MCBRIDE DAVENPORT JAMES
BARRISTERS AND SOLICITORS

AUGUST 2007 LEGAL UPDATE

EMAIL/INTERNET USE

In this update we discuss a recent Authority decision, Wood v Arthur D Riley & Co Ltd, which considers the extent to which an employer can rely on its policies and procedures on potentially objectionable material to dismiss an employee.

Facts

Wood was employed by Arthur as an Administrative Assistant. At the commencement of her employment she was provided with a copy of Arthur's policies and house rules, which included that posting offensive written or visual material on computer systems was an example of misconduct, and that breaching the internet and email policy was an example of serious misconduct. The policy provided that Arthur's email system, its intranet, and its internet connection were strictly for business purposes only. Further, employees were required not to access, download, upload, save, request, transmit, store or purposefully view sexual, pornographic, obscene, racist, profane or other offensive or inappropriate material.

Wood was issued with a verbal warning over her misuse of email in December 2005, including for the high number of her "forwards"/joke emails. Wood then received a further verbal warning in August 2006 for breaching the company's internet and email policy in similar circumstances.

The incident that led to Wood's dismissal took place in August 2006. Her father had sent her an email containing a number of images of adult men and women, some of whom had little clothing on or were naked; the Authority noting that "*none of the images could be described as rivals to Michelangelo's 'David'*". Wood then forwarded that to two work colleagues and other external acquaintances, along with her comment, "*Ewww*". Disciplinary meetings ensued, during which Wood apologised and was dismissed for breaching the internet and email policy.

The Employer's Case

In the Authority, Arthur said that it had considered a wide range of factors before reaching its decision, including: that Wood had sent the email to work colleagues and to others external to the work place; the content was offensive; sending the email would affect Arthur's reputation; Wood had no control over where the email could end up; and the email could amount to sexual harassment and a breach of the recipient's human rights (and therefore to financial penalties for Arthur). Arthur also argued that where safety was a concern, an employer was entitled to adopt a zero-tolerance policy (in reliance on the Employment Court's decision in the Fuiava case, which was about potentially explosive aerosols in an aircraft's cargo). Arthur also said that it was entitled to rely on Wood's previous related warnings.

Authority's Decision

The Authority concluded that Wood's dismissal was unjustifiable under s.103A of the Employment Relations Act. In doing so, the Authority noted that Authur's email and internet policy had not been applied consistently (jokes were tolerated and the two internal

recipients had not been disciplined for retaining Wood's email), and that the actual finding of serious misconduct was not warranted given that Arthur relied on management's subjective interpretation of what constituted objectionable material, instead of seeking objective evidence of that, which the Authority said would not be a difficult task.

S.103A

The Authority reached that conclusion notwithstanding Arthur's house rules, which reserved to Arthur the sole discretion to determine what constituted offensive or inappropriate material, as s.103A required that Arthur's actions meet the requirements, objectively measured, of what a fair and reasonable employer would have done in all of the circumstances at the time. Those included the source of the original email; Wood's father – whom the Authority noted could be a person reasonably expected to be reliable concerning what was or was not objectionable, and that the email had originated from his work place – a major local body – and had not been caught by either his or Arthur's computer system. Also relevant was that no complaints had been received from the recipient's of Wood's email. Remedies were however reduced by 25% for Wood's contributory conduct, given that she had earlier received an email from Arthur's HR Manager permitting "funnies" to be sent provided they did not depict nudity or were not sexist or racist.

This case poses the interesting question of the extent to which an employer is able to rely, in the context of having to justify its decisions under s.103A, on its existing policies and procedures, even where those have been acknowledged by the employee. Also, it is clear that "*subjective*" (notwithstanding the Authority's comment as to Wood's father) evidence cannot be relied on in concluding that certain information is objectionable, even where that right is reserved to the employer by express agreement.

Whilst it is very important to have a clear policy on Internet use etc., the employer will still need to show disciplinary action in relation to that policy is what a fair and reasonable employer would do in all of the circumstances.

Seminars

We will be holding a series of free seminars on recent developments under s.103A of the Employment Relations Act in September and October. If you would like to express your interest in attending, please let us know by email to firm@mdjlaw.co.nz or on (04) 801 5427. Thank you.

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