unlikely to complain about its contents as they were her friends.
28. The email was provided to the applicant during the Company's investigation and each attachment was gone through by Mr Mickell in terms of what he considered was offensive, objectionable and inappropriate.
29. The Company had regard to a wide range of factors before reaching its decision, including the fact that: Ms Wood sent the email to work colleagues and to others external to the workplace; sending such emails can be offensive to some people without the applicant realising it; sending such emails can affect the Company's reputation; Ms Wood had no control of where the email could end up; the email could amount to sexual harassment and a breach of human rights and result in financial penalties for the respondent.
30. Where safety is a concern an employee is entitled to adopt a zero tolerance policy: *Fuiava v Air New Zealand*, AC51/06, Shaw J, 12 September 2006.
31. The Company was entitled to rely on the previous related warnings it issued to the applicant, including an informal warning issued by the human resources manager in September 2005 (document 16 in the agreed bundle).

32. Unlike *Dr X* (above), where the Employment Court found that a variety of sanctions and behavioural correctives should have been applied, rather than dismissal (pars 171 & 172), this was a situation where Ms Wood had been warned previously for similar behaviour: further sanctions and correctives were not practical.
33. The Company was therefore entitled to reach the view that it did.
34. In the alternative, and in the event Ms Wood succeeds with her claim, no remedies should be awarded as she was the sole author of her misfortune (as recognised by the applicant by way of her apology at the disciplinary meeting and admission she should not have sent the email): *Dr X* (above) and s. 124 of the Act.

### **Applicant's Position**

35. Because of my findings it is unnecessary for me to summarise argument advanced on behalf of Ms Wood.

### **Discussion and Findings**

36. There can be no doubt as to the right of an employer to put in place for its staff an internet and email, etc work place policy, including one that defines or sets standards as to what personal use and material can be sent via the employer's resources. It follows of course that the application of any such policy is subject to the objective fair and reasonable test set out in s. 103A of the Act.
37. As the evidence makes clear, the Company has a significantly flawed and less than consistent approach to its internet and email policy. While described as a business resource to be used only for business purposes and not for personal use (clause 4, p 14 of document 4), the respondent in fact accepts a significant measure of personal email usage including the sending of jokes – oral evidence from Mr Mickell and document 16.
38. Similarly, notwithstanding the house rules prescribing the accessing, downloading, saving, storage and purposive viewing of pornographic, offensive or inappropriate material, no disciplinary action was taken in respect of its other employees who – the Company had identified – received, viewed and retained Ms Wood's email.
39. For these reasons, and as advanced by the applicant, I am satisfied that the Company is unable to rely on its argument that an action contrary to house rules is thereby

determinative of serious misconduct. In other words, it does not follow automatically – because of its policy – that Ms Wood’s email amounted to serious misconduct: that is because the respondent’s application of its policy was not consistent and therefore, objectively measured, cannot be said to be fair and reasonable.

40. This conclusion is reinforced by the fact that the house rules are also ambiguous as to whether computer misuse is misconduct or serious misconduct: page 5 of the house rules describes posting offensive material on computer systems as misconduct. Whereas the respondent justifies its definition of serious misconduct on the ground of risk of claims for human rights, etc abuse, it impliedly tolerates the same risk elsewhere by reserving the application of a misconduct finding for computer misuse.
41. Section 103A any way requires an objective scrutiny of what “... *a fair and reasonable employer should have done in **all** the circumstances at the time*” (emphasis added). I understand this to require the Company to have regard not only to its policy, and whether it was being appropriately applied, but also to all other relevant factors, including such matters as where the applicant’s email originated from (her father) and its actual effect (there were no complaints).
42. Having regard to the respondent’s actions, and on an objective basis, I am satisfied a fair and reasonable employer would not have reached a conclusion that the content of the applicant’s email was objectionable/pornographic or offensive. That is because I am not satisfied the respondent can say its conclusion was “**1** *not influenced by personal feelings or opinions in considering and representing facts*” (Concise Oxford Dictionary, 10<sup>th</sup> Edition). As the evidence makes clear, Mr Mickell arrived at his conclusion by way of his own assessment as reinforced by the views of his human resources manager and the Company’s director. With all respect to Mr Mickell, some of his conclusions (and therefore the views of the others) are unsustainable. They included a claim that a picture of an obese person was offensive as it might offend other obese persons; that the image of a masked person (if that is what it is) inside of stretch material was either objectionable or offensive or not; that another possibly depicted a transsexual person (i.e. a woman’s head projected on to a man’s body) and therefore was offensive; and that one of the images was offensive because it depicted body piercing. No objective criteria were advanced in support of these conclusions or in respect of the other conclusions reached by Mr Mickell.
43. Something more concrete is required than Mr Mickell and his colleagues’ personal views. That is because of the requirements of natural justice, the unacceptability of arbitrary behaviour and the fact that opinions as to what is objectionable/pornographic or offensive

