

Attention is drawn to the
order prohibiting publication
of certain information in this
determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 177
5316525

BETWEEN X
Applicant

A N D SECRETARY FOR JUSTICE
Respondent

Member of Authority: Helen Doyle

Representatives: Jeff Goldstein, Counsel for Applicant
Alastair Sheriff and Sean Heywood, Counsel for
Respondent

Investigation Meeting 8 June and 19 July 2011 at Christchurch

Submissions Received: 19 July 2011

Date of Determination: 17 November 2011

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] The applicant seeks, and the respondent does not oppose, an order prohibiting from publication any medical evidence provided for the purpose of the investigation meeting. I prohibit from publication under clause 10 of Schedule 2 of the Employment Relations Act 2000 any medical evidence in this matter.

[2] The applicant also seeks permanent prohibition from publication of his name and any evidence that may otherwise identify him. I made an interim order for non-publication of the applicant's name until determination of the employment relationship problem. A permanent order for prohibition from publication of the applicant's name and any evidence that may identify him is opposed by the respondent.

[3] Mr Goldstein submits the Authority is required to balance the applicant's interests with the interests of the public. He submits that if the applicant succeeds in his application then his interests in not having his name published outweighs any public interest because to publish would taint the applicant's reputation and any deterrent type aspect of publication is meaningless in those circumstances. If the applicant was not successful, then Mr Goldstein submits there is a real risk to his health if publication takes place.

[4] Mr Goldstein submits that the situation is distinguishable from that in the Employment Court judgment of *X v. Auckland DHB* [2007] 66 where there was an issue of permanent name suppression because, unlike that case, there is no existing interest about this matter in the public forum and the applicant does not hold a public position as such.

[5] I start with the principle that justice should be open. Chief Judge Colgan said in *X v. Auckland DHB* at para.[232]:

Another consideration is the general principle that there should not be suppression of identity of persons in public positions in public institutions and especially following conclusions of cases where the extent of misconduct can be clearly established by reference to a public judgment.

[6] I accept Mr Sheriff's submission that the subject matter of the allegation against the applicant is far from the most serious allegation of misconduct that is in the employment law books of this nature. Mr Sheriff provided a number of cases of this nature where the names of employees have been published. There is no automatic name suppression for allegations of the nature as arise in this case.

[7] There is a risk that suppression of the applicant's name would create a suspicion over other employees of the respondent. That, together with the fact the applicant works for a government department that administers the judicial system are matters that, in the interests of justice, favour publication.

[8] I have carefully considered the medical evidence. The evidence about the effect of publication can be described as evidence of a general nature of publication. It was not evidence that enabled the Authority to be satisfied that there was a good reason on medical grounds pertaining specifically to X for a permanent non publication order.

[9] One of the more persuasive grounds I consider for the applicant in terms of this application is the ongoing nature of the relationship between the parties. The Authority must, in carrying out its role, support successful employment relationships. There is a successful relationship between the applicant and his employer and I have carefully considered whether publication could impact in a significant way on that. The evidence is clear that before this matter came before the Authority, it was dealt with in a confidential way by the respondent and as a result there is no knowledge of it outside of those involved in the disciplinary investigation and decision making process. He was cautioned against discussing his situation with others at the Ministry as the disciplinary process continued.

[10] The applicant is held in high regard by his line manager and he has a good work record and publicity is very unlikely given the evidence I heard to change that. The applicant lodged these proceedings. There is always a risk with litigation that there will be publicity about the outcome. I am not satisfied that there was anything before the Authority to support that publication would impact or change an otherwise successful relationship in a negative way aside from some short term embarrassment.

[11] I have then turned to the issue of the merits of the claim and whether, as Mr Goldstein submitted, success would support a non-publication order because otherwise there would be significant effect on the applicant's reputation. This is not the most serious type of case of this nature. It concerned unsolicited material sent by email to X. I accept that publication will be embarrassing for the applicant but it does not persuade me that success in this case is sufficient in the interests of justice to prohibit X's name from publication. Ultimately in this case, I am not persuaded that the interests of justice require a permanent order for non-publication of the applicant's name and any details that may identify him.

[12] The application is therefore declined.

[13] Prohibition from publication is an important issue to the applicant. I will make a further interim order prohibiting from publication his name and any details that may identify him for a period of 28 days from the date of this determination. This will enable a challenge to the Employment Court if the applicant wishes. At the end of 28 days, unless there is a further order of the Authority or Employment Court, this interim order will lapse and there will be no restriction on publication. I shall refer to the applicant hereafter as X.

Employment relationship problem

[14] X has worked for the Secretary for Justice hereafter referred to as the Ministry as a Court Registry officer since January 2006. His terms and conditions of employment at the material time were those in the expired Ministry of Justice/PSA Collective Employment Agreement 1 June 2007-30 June 2009.

[15] Material was found on X's work computer when a computer audit was undertaken for the Ministry by eRisk Consulting Limited (eRisk). This led to an allegation being put to X as below:

Your use of the Ministry's computer system to receive, access, hold and send messages containing inappropriate sexual content discovered under your login appears to breach the Ministry's policies including the code of conduct, use of computer, email, intranet and internet policy and the information technology pc/network operating standards.

[16] Following the allegation being put to X, there was a disciplinary investigation undertaken and the outcome was that X was issued with a first written warning by Murray Smith, the regional manager, District Courts for the Southern Region.

[17] X says that he was unjustifiably disadvantaged by the issue of the warning. He further says that the Ministry breached the terms and conditions of his employment and its good faith obligations towards him.

[18] X seeks compensation in the sum of \$15,000 or alternatively damages for breach of contract. X also seeks special damages for legal fees incurred during the disciplinary investigation process, penalties and costs.

[19] The Ministry does not accept that any of its actions were unjustified or that X has suffered disadvantage as a result. It does not accept that there are any grounds upon which X should be awarded compensation or damages, general or specific. It denies that there was any breach of good faith and does not accept that its actions were such that would make it liable for a penalty.

Issues

[20] The Authority is required to have regard to and determine the following issues:

- The reasons for the written warning;
- What policies applied to X in relation to his computer;
- Was there a full and fair investigation carried out in accordance with X's employment agreement and in accordance with the statutory obligations of good faith into the alleged conduct that disclosed conduct in breach of those policies;
- Was the decision of the Ministry to issue X with a first written warning justifiable in all the circumstances – s.103A Employment Relations Act 2000;
- If the decision to issue X with a first written warning was not justifiable in all the circumstances, what remedies should be awarded to X, are there issues of contribution and should a penalty be awarded; and
- Should special damages be awarded?

The reasons for the first written warning

[21] X received emails from three different people. I am not persuaded that identification of them serves any purpose in resolving this employment relationship problem. The first person was a solicitor and I shall refer to him as P. The second person was a good friend of X and I shall refer to him as D. The third person was X's partner and I shall refer to her as A.

[22] On 16 February 2010, X received an email from P with a video attachment. The video was detected by eRisk on 20 and 21 February 2010.

