

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Robert Donselaar (Applicant)  
**AND** Attorney-General in Respect of the Department of Corrections  
(Respondent)  
**REPRESENTATIVES** Barbara Buckett for Applicant  
Joanna Holden for Respondent  
**MEMBER OF AUTHORITY** G J Wood  
**INVESTIGATION** 4 April 2006  
**MEETING**  
**DATE OF** 6 April 2006  
**DETERMINATION**

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

1. Mr Donselaar is employed as a business analyst in the business technology division of the respondent (“Corrections”). He reports to Ms Robyn Heywood.
2. There have been difficulties between the parties during Mr Donselaar’s employment, but the matters that triggered the employment relationship problem before the Authority followed advice from Ms Heywood to Mr Donselaar that he was required to attend a meeting to investigate allegations that he had not kept personal use of the internet to a minimum level and had circumvented specialist software that blocks access to banned sites. The internet use policy defines what is minimal personal use by using guidelines, such as that transactions are not to be longer than two to three minutes. Ms Heywood’s advice, by way of letter, included a notice that should the allegation be proven disciplinary action could be taken, up to and including the termination of Mr Donselaar’s employment. Corrections’ policies provide for a preliminary fact finding interview to determine whether there is apparent misconduct.

If there is apparent misconduct then an employment investigation to establish whether there has in fact been misconduct is to be held.

3. Mr Donselaar got legal advice. Ms Buckett responded on his behalf accordingly on 16 August 2005, denying the allegations. Corrections' actions were alleged to have been unfair to Mr Donselaar, by not specifying what reasonable use of the internet was and by threatening Mr Donselaar with dismissal. Mr Donselaar denied circumventing software or being aware of any excessive personal use of the internet. Corrections was also informed that Mr Donselaar was prepared to meet with it to discuss all issues once the allegations and the threat of dismissal was withdrawn. Corrections declined to do so and asked to meet Mr Donselaar on 2 September.
4. Mr Donselaar went to see his doctor again as the allegations had caused him to become ill. He was assessed as being extremely anxious about returning to a hostile work environment where he gets extremely stressed. He was told by his doctor that he was medically unfit for work until 10 September and therefore he was unable to attend any meeting. Corrections were then so informed. Corrections responded that day informing Mr Donselaar of his paid sick leave entitlements, which expired on 5 September.
5. Mr Donselaar's medical certificate was then extended, on 9 September, to 10 October. It was later extended to 10 November and has now been extended indefinitely, unless Mr Donselaar could, as his doctor states, "*return to another department or position where these issues can be taken care of and in particular, where he has a new line manager*".
6. On 19 October Corrections again asked to meet with Mr Donselaar over the issues. On that date Mr Donselaar also filed an application in the Authority over personal grievances flowing from Corrections' actions in respect of its investigations into his internet use, plus a claim that it had failed to provide Mr Donselaar with work. It was also claimed that Corrections had effectively concluded its investigation and therefore could not resume it.
7. The parties attended mediation on these matters in early December, following discussions facilitated through the Authority. By agreement, investigation meeting

dates were set for mid-February and early May 2006. Mediation did not result in settlement of the issues between the parties.

8. Accordingly Corrections wrote to Mr Donselaar on 15 December asking for his input into their investigations. Mr Donselaar was informed that at the conclusion of the investigation a decision would be made as to whether Corrections would move to a disciplinary process. Responses were sought by 14 February 2006.
9. The parties later agreed that the Authority's February investigation meeting date be vacated.
10. In the meantime Corrections was trying to get information from Mr Donselaar about his health issues and when he might be able to return to work. Other than provide a medical certificate from his general practitioner, as quoted above, Mr Donselaar has not provided any further information to Corrections.
11. On 13 February 2006 Mr Donselaar responded to the allegations, denying that he had knowingly breached any policies and stating that if he had known he was doing anything that might be perceived as wrong he would have remedied it.
12. The Authority held a conference call on 14 February, as planned, and it was agreed that matters would be deferred until 10 March, after Corrections' response to Mr Donselaar's answers to the allegations against him would have been received.
13. On 8 March, Corrections wrote to Mr Donselaar stating that it had decided to progress matters to a disciplinary investigation, which would be conducted by another manager and in accordance with its disciplinary processes. Ms Heywood made the point that the formal investigation process would amount to an "*objective consideration of all the relevant factors by a third party*".
14. In coming to her decision, Ms Heywood relied on her own assessment of the situation, Mr Donselaar's response and a written report by an independent IT contractor, which Mr Donselaar was then provided with. While the draft of this report was provided to Corrections before Mr Donselaar's response, Ms Heywood had to follow up certain matters in it and therefore did not receive the final report until after Mr Donselaar had filed his responses on 13 February. The report shows, amongst other things, that for

several days in the month of June 2005, Mr Donselaar's web browsing time was greater than his working time. However, as Mr Donselaar points out, web browsing time may include time when the web pages were minimised and therefore he could not have been perusing them.