are notoriously subjective. A perusal of newsstands and magazine covers illustrate the ready availability of explicit body images. The televised images of Wimbledon tennis competitors and their costumes, of tri-athletes and fashion parades, etc often leave little to the imagination. A fair and reasonable employer would therefore, I am satisfied, go beyond personal views and those of colleagues and others to whom they are accountable and seek out more reliable, objective measures. It is not a difficult task: during the investigation I understood Mr Mickell to concede that, had he sought the views of the Office of Film & Literature Classification, he anticipated he would not have received their endorsement that the material of concern to him was objectionable, etc. That is because the Films, Videos and Publications Classification Act 1993 defines "*objectionable*" as a publication that describes, depicts, etc "... *matters such as sex, horror, crime, cruelty or violence in such a manner ... likely to be injurious to the public good*" (s. 2 of that Act).

44. By that measure, and in the absence of any other relied on by the respondent, the objective bar as to what is objectionable and therefore injurious, is set well above the content of Ms Wood's email. I reach this conclusion notwithstanding the respondent's house rules reserving to the Company the right, at its sole discretion, to determine what constitutes offensive or inappropriate because of the requirement of s. 103A that the employer's actions met the requirements, objectively measured, of what a fair and reasonable employer would have done in all the circumstances at the time.
45. In determining all of the circumstances, it is also appropriate to note again that the email originated from Ms Wood's father (a person she could reasonably be expected to rely on in respect of what was and was not objectionable, etc), was sent from his workplace – a major local body, had not been caught by any computer filtering programme that employer or the respondent might have, and that there had been no complaints as a result of the applicant forwarding on the same material. These are objective considerations that militate against a finding of serious misconduct warranting summary dismissal.
46. It is therefore difficult to see, objectively, how the Company could identify any risk to public good or to any other measurable concern open to a fair and reasonable employer.
47. In the absence of the application of any other criteria, and after having regard to the facts and findings of the Employment Court in *Dr X* (above), I am satisfied the Company's reliance on its own views as to what constitutes objectionable, etc is not what a fair and reasonable employer would have done in all the circumstances at the time.

## Remedies

48. Ms Wood claims wages lost since 18 September 2006 until gaining employment in January 2007, compensation of \$12,000 for humiliation, etc and costs.
49. I have no reason to doubt the unchallenged evidence set out by the applicant at par 32 of her witness statement as to the efforts she made attempting to find work and to mitigate her losses (including moving back into her parent's home). I am therefore satisfied the Ms Wood should be compensated for those lost wages.
50. Ms Wood also gave compelling evidence as to the effect on her of her unjustified dismissal. I find that she has made out her claim for \$12,000.

## Contributory Fault

51. Ms Wood must accept some responsibility for the situation that gave rise to her personal grievance. That is because she was under a current warning for breaching Company email policy "*regarding forwarding jokes*" (document 5).
52. Despite the haphazard application of the Company's email policy I find the applicant needlessly forwarded an email that she thought funny: the apology offered by Ms Wood during the meeting of 15 September 2006 and acknowledgement she should not have forwarded it is evidence in support of a finding of contributory fault. I also take into account an email dated 26 September 2006 from the Company's human resources manager: while Ms Wood could not recall receiving it, the email specifically consented to her sending "*funnies*" provided they did "*not depict nudity, be sexist or religion oriented*" (document 16). While the application of these criteria is subject, each time, to the requirements of s. 103A, they are broadly sensible guidelines that Ms Wood could and should have had regard to.
53. Having regard to the above, it is appropriate therefore to reduce Ms Wood's remedies by 25%.

## Determination

54. For the reasons set out above, I am satisfied that Ms Wood was unjustifiably dismissed by the respondent and therefore direct Arthur D Riley & Co Limited to pay to her the following remedies:

- a. Wages lost from 18 September 2006 until January 2007 less 25%; leave is reserved to the parties to return the calculation of this claim to the Authority in the event that agreement cannot be reached. And,
- b. Compensation of humiliation, etc of \$12,000 (twelve thousand dollars) less 25%, i.e. \$9,000 (nine thousand dollars).

55. Costs are reserved.

**Denis Asher**

Member of Employment Relations Authority