[23] On 24 February, X received an email from D with images attached. X forwarded six of those images on to other people. On 27 and 28 February 2010, eRisk detected these emails/images.

[24] On 19 March 2010, X received an email with attachments from A and it was still in his mailbox over the weekend of 20/21 March 2010.

[25] On 7 April, P sent another email with images attached. On 11 April eRisk detected these images.

[26] On 9 April 2010, an eRisk report was received by the Ministry about the emails.

[27] Mr Smith concurred with the findings of the final report from the investigator. The reason for the first written warning was that in retaining and, in one instance forwarding, the emails in the Ministry's system, X was in breach of the Ministry's use of computer, email, intranet and internet policy; and that by being in possession of the material in the workplace, that was deemed inappropriate, obscene, objectionable or likely to offend, he was in breach of the Ministry code of conduct. It was accepted that X had not requested that any of the emails be sent to him and whilst Mr Smith deemed that the images actually forwarded by X were inappropriate he was satisfied that there was no forwarding of those found to be objectionable.

[28] Mr Smith in arriving at his decision viewed the emails differently. He concluded that X retaining, and not deleting, the two emails with images and video attachment from P was serious misconduct. That was on the basis that the P email attachments/images were objectionable and Mr Smith concluded that X retained the material on his computer for a period of days when he should have deleted them. He accepted X did not forward this material to anyone else. As to whether X viewed the video image attachment to the email of 16 February 2010, Mr Smith in making his decision decided (unlike the investigator in her final report) that he could not be sure that the email attachment was viewed. He concluded knowledge on the part of X that the content of the video attachment to the 16 February 2010 email from P was, at the very least inappropriate, by having regard to the email's title heading *FW: Waterworld* and the attachment entitled *all_girl_squirt_gangbang.wmv* and X's earlier experience of having received objectionable emails from P.

[29] Mr Smith concluded that D's email images were inappropriate for the workplace and that A's email images were highly inappropriate. Retaining those images and, in the case of D's emails, forwarding them was considered misconduct.

[30] The investigator had recommended a final written warning in her report but Mr Smith, in concluding the appropriate penalty was an ordinary written warning, took into account the less serious nature of the [serious] misconduct as he had found it

and the fact that there were only three occurrences of misconduct and only one of actually forwarding material deemed inappropriate using the Ministry's system. He also took into account that X engaged in the investigation, had a longstanding record with the Ministry and evidence from X's line manager and recent job evaluation of his good character.

What policies apply to X in relation to his work computer?

[31] The relevant policies were referred to and attached to the letters X received on 5 and 10 May 2010 advising him of the allegations in relation to his use of the Ministry's computer system. These were the code of conduct, use of computer, email, intranet and internet policy and information technology pc/network operating standards. Ultimately, no breaches were identified of the information technology pc/network operating standards and nothing further needs to be said about that policy.

Ministry Code of conduct

[32] The code of conduct under a heading of performance of duties sets out employee responsibilities that include ensuring *you do not make or allow any unauthorised use of, or access to, the Ministry's property or resources, or information about its business or clients.*

[33] Appendix 1 to the code of conduct outlines examples of behaviour that the Ministry considers unacceptable and breach of the code amounting depending on the circumstances constituting misconduct or serious misconduct. This includes:

- *Possession of material in the workplace that is obscene, objectionable or likely to offend;*
- *Inappropriate use of the computer system (eg downloading and/or viewing inappropriate, objectionable or obscene material from the Internet; or using the computer system to send or intentionally receive such inappropriate, objectionable or obscene material);*
- *Any action which would bring the Ministry into disrepute.*

Use of computer, email, intranet and internet policy

[34] This policy provides amongst other matters:

Appropriate language/conduct:

Employees cannot distribute, publish, reproduce, transmit or access any information, software or other content which violates or infringes upon the rights of others, or which may be considered to be abusive, profane, of a sexual nature, offensive or defamatory from or on a Ministry of Justice computer.

Employees should be aware that all information stored, sent, used on the Ministry computer system, email system and the Intranet could be subject to official information and privacy requests. Employees should evaluate the appropriateness of information transmitted.

[35] X accepted that he was aware of the code of conduct and policies relating to computer use.

Was there a full and fair investigation carried out in accordance with X's employment agreement and in accordance with the obligations of good faith into the conduct alleged to be in breach of these policies?

[36] X was concerned about the delay between the alleged inappropriate emails/attachments having been sent to him and the bringing of the matter to his attention. In giving his evidence, X said that he felt, because of the delay in the Ministry advising there was something in his email that should not be there, he had been set up because further emails deemed to be inappropriate were then sent to him. He also felt where he was the recipient of material that he did not request that the Ministry systems should have prevented the material getting to him in the first place.

[37] I can understand why X would feel somewhat aggrieved about the delay in the advice to him that the audit had picked up material that should not be in his email. Whilst the emails and attachments had been identified earlier by an eRisk scan, the formal reporting by the company to the Ministry only occurred every few months or so. Any delay, therefore, was due to matters out of the control of the Ministry because they had no knowledge about it until the report was received. For completeness I am quite satisfied that there was not any setting up as such of X.

[38] Some workplaces may have been able to block the material or at least some of it getting through to an employees email. In the circumstances of this workplace I accept Mr Sheriff's submission that the Ministry is usually not in a position to block or prevent material coming from a solicitors office. Mr Sheriff referred to additional difficulties in preventing video attachments coming onto the system because some Court judgments have embedded videos, pictures and web links.

[39] The Ministry as a fair and reasonable employer is entitled to have regard to individual employee responsibility set out in the relevant policies for material on workplace computers. It appropriately took into account that the emails with various images/attachments had arrived unsolicited onto X's computer in both the final investigation report and when the decision as to penalty was made.

[40] The report from eRisk was made available to the General Manager of all District Courts in New Zealand, Tony Fisher, at head office. He decided that Mr Smith, could be the decision-maker and asked him to commence an investigation into the material.

[41] Mr Smith's actions then in commencing an investigation, appointing an investigator and drafting the terms of reference were referred to by Mr Goldstein in submissions as breaches of the relevant policy contained in a policy entitled *Managing employee conduct and behaviour*.

Policy on managing employee conduct and behaviour

[42] The policy requires the Ministry ensure fair and objective processes to determine whether or not misconduct or non-performance has occurred and that such processes will also take account of the obligation to operate in good faith at all times.

[43] The first alleged breach of the policy is that X's line manager, was not appointed investigating manager. Mr Smith asked another manager, Eileen McGregor, Area Collections Manager, to undertake the investigation. The policy anticipates that the employee's line manager will begin the investigation in clause 5 (a) where there had been non-compliance with department policy and practice or the law. Clause 6 provides that wherever practicable the investigator and delegated decision maker should be separate people and preferably the manager and the manager's manager.

