IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 8/09
CRC 8/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SAFE AIR LIMITED Plaintiff
AND	PHILIP TERENCE WALKER Defendant

Hearing: 30 and 31 July 2009
(Heard at Christchurch)

Appearances: T P Cleary, Counsel for Plaintiff
M Hardy-Jones, Counsel for Defendant

Judgment: 7 August 2009

JUDGMENT OF JUDGE A A COUCH

---

[1] Mr Walker was employed by Safe Air Limited ("Safe Air") at its Blenheim airport facility as a purchasing officer. On 10 February 2009 he was dismissed for inappropriate use of company email facilities. He then successfully pursued a personal grievance. In its determination dated 22 June 2009 (CA 86/09), the Employment Relations Authority concluded that Mr Walker had been unjustifiably dismissed and, together with other remedies, ordered that he be reinstated to his former position. By a statement of claim filed on 29 June 2009, Safe Air challenged the whole of that determination.

[2] Safe Air sought a stay of the order for reinstatement pending a decision of its substantive challenge but that was refused by the Authority (CA 86A/09). In separate proceedings, I dismissed a challenge by Safe Air to that determination (CC 7/09). At

the time of hearing, however, Mr Walker was not back on the job as there had been delays in obtaining necessary security clearances.

[3] Because reinstatement was seriously at issue, all aspects of this matter were accorded urgency. This has required considerable effort on the part of counsel and I commend them for the thorough yet focussed manner in which they have presented the cases for the parties. The decision I must make is by no means straightforward but I am conscious that the parties need a decision as soon as possible. Given my other commitments, it may have been some months before I could have completed a fully reasoned decision. Accordingly, at the conclusion of the hearing, I offered the parties the option of a prompt decision with only the essential reasons. Both parties opted for such an abbreviated decision although, as it has turned out, I have been able to provide somewhat more detail than anticipated in this judgment.

[4] One of the issues raised on behalf of Mr Walker was disparity of treatment compared to other employees of Safe Air. That necessitated evidence relating to the conduct and disciplinary outcomes of other present and former employees. To protect the privacy of those people, I made an order at the beginning of the hearing prohibiting publication of the names or other information which might identify persons employed by Safe Air and allegedly involved in email related misconduct who are not parties to this proceeding. That was a permanent order but does not affect the publication of this judgment as any references in it to such persons are anonymous.

Facts

[5] Safe Air Limited is a wholly owned subsidiary of Air New Zealand Limited. It provides aircraft engineering services to Air New Zealand and to the Royal New Zealand Air Force. The company is based at Woodbourne, near Blenheim, where it employs more than 380 staff. Virtually all of the work of Safe Air is properly described as safety sensitive.

[6] Mr Walker is 29 years old. After leaving school, his initial work history comprised manual work. He then worked as a forklift driver and as a sales assistant in

an automotive parts business. In this latter position, Mr Walker began using computers in his work. In June 2007, Mr Walker applied for and was subsequently appointed to a position with Safe Air as a stores person.

[7] Before he started work, Mr Walker was given an extensive induction programme spread over 2 days. This included a substantial component conducted by one of the human resources staff. In the course of that induction process, Mr Walker was made aware that the operations of Safe Air were subject to stringent requirements as to safety and security. He learned that the detailed policies of Safe Air relating to those and other issues were contained in policy manuals which were readily available in the workplace. He was also made aware that Safe Air had policy on issues including use of computers. The policies in effect at that time contained a statement that company email facilities were a business tool and were not to be used for frivolous purposes such as jokes or anecdotes.

[8] An issue relating to the induction process was whether or not Mr Walker received a booklet called the "WE Guide" published by Air New Zealand for the guidance of all staff including those in subsidiaries such as Safe Air. It included specific rules regarding the use of email which made it clear that the company's email facilities were not to be used for storing or sending material which was offensive in any way. It also warned that breach of these rules may result in dismissal.

[9] Evidence was given that the WE Guide had been published in December 2006 and that copies were subsequently given to all existing and new employees of Safe Air, including Mr Walker. Mr Walker said that he believed he did not receive a copy of the WE Guide but accepted the possibility that he did and had lost it. In any event, Mr Walker said that, if he did receive a copy, he never read it.

[10] In December 2007, Mr Walker signed a document agreeing to conditions of access to the internet though Air New Zealand's computer network. This included statements that use of the internet needed to be appropriate, that it would be monitored and that inappropriate use would be referred to line managers for action. This included the sentence *"Please be aware that this particularly applies to material of a*

pornographic nature." The document concluded *"Your attention is also drawn to various IT policy documents."*

[11] In March 2008, Mr Walker applied for a position as a purchasing officer which had been internally advertised. In his letter of application, Mr Walker said *"I am very organized and have a good knowledge of the Safe Air computer system."* Mr Walker was appointed to the position and took it up on 5 May 2008.

[12] This appointment was on the terms of an individual employment agreement dated 16 April 2008. That agreement included the following provisions:

> ***4. COMPANY POLICIES***
>
> *4.1 The Company issues new or amended Company policies from time to time. You should read and ensure that you understand the Company policies that apply to the employment relationship between yourself and the company.*
>
> ...
>
> ***21. EMPLOYEE'S ACKNOWLEDGEMENT***
>
> *21.1 I acknowledge that I have read, understood and fully accept the conditions of employment in this agreement; and that I have been offered an opportunity to read and understand Safe Air Human Resources Policy and Procedures and that I fully accept the relationship and content of the various manuals that are applicable.*

[13] During the first half of 2008, the human resources operations manager for Safe Air, Joanne Birnie, revised and updated the company's human resources manual. This was published on the company's intranet and all staff were sent an email on 5 August 2008 advising them of this. The new manual contained a very much more detailed policy on use of email which was similar to that in the WE Guide. It specifically prohibited sending offensive material by email and warned that breach of the policy could result in dismissal. The manual was readily available to staff through a link on the opening page of the intranet.

[14] Much of Mr Walker's work in his role as a purchasing officer was conducted using the company's computer system, including email. Attached to all of Mr

Walker's emails was a standard signature piece which included his name and contact details at Safe Air together with the company logo.

[15] In May 2008 an investigation began into concerns that sensitive information was being sent out of the company by computer. As part of that investigation, Ms Birnie conducted an examination of the emails sent and received by a particular staff member. This disclosed that emails containing inappropriate material were being sent and received by a number of Safe Air staff. Ms Birnie was then directed to conduct a much wider investigation into that issue.

[16] This wider examination involved a review of the emails sent and received by all Safe Air staff and took some time to carry out. What emerged was that some 123 staff had received inappropriate emails and that 34 staff had sent them. It was decided that staff who had merely received such emails and had neither sent them on nor originated such emails would be investigated no further. A more detailed analysis was then conducted of the email history of those staff who had sent inappropriate emails.

[17] On 9 September 2008, Mr Walker was told that he was part of this investigation and his email traffic over the preceding 6 months was then analysed by Ms Birnie. What this revealed was that, during the period in question, Mr Walker had sent a total of 425 inappropriate emails, many of them to multiple recipients. The majority had been sent internally to other Safe Air staff but 172 were identified as having been sent to people outside the company.

[18] Of the 425 inappropriate emails identified, many contained jokes, cartoons or other material which, while inappropriate, were not offensive or only mildly so. There were, however, at least 26 emails which contained material which was distinctly offensive in one way or another.

[19] Ms Birnie reported her findings to Wayne Price who was then materials business manager for Safe Air and Mr Walker's senior line manager. That report was received by Mr Price as one of many similar reports concerning other staff. It is unclear exactly when Mr Price received the report about Mr Walker but it was at a time when Mr Price was already involved in disciplinary inquiries into the conduct of

many other staff. This resulted in the disciplinary inquiry into Mr Walker's conduct being delayed.

[20] On 26 January 2009 Mr Price wrote a letter to Mr Walker providing him with full details of the analysis carried out by Ms Birnie. Attached to the letter were copies of the relevant policies relating to email use and the letter itself identified the 26 emails of greatest concern.