[44] Whilst it is preferable in most cases that the line manager becomes the investigating manager, I am not satisfied that this is a mandatory requirement under the policy. Clause 6 supports that there is a degree of flexibility in the policy. As a matter of commonsense, there may well be situations that arise from either the employee's or employer's perspective where it would not be appropriate for the line manager to be the investigating manager and/or practical considerations such as the line manager being on leave prevent his or her involvement. The second unnumbered

bold heading at the top of the policy, **Policy Guidelines**, would also support some flexibility in its application.

[45] I am not satisfied that Mr Smith asked Ms McGregor to carry out the investigation for any improper or unlawful reason. Mr Smith thought, given the nature of the allegations and the need for confidentiality and experience, that Ms McGregor would be the suitable person to undertake the investigation. I accept he was probably aware of the good relationship X had with his line manager but he did not put that forward in evidence as justifying his decision that Ms McGregor undertake the investigation. As will become apparent later, X asked that his line manager be interviewed as part of the process as a character witness and he was. It is difficult to see any disadvantage in those circumstances and there is, I find, no breach of the policy in that regard.

[46] The second aspect that Mr Goldstein alleges breaches the policy is that Mr Smith, as delegated decision-maker at the start of the process, wrote a letter to X, drafted the terms of reference for the investigation and instructed Ms McGregor to undertake the investigation and then, at the end of the investigation, made the decision to issue a warning. It is alleged he overstepped the mark with respect to the separation of the investigator and decision-maker.

[47] I am not satisfied that Mr Smith, in appointing an investigator, was acting outside of the terms of the policy. The letter he wrote to X was, putting an allegation of predetermination in relation to its contents aside for the moment, unexceptional and nothing that would prejudicially impact on the preferred separation provision in the policy of the decision-maker and investigator in a disciplinary matter. Finally, the policy does not prohibit the preparation of terms of reference by the decision-maker and I find no breach in that regard.

[48] It was alleged that the wording used in the terms of reference and the letter to X was such as to suggest a predetermined view had already been reached by Mr Smith that the emails/attachments contained inappropriate sexual content. I accept there is some justification the view that at an early stage Mr Smith did consider the material on the computer contained inappropriate sexual content. Mr Sheriff submits that the Authority needs to consider the wording in the eRisk report that refers to inappropriate/ partial nudity and highly inappropriate content assessment and would

no doubt have been before Mr Smith when he prepared his letter. I accept that that may well have had some influence on Mr Smith.

[49] I shall return to consider whether, after analysing the process as a whole, there was predetermination of this matter by the decision-maker, Mr Smith. It is artificial at this stage, in isolation of the overall process, to reach a view on that. It is also the case that X did agree that the attachments to the emails from P sent to him in February and April were objectionable so there can be no unfairness there. The allegation of predetermination as to how matters were stated at that early time could only have any bearing on the early assessment of emails/images from D and A as containing inappropriate sexual content.

5 and 10 May 2010 letters

[50] Mr Miles met with X on 5 May 2010 and told him about the report from eRisk and gave him a letter from Mr Smith setting out the allegation and advising him that Ms McGregor was the investigator. Attached to the letter were copies of the relevant policies, the terms of reference for the investigation and the computer audit report.

[51] On 10 May 2010, Ms McGregor commenced her investigation and provided X with a letter outlining the allegations and requesting X's attendance at a preliminary meeting on 12 May 2010 at 9am and a substantive meeting on 14 May 2010 at 9am. X was advised in the letter of his right to representation. It was made clear in the letter from Ms McGregor that the purpose of the preliminary meeting was to provide X with a copy of the eRisk report and any other documents/videos, to discuss the seriousness of the concerns, explain the investigative process, obtain the names of other people who X believed should be interviewed and explain the right to representation. All of this was in accordance with the managing employee policy.

[52] Prior to the preliminary meeting on 12 May 2010, X instructed his solicitor, Katherine Dalziel, who was from that time involved throughout the process. At the meeting on 12 May 2010, X was given a memory stick which contained the incident report produced by eRisk and printouts of the information it contained. A video clip was also provided

Preliminary meeting 12 May 2010

[53] This meeting was attended by X and Ms Dalziel, Ms McGregor and senior human resource adviser, Christopher West.

[54] Ms Dalziel gave evidence at the Authority investigation meeting that there were three matters that she put forward on behalf of X at the preliminary meeting that were not recorded in the final investigation report. The first was that X denied any wrongdoing, the second that he intended to fully and honestly engage with the process and was very upset and anxious as a result of the allegations and the third that she had notified an expert from the Department of Internal Affairs about the matter. In relation to these three issues, I find that there was mention of the Department of Internal Affairs in Ms McGregor's final investigation report. The final report contained information that the Department of Internal Affairs had been in contact with the Ministry to advise that it deemed the video clip sent by P to X on 16 February 2010 objectionable and requested some information from the Ministry about it. X's explanations to the allegations were included in the final report and I do not find any unfairness that the other matters were not specifically mentioned.

[55] At the preliminary meeting, Ms Dalziel also requested that X's line manager be interviewed. The line manager was interviewed and also answered some other questions put by Ms Dalziel before the decision was made but only after the X had attended a substantive disciplinary meeting. I am not satisfied that this approach was unusual or unfair. Having carefully considered this issue, I agree with Mr Sheriff's submission that nothing that manager said could have changed what X said at his earlier interview. There was no unfairness in that regard. The line manager's statements went to X's character and were clearly taken into account by Mr Smith as decision maker.

Provision of further information between 12 May and 15 June 2010

[56] A further data stick (memory stick No 2) was provided to Ms Dalziel on 14 May 2010. This had only become available at this time and had been given to Mr West. The memory stick contained a spreadsheet of images sent from P to X in April 2010 – see document 38.

[57] During the period between the dates mentioned above Ms Dalziel made a number of requests for further information from the Ministry's IT expert through Ms

McGregor. She advised Ms McGregor in one of her emails that she had consulted with an expert in IT investigations from another government agency. Following on from that Ms Dalziel asked a number of pertinent technical questions of Ms McGregor about when the files pertaining to the allegations were accessed and how attachments were stored etc. Ms McGregor had to forward the questions to the IT division at the Ministry. The meeting on 14 May 2010 was adjourned at Ms Dalziel's request. Ms Dalziel also requested an adjournment of the next date for a planned substantive disciplinary meeting – see email 18 May 2010 4:18pm. Some issues arose out of the exchange that then followed. I shall address them.

[58] Ms McGregor, whilst not opposing such an adjournment, set out in an email dated 18 May 2010, amongst other matters, that:

It is prudent that we still have the meeting. There may be some information we are not yet in a position to be able to provide by tomorrow or unable to provide at all. However, that should not be an impediment to us meeting and discussing the substantive issues that have already been raised with X in previous correspondence, and the information that has already been produced.

[59] Ms Dalziel responded strongly to this in an email sent on 18 May 2010 at 5:06pm. She questioned Ms McGregor why she thought a meeting would be prudent and asked her to explain that. It was alleged that Ms McGregor's use of the word *prudent* in relation to a further meeting was one of the matters which indicated predetermination on her part. Having considered the emails, Ms McGregor did, I find, make a response to Ms Dalziel at the end of a long email she sent her dated 19 May 2010 sent to Ms Dalziel at 11:26am when she said the following:

While we have not been able to provide the above information we do not believe it changes the substantive allegations or supporting information that has already been provided to you in order for X to answer questions around the allegations that have already been formally put to him.