[21] There was then a meeting on 3 February 2009 to discuss the issues and at which Mr Walker had an opportunity to respond to the concerns expressed. At that meeting, Mr Walker was represented by counsel, Mr Hunt, who largely spoke on Mr Walker's behalf. In the course of that meeting, Mr Hunt referred repeatedly to Mr Walker having had only a limited understanding of the company's email policy and made the point that, once he had been told on 9 September 2009 that he was under investigation, Mr Walker acquainted himself fully with the policy and sent no more inappropriate emails. Mr Hunt also referred to there being a culture of sending inappropriate emails within Safe Air and said that Mr Walker made a *"judgement call"* about the content of the emails he sent. Mr Walker himself said that he never considered the content of the emails he sent as being *"of bad nature"*. He also said that he forwarded one of the most objectionable emails, which consisted of a link to a website, without seeing it himself. Towards the end of the meeting, Mr Hunt said that Mr Walker had a *"deep sense of regret"* about what he had done.

[22] Following the meeting on 3 February 2009, Mr Price prepared what was described as a *"Report on Final Findings"* recording in considerable detail all aspects of the disciplinary investigation to that point. In doing so, he identified 7 of the emails sent by Mr Walker which he regarded as being of *"particularly serious concern"*. In a summary at the end of the report, Mr Price said:

> *In considering your actions I am of the view that you have routinely and actively engaged in the distribution of personal email that is not business related. At least 26 emails have been discovered on your computer that any fair and reasonable employer would consider as offensive and inappropriate due to graphic nudity, lewdness and depiction of sex acts. In particular, an email containing depictions of graphic and highly inappropriate sex acts is considered to be extremely serious and of major concern.*

> *You should have been fully aware of the Company policies on internet and email usage and it is not unreasonable to expect that you had some comprehension of the seriousness of your actions at the time.*
>
> *I have formed a view that your actions amount to serious misconduct and I now need to consider an appropriate outcome.*

[23] Mr Price concluded by saying that he was considering dismissal. A further meeting was then held on 10 February 2009 at which Mr Walker was given an opportunity to make submissions about the appropriate penalty. At that meeting, Mr Walker was accompanied by his father, who appears to have dominated the discussion in an unhelpful manner. Towards the end of the initial part of the meeting, however, Mr Philip Walker was recorded as saying *"Just basically I was not aware that it would go this far by my actions and I would very much like to keep my job. I apologise if I have done anything wrong."* After an adjournment, Mr Price said:

> *We have listened to and considered the range of issues raised. There are clear policies in place and in your case there has been clear and multiple breaches of these policies. While you have emphasised a culture of email abuse in the workplace, I am very clear that the management of the company was not aware of and did not in any way approve of the culture that you claim exists. The company has responded at different levels of the organization according to the seriousness of the activity and the responsibility level of the people involved. At your level you have exhibited extremely high volumes of inappropriate email activity, and in particular a relatively large number of extremely serious emails including the Sex Statistics email with its graphic sexual content.*
>
> *You seem to be suggesting a large element of company responsibility for the situation that has arisen, but I have not picked up a sense of acknowledgement of your personal responsibility for your actions.*
>
> *I have difficulty accepting this low level of acceptance of accountability on your part. Accordingly I have decided in all the circumstances that an appropriate outcome is termination of your employment effective today.*

[24] In December 2008 and February 2009, 35 staff other than Mr Walker were the subject of specific investigation regarding their use of email. Of those, 4 were dismissed, 7 received final warnings and 11 were given first warnings. No disciplinary action was taken in 12 cases and one resigned prior to an outcome being decided. Of the 3 staff investigated who held management positions, 2 were dismissed and the other resigned. The team leader investigated was also dismissed.

[25] In the course of his evidence to the Court, Mr Walker acknowledged that he knew at the time he sent the emails that Safe Air had policies on email usage. He also acknowledged that he had an obligation to make himself aware of what those policies were.