We have not interviewed [line manager] at this point as it is our intention to interview him after our substantive meeting with X. Notes from this interview will be provided as part of the draft investigation report that you will be given an opportunity to make submissions on, prior to finalisation.

Given the above information should you now wish to revisit your decision and meet with us today please advise without delay. Failing that, once the rebuilt mailbox and any answers we are able to provide in respect of the technical information is available, we will reschedule the substantive meeting with X.

Personally I wish to progress the meeting as I think it will be beneficial to both parties. However if it's your decision to delay the meeting then I have no choice but to accept that delay.

[60] In her evidence in answer to the Authority, Ms McGregor said that she thought it would have been beneficial to have the substantive meeting, understand X's response and then have some idea of what further questions/information she may need to ask/obtain in relation to the investigation. Ms McGregor explained that she wanted to expedite the process and to the extent that she did not specifically answer Ms Dalziel's question at the time, she thought that was because she had simply agreed to delay the meeting.

[61] I do not find any issues regarding predetermination or otherwise about that matter.

[62] By email dated 9 June 2010, Ms McGregor emailed Ms Dalziel to advise her that she had now received the further information Ms Dalziel had requested and was collating it. By way of attachments to a letter dated 9 June 2010, Ms McGregor provided a summary of all the questions Ms Dalziel had asked and the answers from the Ministry. There were some questions that the Ministry was unable to answer and these were identified as follows:

Q: When the emails are accessed and how many times, if and when the images were accessed and when the file was deleted.

A: Current systems and processes are unable to provide this level of information.

[63] The Ministry was unable to tell from its systems and processes when the emails and attachments were opened or deleted.

[64] There was a reconstruction undertaken of X's mail box showing both screen snapshots and sent items between 1 February and 3 March 2010 and this reconstruction was also attached to the 9 June 2010 letter. That such a reconstruction was to be undertaken had been indicated by Ms McGregor to Ms Dalziel in earlier email exchanges as set out above.

[65] Ms McGregor indicated in her letter to Ms Dalziel that that was all the information that was available to be considered in the investigation together with the substantive interview of X (yet to take place) and the requested interview of the line

manager planned for after the substantive meeting with X. It was alleged that Ms McGregor had not provided all the information at that time. I shall refer shortly to some omitted emails but looking robustly I do not find this compliant made out. .

[66] There was some suggestion that the investigation to the point of the substantive disciplinary meeting had been piecemeal. Objectively assessed and I have already dealt with the second memory stick, Ms Dalziel quite properly requested between the preliminary meeting and the substantive meeting further information. It took a little while to obtain but once obtained, was collated by the Ministry and then provided to Ms Dalziel. It may have been desirable for that to have all been available at an earlier date, but I am not satisfied there was any unfairness because it was provided before X was required to give his explanation to the allegations.

15 June 2010 substantive disciplinary meeting

[67] X attended this meeting with Ms Dalziel. Ms McGregor attended with Helen Manning, another senior human resource adviser. There was a concern from X there had been a change in the human resource adviser from Mr West to Ms Manning. Ms McGregor explained in her evidence that there had been a sudden bereavement in Mr West's family and therefore the change was at short notice. I am satisfied it was not for any other reason and although the failure to give advance notice of the change was unfortunate, it could not be helped.

[68] I have had the benefit of typed notes from the Ministry and Ms Dalziel's handwritten notes. Ms Dalziel prepared in anticipation of the substantive disciplinary meeting a careful submission in relation to each of the emails and images. She read this out after a short initial discussion. Ms Dalziel felt her request to read her submission out was received coolly from Ms McGregor. Ms McGregor's evidence about this was that she felt it was "*a bit different*" reading a submission at the start because normally something of that nature is provided at the end of such a meeting. She said she found the submission helpful. Nothing particularly turns on this matter. Ms Dalziel was able to read her submissions out when she wished to do so and I am satisfied that Ms McGregor had regard to them.

[69] X was then asked a series of questions that had been pre-prepared. In summary, the explanation put forward by X was that he was aware of the policies relating to email, internet and intranet use. He knew that when he received

inappropriate emails then he needed to delete them straight away. He accepted that he had received the emails, images and the video referred to in the eRisk audit report. He accepted that the video attachment to the email from P sent to him on 16 February 2010 was objectionable as were the attached images to the email sent to him from P in April 2010.

[70] I now turn to the explanations given about the emails at the substantive disciplinary meeting. Both X and Ms Dalziel stated that when X became aware of the nature of the attachments to the P emails he immediately deleted the email. X stated at one point when he saw the 16 February 2010 email he opened and deleted it on 16 February. He was then questioned about what he meant by *opened it* and responded that *he opened the email, opened the image, realised what it was and deleted it straight away*. Further in his interview X answered a question about his reaction when he received the video clip as *inappropriate* but then when asked what he did when he received it he said *I don't recall opening the video –hard to say. If I did I would have deleted it straight away*. When he was asked when he deleted the video clip from his email mailbox he said *straight away*. When asked why the emails were still in his inbox on 1 March 2010 he responded *there was no way that I had it in my inbox on 3 March*.

[71] Knowledge of the attachment content is a necessary element for a fair and reasonable employer in concluding any breach of the policy in then retaining objectionable material on the Ministry system. Mr Smith in making his decision and this was a different conclusion to that ultimately arrived at by Ms McGregor found that *there is no unequivocal evidence that you viewed the objectionable material in the file attached as part of the P email of 16 February*. Mr Smith concluded that X must have known that the 16 February 2010 email/attachment was at the very least inappropriate because of the title to the attachment and email and X's statements at the substantive disciplinary meeting that P had sent some earlier objectionable emails to X to the extent that he had asked him not to send objectionable emails.

[72] Objectively assessed that conclusion arrived at by Mr Smith about knowledge of the attachment is different and more favourable to X than that arrived at by the investigator in her final report who relied it is clear on X's statement that he did open the attachment and then deleted it with the reconstructed mailbox showing it still there on 3 March 2010 some 15 days later. The Authority notes at this stage that there were

no questions to X about the title of the email and attachment sent to X on 16 February 2010 although the title to the attachment was set out in the material supplied to Ms Dalziel on 9 June 2010. X said in his evidence at the Authority investigation that had he been asked that question he would have explained his email box was set up in such a way that he cannot see the name of an attachment.

[73] X was asked some questions at the disciplinary meetings about interactions with P. Mr Smith placed reliance on the answers to these questions in making his eventual findings as to knowledge of inappropriateness. X was asked over what period had P sent him emails and he answered *approximately a year* and he was asked whether they had been inappropriate and X answered *Yes – some objectionable but the majority are appropriate*. X was asked what he had done to stop the email being sent to him at work and he replied *Have asked him not to send me objectionable emails* and later when asked how responded *verbally*. X was also asked specifically in relation to the video clip whether he told P it was inappropriate and to stop sending such material and he responded *I don't recall*.

[74] These answers about emails from P assume some importance. That is because at the Authority investigation meeting X, in response to questions from Mr Sheriff, said that he was referring when he answered questions at the disciplinary meeting about telling P not to send objectionable emails only to the emails and images sent by P in February and April 2010 that were the subject of the allegations he was answering. He further said that he only asked P not to send objectionable emails after receiving the 16 February email. With due respect to X I find that a fair and reasonable employer would have taken the meaning from the answers that Mr Smith did about earlier emails sent from P and what X said he advised P in relation to objectionable emails. I have formed this view from reading the answers given to this matter as a whole.

[75] X and Ms Dalziel disputed that the emails sent to him from D and A were inappropriate in any way. Ms Dalziel described the photographs from D as a humorous series showing Liverpool Soccer Club Supporters and that X did not believe in forwarding the emails of women with bare shoulders/midriff he was in breach of any policy. An extract was produced from a community newspaper that it was said on behalf of X showed one of the images in the series. In terms of A's

images similar explanation were given that they did not breach any policies and that the women were fully clothed although there was cleavage showing.

[76] X said Ms Manning reacted negatively to a submission by him at the substantive disciplinary meeting that the email attachments from D were not objectionable or inappropriate. He said that her response to the community newspaper was not recorded and she had clearly formed a view on the images from D. In his written evidence, X said that in relation to the draft investigation report he believed Ms McGregor was determined to record he had admitted opening an email in the full knowledge of the content of the attachment to it and retained it. He referred to a facial gesture at that time. These allegations were not accepted by Ms McGregor. I am not satisfied that they have any bearing on the fairness of the process overall.

[77] X was advised Ms McGregor's draft report was likely to be available when he was away on leave between 23 June and 9 July 2010.

[78] On 29 June 2010, the line manager was interviewed and, as foreshadowed in the extract from the email dated 19 May 2010 from Ms McGregor to Ms Dalziel at para. 59 above, the notes of the interview were attached to the draft report.

[79] The draft report was not received until 27 July 2010. Ms Dalziel in subsequent correspondence referred to this delay between 15 June and 27 July 2010 as *particularly egregious*. When asked by the Authority about the reason for the delay, Ms McGregor said that it was in part due to the fact that it was the end of year and there were financial commitments she was involved in. She said that she needed also to be clear about what could and could not be established in terms of the matter involving X. She said that she was being careful and the matter took a bit of time.

[80] The policy on managing employee conduct and behaviour does support careful consideration by the investigating manager:

- (d) *The investigating manager must carefully consider both the information gathered and the explanation or response by the employee and give appropriate weight to the facts before reaching a conclusion.*

[81] There was some delay, it was not substantial and I do not find it was unfair.

Draft report

[82] On 26 July 2010, Ms Dalziel was sent a copy of the draft report and given an opportunity to provide some feedback to it. She asked for more time to respond until 2 August 2010 which was granted by Ms McGregor. Ms Dalziel also requested some further information from IT and an opportunity to talk to the line manager herself. Whilst Ms McGregor was not opposed to such a request she indicated in an email to Ms Dalziel that as she was not his manager she could not require him to talk to Ms Dalziel and that ultimately such a request would have to come from Mr Smith. The further emails from IT were provided and whilst there was criticism about the content of these emails and another one from Ms McGregor I do not find anything turns on them. Ms Dalziel had an opportunity to comment on them. The earlier omission I accept of these from the report was because it was felt that the content of the emails was sufficiently summarised therein. For completeness because it was alleged I am not satisfied that they indicated pre-determination on the part of Ms McGregor.

[83] The policy on managing employee conduct and behaviour in clause 5(e) provides that once the investigating manager has had time to consider all the facts and the employee's comments and explanations, they should present the finding to the employee along with the recommendations as to how to proceed and conclude the matter in a meeting. The purpose of the meeting is to explain to the employee what decision has been reached by the investigating manager. It is common ground there was no such meeting and I shall return to that matter shortly.

Submission of personal grievance and response to draft report

[84] On 2 August 2010, Ms Dalziel raised a personal grievance in a nine page letter to Mr Smith on X's behalf claiming unjustified actions causing disadvantage in relation to the process to date. The letter was nine pages long. In the letter Ms Dalziel requested that the Ministry consent to mediation.

[85] On the same day, Ms Dalziel responded, without prejudice to that personal grievance, to the draft report in a letter to Ms McGregor and raised 21 points that included that X was confused by the way the interview questions were framed and that there has been a *significant misunderstanding in X's response and confusion between opening an email and opening an attachment*. Ms Dalziel said that X was

clear that he *deleted the email once he had opened the email for a second time AND opened the attachment*. In short she said that the evidence the Ministry had [X's reconstructed mailbox] suggested the email remained on the system but that there was no evidence that X knew of the content of the attachment and that he retained it in breach of Ministry policy. She further stated in her letter and this was the first reference to titles or emails and attachments that there was nothing in the subject line of P's email to alert X to the nature of the attachment.

[86] Ms McGregor commented in an attachment to the final report on each of Ms Dalziel's submissions and in doing so referred for the first time to the title of the emails, video attachment and image attachments indicating that they were likely to be inappropriate in a work environment and was not work related.

[87] On 5 August 2010, Mr Smith wrote to Ms Dalziel acknowledging receipt of the personal grievance and advising that as he did not have the final report from Ms McGregor and no detailed knowledge of the process or findings he was not in a position to respond to the concerns in a mediation setting. He advised in his letter that, in order to ensure the integrity of the process of investigation and fairness in decision making, he would need to await the receipt of any final report before participating in mediation. He stated that this would then allow him to better understand the process of investigation and its findings and consider any submission that Ms Dalziel made.

Final investigation report and findings

[88] On 13 August 2010, Ms McGregor provided the final investigation report to Ms Dalziel. It had been provided to Mr Smith on 10 August 2010.

[89] In relation to the emails from P dated 16 February 2010 with a video attachment and 7 April 2010 with images attached, it was concluded that X did not delete these emails and attachments immediately but retained them on the Ministry's system and in doing so was in breach of the use of computer, email, and intranet and internet policy. The 16 February 2010 email was still sitting open with the video attachment as at 3 March 2010 and the 7 April email and images were in the mailbox when the audit took place over the weekend 10 and 11 April. There was no reconstruction of X's mailbox for March and April 2010. By retaining the material it was found that X was in possession of material in the workplace that was obscene,

objectionable or likely to offend at the time the initial security scan [by eRisk] and he retained it in his mailbox in breach of the Ministry's code of conduct because it was an inappropriate use of the computer system.

[90] In relation to the email from D dated 24 February 2010 with images that were found in breach of the use of computer, email, intranet and internet policy X did not delete the email and images immediately and was in possession of material in the workplace that was inappropriate and suggestive and it was inappropriate for such images to be retained in the mail box up to at least 3 March 2010. In relation to the D email images forwarded on by X to internal/external recipients on 24 February 2010, that this was a conscious decision to distribute images that were inappropriate and suggestive to internal and external recipients.