[26] In the course of cross-examination, Mr Cleary asked Mr Walker how he would have reacted if Mr Price had looked over his shoulder while he was viewing one of the more objectionable emails. Mr Walker replied that he would have been embarrassed. Subsequently, in answer to questions from the Court, Mr Walker said that he would not have been happy for Mr Price to know the type of email he was looking at because of the content and because he should have been working.

Nature of the emails

[27] The exhibits provided to the Court included all of the emails sent by Mr Walker which were considered to be inappropriate. Copies of the emails sent by all other employees of Safe Air who were investigated were also provided. In addition, there were useful spreadsheets tabulating the information in relation to each employee and as compared with each other. All of this information was provided in electronic form on five CD-ROMs and a flash drive. This was a convenient and helpful means of producing these exhibits as it enabled me to view the emails as they would have been seen by a recipient. It also enabled me to view attachments which were in the form of videos.

[28] I have viewed all of the emails sent by Mr Walker which were regarded by Mr Price as being inappropriate. The majority of these comprised what were intended to be jokes and were in text or cartoon form. Many of these had mild sexual connotations but were unlikely to be offensive to most viewers. A small number of the emails were informative or possibly artistic, an example being a series of photographs of aircraft.

[29] I viewed more than once the 26 emails identified by Mr Price as being of particular concern. As Mr Price observed, these included graphic nudity, lewdness and depictions of sex acts. They also included pictures and text which were racist,

misogynistic or denigrating of women. A particularly offensive example of the latter was a poster depicting a young woman walking down the street being watched by a group of five men with the title *"Gang Rape 5 out of 6 people enjoy it"*.

Issues

[30] Mr Walker's claim is that he was unjustifiably dismissed. Whether that is so must be decided in accordance with s103A of the Employment Relations Act 2000 which provides:

> ***103A Test of justification***
>
> *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[31] Section 103A applies broadly to both the process adopted by the employer in deciding what action to take as well as the nature of that action. In this case, it was accepted that the process was what a fair and reasonable employer would have done. I agree. What was contested is whether the decision to dismiss was substantively justifiable, that is whether a fair and reasonable employer would have reached that decision in all the circumstances.

[32] In that context, Mr Hardy-Jones submitted that the facts give rise to the following issues:

a) Was Mr Walker aware of the Safe Air policies on email?

b) Was that policy fairly applied?

c) Did the extent to which other staff were breaching the email policy make Mr Walker's conduct less culpable?

d) Was Mr Walker's conduct as a whole capable of amounting to serious misconduct?

e) Did Mr Price have proper regard to the mitigating circumstances of Mr Walker's conduct?

f) Was there disparity between the treatment of Mr Walker and that of other staff who breached the email policy?

[33] For Safe Air, Mr Cleary addressed broadly similar issues.

Discussion and decision

[34] I find on the evidence that Mr Walker did not actually know the substance of Safe Air's email policies until he became aware on 9 September 2008 that he was under investigation and acquainted himself with them.

[35] In *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)* [2005] ERNZ 767, the Court of Appeal rejected the proposition that ignorance of significant employment obligations meant that breach of those obligations could not be regarded as serious misconduct. It found that the proper approach is to consider whether, in all the circumstances of the case, the employee could be expected to know of the obligations and, if so, it was a matter of fact in each case whether breach of those obligations was capable of amounting to serious misconduct.

[36] In this case, it is clear that Mr Walker was aware that Safe Air had policies relating to email use and that he was bound by them. On his own evidence, it is also clear that he knew at the time that it was wrong to send the emails he sent. The policies were readily accessible to Mr Walker and readily understood by him when he looked at them on 9 September 2009. In these circumstances, I find that Mr Walker ought to have known what the policies were and that his ignorance of them was inexcusable.

[37] Through the nature of questions he asked in cross-examination, Mr Hardy-Jones suggested that Safe Air did not implement all aspects of its policy on email usage. For example, Mr Hardy-Jones drew attention to the statement in the policy that email usage would be monitored and questioned whether Safe Air had done this

sufficiently or effectively prior to the investigation in mid 2008. While this may form a part of *"all the circumstances"* for the purposes of s103A, I do not find it significant. In any event, given that Mr Walker did not know the detail of the policy, this cannot have influenced his conduct.