[91] In relation to the email from A, that X did not delete this email immediately but retained it on the Ministry's system and that by doing so he was in possession of material that was obscene, objectionable or likely to offend, or at the very least highly inappropriate, at the time the security scan occurred and it was inappropriate use of the computer system and in breach of both the code of conduct and the use of computer, email, intranet and internet policy.

[92] The investigation report found that the retention of the emails and attachments from P constituted serious misconduct and retention of the other emails misconduct. Further Ms McGregor concluded that X maintained a stance throughout the investigation that was not supported by the evidence and led Ms McGregor to the conclusion that X was being less than truthful and that the series of events demonstrated a pattern of behaviour over a period of three months. The recommendation was a final written warning.

Events leading to the disciplinary outcome

[93] On 16 August 2010, Mr Smith wrote to Ms Dalziel and advised that he had received a copy of Ms McGregor's final report and accepted the preliminary findings therein. He advised in his letter that penalties had not yet been finalised and he was open to receive submissions regarding the findings of the report and/or the appropriateness of penalties. He invited such a submission to be sent before the final meeting in the process and set that date as 23 August 2010 at 2pm. Ms Dalziel duly made some submissions in writing. The managing employee policy set out various

steps required once the final report was completed. If the decision maker accepts, as Mr Smith did, the findings of the investigator and, there is a possibility of disciplinary action, the policy requires the delegated decision maker to organise a meeting with the employee and their representative to confirm the acceptance of the finding by the decision-maker and to discuss the proposed penalty – 5 (e) of the policy.

[94] Ms Dalziel responded to Mr Smith on 19 August 2010. In her letter she referred to the difficulty of making submissions on penalty when the findings were unjustified. She referred to Ms McGregor for the first time in the attachment to the final report setting out a response to Ms Dalziel's submissions to the draft report that the titles of the emails, video attachment and image attachment indicated they were likely to be inappropriate. Ms Dalziel stated in her letter that had not been put to X. She stated that despite Ms McGregor's lack of faith in X he is adamant that he did not look at the attachments and then hold onto the emails. Further she said that he has not been given a chance to talk to Mr Smith about this directly and this is unfair. She said in relation to penalty, whilst disputing X breached any duties, that if X had looked at the attachments and then held onto them then with mitigating factors the best the breach would warrant a warning. She said in her letter that she was unsure whether Mr Smith still wanted to meet with X on Monday but her offices were available for such a meeting and she asked for a response from Mr Smith in respect of her request for mediation.

[95] Mr Smith responded to Ms Dalziel on 23 August 2010. He confirmed that the meeting scheduled for the afternoon of 23 August 2010 was to specifically provide an opportunity for X to meet with him and provide any submissions relating to the findings of the investigation and the reports recommendation relating to penalty. He accepted in a letter of the same date to Ms Dalziel that it may be preferable to seek the assistance of a mediator and advised that the meeting scheduled for that day was suspended pending that assistance.

[96] I accept Mr Smith clearly intended to have a meeting that would have satisfied the requirements of the managing employee protocol - clause 5(e). The agreement to attend mediation overtook at that stage that step.

[97] There was then a long gap in the process with the mediation taking place eventually on 26 October 2010. There was no resolution reached.

[98] On 9 November 2010, Mr Smith wrote again to Ms Dalziel in very similar terms to his letter of 16 August 2010 advising that he was proposing to accept the recommendation of the penalty of the final written warning in the investigation report from Ms McGregor subject to any submission he may receive from Ms Dalziel. Mr Smith said in his letter that Ms Dalziel may wish to make submissions as to penalty in writing or alternatively or in addition she may present such a submission in person. The date of 17 November 2010 was set as a deadline.

[99] On 16 November 2010, Ms Dalziel wrote to Mr Smith. She made it clear in her letter on behalf of X that it was considered that the findings were unjustified and not ones that a reasonable employer would come to in the circumstances of the case. She wrote in her letter that if X had looked at an attachment in an email containing inappropriate, offensive or objectionable material and then without forwarding it held onto that material, at best the breach would warrant a first written warning. Ms Dalziel set out six mitigating factors. In relation to whether or not she wanted to meet again with Mr Smith Ms Dalziel said she was not sure whether having received the written material Mr Smith still wanted a meeting with X and that her offices were available if he wished to discuss the submissions with him further. No meeting took place.

[100] On 8 December 2010, Mr Smith met with X and Ms Dalziel and delivered a letter of some 5½ pages dated 7 December 2010 which set out the outcome of the disciplinary process of a first written warning and the reasons for that outcome. I am satisfied that Mr Smith had regard to all the mitigating factors Ms Dalziel set out and took those into account in making his decision about penalty.

Conclusions

[101] In *X v District Health Board* two separate considerations were referred to in relation to the test of justification under s 103A of the Act. These are what the employer did in this case issuing X with a first written warning and the justification and grounds for that and the other is how the employer acted in the process leading to those outcomes. The statutory obligations of good faith dealing inform the decisions as to how the employer acted. The Authority must be satisfied in relation to both substance and procedure that what the employer did and how the employer acted were what a fair employer would have done in all the circumstances at the time the alleged disadvantage occurred.

[102] It was alleged that most of the aspects of the investigation and decision making process in this matter were unfair, the outcome was pre-determined and that there were breaches of the managing employees policy. I am mindful that the Authority must have regard to overall/substantial procedural fairness rather than undertake a pedantic scrutiny of the employer's investigation: *Clarke v. AFFCO NZ Ltd* [2011] NZEMPC 17. I have dealt with some of the issues advanced as unfair as I have worked through the factual matrix.

[103] During the process leading to the issuing of a first written warning X was advised about the allegations he was facing and the relevant policies that it was considered may have been breached. He was well represented throughout the disciplinary process and was provided with information in order to properly understand and respond to the allegations. He had an opportunity to advance his explanation and then there were several opportunities for submission about the preliminary findings, final investigation report and about penalty.

[104] On 2 August 2010, Ms Dalziel raised a personal grievance of unjustified action cause disadvantage and a large number of concerns about the process that had taken place to that point in time. When Mr Smith was in receipt of the final investigation report, he agreed to attend mediation and the process was stopped whilst that process was undertaken.

[105] Mediation was unsuccessful. Ms McGregor had recommended a final written warning but Mr Smith took into account the contents of Ms Dalziel's letter of 16 November 2010 in relation to penalty and his findings that there was no unequivocal evidence about viewing the objectionable material to find the seriousness of the serious misconduct reduced and imposed a first written warning – described in the managing employee policy as an *early warning mechanism*. It was where there was an allegation of serious misconduct a first step disciplinary outcome

[106] There were two breaches of the managing employees' policy where meetings were not held. The first breach was that there was no meeting at the time at which the investigator presented the findings and explained what decision had been reached and how that decision had been arrived at [draft report stage]. Ms Dalziel was given an opportunity though to put written submissions forward over a period longer than the usual 24 hours referred to in the policy. It was only after those written submissions had been provided Ms McGregor mentioned the title of the February email and

attachment. I am not satisfied that a meeting would have resulted in a different outcome at that particular point in time. Whilst a breach of policy should not ideally occur it had no overall effect on the substantial fairness in the circumstances.

[107] I have then had regard to the second breach in relation to the meeting required in the protocol between the decision-maker and the employee to confirm the acceptance or otherwise of findings in an investigation report and to discuss the proposed penalty. Mr Smith initially suggested a meeting in accordance with the policy. Mediation overtook that step and a further meeting did not take place in accordance with the policy before a decision was made by Mr Smith. Mr Smith did offer a meeting for submissions to be made in person and I accept Mr Sheriff's submission that Ms Dalziel's response was somewhat equivocal. Equally she made no clear statement that X did not want to meet. Ms Dalziel in her evidence said that it was not for her to tell Mr Smith how to do his job. In breach of the policy there was no meeting before a final decision including penalty was made. Ms Dalziel did make further submissions and I am satisfied that due weight was given to those.

[108] There one very clear procedural difficulty for the Ministry. X never got an opportunity to answer any questions about the title of the 16 February email and its attachment but Mr Smith concluded that they were of a nature that X must have had knowledge that they were at the very least inappropriate. I find that the failure to have a final meeting required by the policy before a decision was made is a fundamental one and not simply a technical procedural breach. That is because had a meeting been held then it is likely there would have been discussion about the titles of the email/attachment. That failure goes to the substantial fairness.

[109] One of the sustained criticisms of this process was that there was predetermination on the part of Ms McGregor and Mr Smith that X had on his computer inappropriate material and he knowingly held onto it. Most of this related to the words used in the terms of reference and the initial letter containing the allegation right at the start of the process. In a fair process the outcome must not be pre-determined until the evidence and explanations are considered. It would not be appropriate for the Authority to simply have regard to words used and not the process overall and the outcome. It is clear that in making his final decision Mr Smith, far from closing his mind, took careful account of the evidence and Ms Dalziel's

submissions including those about X's confusion regarding opening and deleting emails and attachments that directly went to knowledge and those regarding penalty.

[110] He did not follow Ms McGregor's recommendation as to penalty instead imposing a first written warning only and an analysis of the decision reflects that his conclusion as to whether the attachment was actually viewed [knowledge] played a significant part in that. X agreed the attachment and images to P's emails were objectionable. Mr Smith gave careful reasons why he considered the images sent from D and forwarded to others by X to be inappropriate and those from A highly inappropriate in his written decision containing the warning. X and Ms Dalziel strongly argued to the contrary and Mr Smith recorded this in his warning decision. Not accepting these arguments is not an indication of predetermination. I do not find objectively assessed that an allegation of predetermination is made out on the part of Ms McGregor or Mr Smith.

[111] I find that a fair and reasonable employer would have questioned X about the title of the email and attachment relied on by Mr Smith arriving at his decision to form a view that X must have had knowledge that the content of the attachment was, at the least inappropriate. X says that had he been asked he would have said that his computer was set up in such a way that he could not see the attachments. That is an omission that I find impacted on the substantive fairness of the process and as a result the investigation was not a full and fair investigation that a fair and reasonable employer would have undertaken.

Was the decision of the Ministry to issue X with first written warning justifiable in all the circumstances – s.103A Employment Relations Act 2000?

[112] I have found one aspect of the process to be unfair and not that a fair and reasonable employer would done in all the circumstances. It was an important matter and went directly to knowledge of the content of particularly one of the attachments. Objectively assessed the video clip attachment was a matter that assumed in the final decision making significant focus. The Ministry would not want to have such a clip retained on its system.

[113] Mr Goldstein in his submission states that the difficulty for the Ministry was that it could not ascertain when or even if X had accessed the attachments to the P emails or when he had deleted the attachments or emails. He submitted that all it could determine was when the email (not the attachment) was open in the applicant's

inbox and that it may well have been that X deleted the attachments and left the emails open. Mr Goldstein questioned Ms McGregor on that possibility and she responded in accordance with her final report findings that the both emails were on the system at the times referred to earlier **with** the images and video attached. I could not find anywhere where Ms Dalziel had throughout the process raised this possibility of the attachment being deleted separately to the email. I do not find therefore a basis for that.

[114] Mr Smith knew that the Ministry's IT system could not establish when the attachment was opened and/or deleted by X. Knowledge of its contents and retention in the face of that knowledge was a fundamental element to be established in terms of the two counts of serious misconduct found. X's mailbox was therefore reconstructed but only up to 3 March 2010 and not for the months of April and May. I am satisfied that the mail box would enable a fair and reasonable employer to conclude that the 16 February 2010 email with video attachment remained in that mail box until 3 March 2010 some 15 days after it had been sent to X. The email was shown as open. The second email from P with objectionable images fell outside of that reconstructed mail box time frame because it arrived in April but it was still on the system some three to four days after it arrived.

[115] The basis for Mr Smith imputing knowledge to X of the attachment to the P email was different to Ms McGregor and had never been put to X for explanation. X said that if he had been asked he would have explained that he could not see the attachment title because of the way he has his mailbox set up. The retention of these two emails and attachments was considered serious misconduct although less serious than that found by Ms McGregor. I find that both of these emails must therefore have been the significant reason for the first written warning. If X had knowingly retained these objectionable images on the system then a fair and reasonable employer would have imposed a warning. Of the two emails Mr Smith I find focussed primarily on the first email from P with the video clip in the reasoning in his written decision.

[116] The procedural failure by Mr Smith to put one of the reasons that X must have had knowledge from the title of the first email and attachment from that they were at the least inappropriate overlaps the substantive justification in this case to the extent that I find without first giving X that opportunity to explain a fair and reasonable employer would not have proceeded to give X a first written warning.

[117] I find that a fair and reasonable employer would in all likelihood have concluded in terms of the D and A emails that they were the sort of emails which were not suitable for the workplace. The focus would then have shifted to whether X properly understood that the images of woman dressed in cheerleader type outfits was inappropriate and not suitable for the workplace and forwarding together with the more inappropriate images from the A email. X's consistent explanation was that he was did not believe that the D and A images were inappropriate.

[118] Whilst there was forwarding by X of the cheerleader styled female images there was no forwarding of the more inappropriate A images. The A images showed cleavage but were X said in his evidence at the end of a number of other images on a motivational email. I find if the A and D images had been the only images detected then a fair and reasonable employer would have given consideration to an outcome short of a written warning. X had a good work record, no previously disciplinary matters and was considered by his line manager to be of good character. Objectively assessed, whilst the Ministry was entitled to say that images forwarded by X from the D emails were inappropriate for the workplace, they are the sort of pictures of women that appear throughout newspapers and magazines. There was nothing to suggest that they had caused offence to the recipients.