[38] In Mr Walker's evidence-in-chief, he said that because other staff at Safe Air were sending emails which were frivolous or offensive he thought that it was acceptable for him to do so. At first sight, such a proposition seems reasonable and plausible but, in light of all the evidence, I do not find it so. In answer to questions put to him later in his evidence, Mr Walker said that he knew at the time that it was wrong to send offensive emails, contradicting his earlier assertion. In his evidence, Mr Price said that senior management were entirely unaware of such breaches of policy until they were revealed by Ms Birnie's inquiry. It is also apparent that there were previous communications to staff reinforcing the email policy and making it unmistakeable that breaches of it would be regarded as misconduct. In these circumstances, I find that Mr Walker could not reasonably have believed that what he and other staff did was acceptable to management. Mr Walker effectively confirmed this in his evidence when he said that he would have been embarrassed if Mr Price had seen the sort of emails he was sending.

[39] A critical issue is whether Mr Walker's conduct was capable of amounting to serious misconduct. Since the introduction of s103A, this issue ought properly to be addressed as part of the overall justifiability of the decision to dismiss but it is convenient in this case to discuss it separately. To be capable of amounting to serious misconduct, the conduct must be such that it would destroy or deeply impair the mutual trust and confidence essential to the employment relationship. In this case, Mr Walker's conduct reasonably led to two important conclusions. The first was that he was prepared to engage in a sustained course of conduct in the course of his employment which he knew to be wrong. The second was that Mr Walker was prepared to engage in questionable conduct which he knew was the subject of company policy without finding out what that policy was.

[40] A key factor in this assessment must also be the nature of the emails sent by Mr Walker. Mr Hardy-Jones submitted that the assessment made by Mr Price was

subjective and that different people may have quite different views of the degree to which particular emails were offensive or humorous. While that is undoubtedly true, the standard to be applied is that of a fair and reasonable employer. That objective standard requires the Court to reflect the generally accepted values of our society in matters such as this. On that basis, I find that a significant number of the emails sent by Mr Walker were seriously offensive and that Mr Price was therefore justified in regarding them as such. Overall, I find that Mr Walker's conduct was capable of being regarded as serious misconduct.

[41] Turning to the mitigating circumstances of Mr Walker's conduct, the following are the considerations Mr Hardy-Jones submitted were relevant, together with my assessment of them:

a) *Mr Walker was relatively new to the work place*. That was relevant in the sense that Mr Walker was not working for Safe Air when an email reminding all staff of the email policy was sent out by the chief executive in January 2006 or when copies of the WE Guide were given to all staff following its introduction in December 2006. As I have found that Mr Walker ought to have known the content of the email policy on the basis of other factors, however, the absence of these sources of knowledge add nothing to the conclusion.

b) *Mr Walker was inexperienced and holding a junior position*. Mr Walker had been with Safe Air for more than a year when the majority of the inappropriate emails were sent. In May 2008, he took up a position of some responsibility which he regarded as a promotion. In his letter of application for that position, he said that he had a good knowledge of the Safe Air computer system. Mr Walker was not naive or immature and, in my view, had been with Safe Air long enough to know and understand the particular nature of his responsibilities as an employee of that company.

c) *Other more senior people sent him similar emails.* In his evidence, Mr Walker said that he was influenced in his decisions to send

inappropriate emails by the fact that he received some such emails from another employee whom he described as a supervisor. On the evidence, it is clear that the person in question was a leading hand rather than a supervisor. While this is a factor which might be taken into account as a relevant circumstance, it cannot have much weight in light of Mr Walker's evidence that he knew at the time that what he was doing was wrong. If Mr Walker knew what he was doing was wrong, he also knew that what others were doing was wrong.

d) *Others with more experience sent him similar emails. The circulation of these emails was widespread.* I have discussed this factor earlier. As I have concluded there, Mr Walker could not reasonably have thought that sending offensive emails was acceptable to senior management of Safe Air.

e) *Mr Walker's previous good performance.* It is common ground that Mr Walker performed his duties satisfactorily while employed by Safe Air. This is a mitigating factor to which a fair and reasonable employer would have regard and it appears that occurred in this case. In answer to a question in cross-examination, Mr Price confirmed that he had taken into account the fact that Mr Walker had received no warnings in the course of his employment.

f) *Mr Walker stopped sending inappropriate emails when he became aware that it was against his employer's wishes.* This is also common ground and a factor Mr Price was alive to. He refers to it specifically in his report.

[42] The final issue raised on behalf of Mr Walker was disparity of treatment. Mr Hardy-Jones advanced two differing submissions on this point. The first was that other employees whose conduct was similar in nature to Mr Walker's conduct had not been dismissed. There was little evidence on which to base this submission. In his evidence, Mr Walker only referred to two other staff whose treatment he said was inconsistent with his. Of these two men, Mr Hardy-Jones focussed in his submissions

on one who had forwarded 5 of the 7 emails Mr Price identified as being of most serious concern to him. He was given a final warning. Mr Hardy-Jones submitted that, in its nature, that man's conduct was comparable to Mr Walker's conduct and that to dismiss Mr Walker was therefore inconsistent treatment.

[43] If there is an adequate explanation for any disparity of treatment, it becomes irrelevant – see *Samu v Air New Zealand Ltd* [1995] 1 ERNZ 636 (CA) affirmed in *Buchanan*. In this case, it was satisfactorily explained why Mr Walker was dismissed while the other man was not. The two emails of serious concern which Mr Walker sent and the other man did not send were the two Mr Price regarded as the most serious. The other man had sent only 9 of the 26 emails sent by Mr Walker which had been identified in Mr Price's initial letter to Mr Walker as being of particular concern. The other man had also sent a total of 74 inappropriate emails compared to the 425 sent by Mr Walker.

[44] Mr Hardy-Jones submitted that there had been another form of disparity in that the email traffic of some employees had been assessed over a 1 or 2-month period whereas Mr Walker's emails were analysed over a 6-month period. This proposition does not seem to be supported by the evidence. When it was put to Ms Birnie, she explained that the emails of the other two employees in question had actually been inspected over a 6-month period but that they had only sent inappropriate emails during a 1 or 2-month period. She said it was for this reason that the reports showed emails of concern only during those briefer periods. This explanation is satisfactory.

[45] Drawing all of these factors together, I find that the dismissal of Mr Walker was what a fair and reasonable employer would have done in all the circumstances at the time. It follows that the dismissal was justifiable and that Mr Walker's personal grievance is not sustained.

Conclusion

[46] The challenge is successful. The determination of the Authority is set aside and this decision stands in its place.

Comment

[47] The decision I have reached differs from the determination of the Authority. To a large extent that reflects the fact that the evidence given by some of the witnesses, including Mr Walker himself, was different or more extensive than that provided to the Authority. That, in turn, led me to a different view of the seriousness of Mr Walker's conduct.

Costs

[48] In its determination, the Authority reserved costs for agreement or for submissions to be filed by 3 August 2009. I do not know whether the Authority has yet issued a costs determination but, if it has, that must also be set aside in light of the successful challenge to the Authority's substantive determination.

[49] I now invite the parties to discuss and, if possible, agree costs in relation to the proceedings as a whole in both the Authority and the Court. If they are unable to do so, Mr Cleary is file and serve a memorandum within 28 days after the date of this judgment. Mr Hardy-Jones is then to have a further 21 days after receipt of Mr Cleary's memorandum to file and serve a memorandum in response. Those memoranda should address costs in the Authority and in relation to both this proceeding and CRC 10/09 in the Court. Counsel are reminded of the need to provide all information necessary for the Court to assess the reasonableness of costs incurred or the ability of a party to pay.

A A Couch
Judge

Signed at 9.30 am on Friday 7 August 2009