[119] I find a fair and reasonable employer would have taken into account that it could only be established the more inappropriate A images remained undeleted in the mailbox for a few days. If there was to be a warning as opposed to an educational type caution or firm discussion about these images a fair and reasonable employer would turn their mind to the managing employee policy which refers to a first step verbal warning in relation to lower level misconduct issues rather than serious misconduct.

[120] For the above reasons I find that the decision to issue X with a first written warning was not a decision that a fair and reasonable employer would have reached in all the circumstances and it is therefore unjustified. X was disadvantaged in those circumstances by the issue of a written warning

[121] Whilst this employment relationship problem has been lodged in the alternative as a grievance or breach of contract I find that X has a personal grievance that the issue to him of a first written warning was an unjustified action that

disadvantaged him and he is entitled to remedies under the Employment Relations Act 2000.

Remedies

The warning

[122] I have found that the issue of a warning to X was an unjustified action. The consequence of that finding is that X is reinstated to the position he was in before the warning was issued, as if, no warning had been issued. The Ministry is to take steps to reflect this finding on X's file. I accept Mr Sherriff's submission that the Authority powers are unlikely to extend to ordering destruction or disposal of records.

Compensation

[123] The evidence about the compensatory award claimed supports that the uncertainty surrounding the disciplinary process and outcome caused X stress and anxiety. It impacted on his overall enjoyment of a holiday he took during the process, he withdrew from a sporting activity and he described generalised anxiety and agitation. I am not satisfied though that the evidence about the stress suffered during the disciplinary process was significantly more than the stress any employee going through such a process would suffer. It was inevitable that a disciplinary process would need to take place once the security scan had picked up the more seriously objectionable images.

[124] X had three consultations with his doctor on 18 August 2010, 7 September 2010 and then 31 January 2010. There was therefore a gap between the issuing of a warning to X on 8 December 2010 and the visit to the doctor that resulted in a weeks leave. I accept Mr Sherriff's submission that the link therefore between the disciplinary outcome and the stress resulting in a week's leave is not as strong in those circumstances. I am not satisfied that the evidence supports an award claimed for compensation of \$15,000.00. Subject to any finding I make about contribution the sum of \$5000 would be a suitable award.

Contribution

[125] The Authority needs to consider under s.124 of the Employment Relations Act 2000 the extent if any to which the actions of X contributed towards the situation that gave rise to the personal grievance. If the actions so require it must reduce remedies

that would otherwise have been awarded. In considering blameworthy conduct I have focussed primarily on the first email from P to X with the attached video clip. If X had knowing the content of that video clip nevertheless retained it then a warning would have been justified on that basis alone.

[126] I find that the email and objectionable video clip attachment sent from P to X on 16 February 2010 was retained in X's mailbox for 15 days. I am required to reach a finding on the balance of probabilities whether X knew that the attached video clip was such that it should not have been on the work computer system but nevertheless failed to delete it during that 15 day period. X said in his evidence that his mail box is set up in such a way that he has to scroll down to see the attachment title. He therefore denies that he knew from the attachment title that it was inappropriate for the workplace and therefore he had no knowledge of the inappropriateness of the attachment over the 15 day period it was retained in his mailbox.

[127] I find on the balance of probabilities, having considered the evidence carefully that it is unlikely and improbable having received an email from P titled *FW Waterworld* on 16 February 2010 X where the reconstructed mailbox shows the email was opened did not then open the attachment and/or make any sort of assessment of the title of the attachment and its appropriateness including whether it was work related or not over a period of 15 days. Over that 15 day period other non work emails were opened and read. I find that even if X minimised his email so the attachment title was not seen it was be highly unlikely that he would not have scrolled down to see the attachment. The title to the attached video clip is such it would immediately alert the recipient to its inappropriateness and the need to delete it. I find that there was blameworthy conduct on the part of X in that knowing the inappropriateness of the email and its attachment he failed to delete it from the Ministry computer system for 15 days.

[128] In all the circumstances I find the contribution on X's part in retaining such an email and attachment is such that there should be no award of compensation and I so order.

Special Damages

[128] X claims special damages for legal fees incurred when Ms Dalziel represented him during the disciplinary process in the sum of \$5827.50 and that there were

breaches during the disciplinary process. Mr Sheriff on behalf of the Ministry opposed such an award of special damages.

[129] I was not referred to any Authority cases in support of such an award but have since that time read a determination of Philip Cheyne in *Moxon v Pathways Health Ltd t/a Pathways* [2011] NZERA Christchurch 151. In that case the Member was asked to determine a claim for special damages for legal costs incurred through representation during the disciplinary process where he had found a personal grievance. Member Cheyne considered the statutory provision and agreed with the view expressed in *Smith v Air2There.com (2008) Ltd* [2011] NZERA Wellington 98 that legal costs are not a compensatable loss for the purposes of s.123 (1) of the Act.

[130] Mr Cheyne referred to the caution sounded in the Employment Court judgement of *Harwood v Next Homes Limited* [2003] 2 ERNZ 433 where the following was said about special damages:

The matter of special damages was not developed by the plaintiff before the Authority or Court in such a way as to permit a proper assessment of a distinction between damages and party and party costs. ...Furthermore, I am not persuaded that in dealing with the resolution of an employment relationship problem as opposed to an action for damages such as in (Binnie v Pacific Health Ltd) [2004] 1 ERNZ 438 (CA) that it would be appropriate to classify costs incurred prior to the filing of the statement of problem as special damages to enable them to be recovered in full and not be subject to any restraint as party and party costs are it he Authority.

[131] I agree then with Mr Cheyne's statement in *Moxon* that not treating pre-litigation legal costs as special damages is more in line and sits more comfortably with the objects of the Employment Relations Act 2000 including that mediation is the primary problem solving mechanism and in s.101 (a) (ab) and (b) of the Act recognising that problems are more likely to be resolved if first raised and discussed between the parties and the special attention to personal grievances.

[132] I also accept Mr Sheriff's submission in terms of general policy considerations that if the Authority was to treat these pre -litigation costs in this type of case that is similar to many before the Authority would entitle every employee who instructs a representative to make a similar claim.

[133] I am not prepared to treat this matter as a breach of contract for the reasons set out above and have therefore treated it as a personal grievance.

Penalty

[134] There are no grounds I find for a penalty to be awarded in this case.

Costs

[135] I reserve the issue of costs. I am conscious of the end of the year approaching and therefore Mr Goldstein had until 15 December 2011 and Mr Sheriff has until 27 January 2012.

Summary of findings and outcomes

- I have not granted permanent prohibition from publication but have extended the interim order for 28 days from the date of this determination to enable X to file a challenge to the Employment Court if he wishes.
- I have found that X has a personal grievance that he was unjustifiably disadvantaged by the issue of the first written warning.
- X is reinstated to the position he was in before the warning was issued as if it had not been issued. His file is to reflect that.
- I have found that his contribution was such to deprive him of compensation.
- I have not awarded special damages for pre-litigation legal costs.
- I have not awarded a penalty.
- I have reserved the issue of costs and timetabled for an exchange.

Helen Doyle
Member of the Employment Relations Authority