15. Corrections' response was not one Mr Donselaar agreed with. He therefore sought to actively progress matters in the Authority. At a conference call held on 17 March, Ms Buckett sought interim declarations against Corrections to stop the disciplinary investigation and to put Mr Donselaar back onto the payroll. The interim investigation meeting was set for 4 April, while a substantive investigation meeting was deferred until 7 and 8 June 2006.
16. At the investigation meeting seeking interim declarations, Ms Buckett also sought an interim declaration prohibiting Corrections from taking any steps in a process that might lead to Mr Donselaar being subject to medical retirement or dismissal for incapacity.
17. Corrections opposed each of these interim declarations sought, but were prepared to undertake to facilitate Mr Donselaar's return to work, subject to medical clearance by a department-appointed doctor, as required by the employment agreement. It was also prepared to undertake that Mr Donselaar be treated fairly at work and be provided with work and resources to do so, except for desktop access to the internet. Corrections further undertook to enter into constructive dialogue and communication with Mr Donselaar. All of these undertakings were made in direct response to matters that Mr Donselaar had identified as important to him in his affidavit in support of the present applications.
18. Corrections also undertook that it would not advertise Mr Donselaar's position until this matter was resolved by the Authority. However, it noted that it needed to progress the disciplinary matter, that it had further information which had come to light about Mr Donselaar's behaviour that it also wished to investigate and that his position could not be left uncovered indefinitely.
19. These undertakings by Corrections were not sufficient to meet Mr Donselaar's requirements as he was still under threat of disciplinary action.

## The Law

20. The tests for an interim injunction are as set out in *Cliff v. Air New Zealand Ltd* [2005] 1 ERNZ 1 at p.9:

*“Those tests are three:*

- *First, whether the plaintiffs have an arguable case of unjustified dismissal;*
- *Second, whether the balance of convenience (including the existence of alternative remedies sometimes said to be a separate test) favours the plaintiffs; and*
- *Third, the remedy being discretionary, where the overall justice of the case lies until it can be heard (including particularly the respective strengths of the parties’ case so far as they can be ascertained at this stage).”*

21. Where a worker seeks to restrain an employer from conducting a disciplinary process, the following factors are important, as was set out in *Russell v. Wanganui City College* [1998] 3 ERNZ 1,076 at 1,082:

- “(i) In the ordinary course of things an employer is entitled to conduct an investigation into the conduct and performance of an employee that is of concern to it and, indeed, bound to do so in the ordinary course of its business of being an employer.*
- (ii) It is a grave matter for the Court to interfere with this entitlement by some form of prior restraint and to take such a course requires justification on proper grounds.*
- (iii) It follows that there must be a burden on the employee in that situation to show that it is just and convenient that the employer’s ordinary rights should be interfered with or modified.*
- (iv) It further follows that an employee cannot be entitled as of right to have an employer’s disciplinary process stayed because of a pending or possible criminal proceeding.*
- (v) The Court’s task is one of balancing justice between the parties, taking account of all relevant factors.*
- (vi) Each case must be judged on its own merits and it would be wrong and undesirable to define in the abstract what are the relevant factors.”*

22. Ms Buckett argued forcefully that this line of authority was no longer appropriate under the Employment Relations Act. Rather, she submitted that the Act required the Authority to focus on supporting successful employment relationships and good faith

behaviour, taking into account the inherent inequality of power in employment relationships.

23. I accept the thrust of Ms Buckett's submissions that the Authority should assist the parties by giving relief, even in the interim, where any one party's rights or benefits are clearly under threat. On the other hand, the Employment Relations Act is also founded on the sanctity of agreement between parties. The parties have agreed here that the procedure for managing misconduct is the one set out in the "*Policies for Managing Human Resources*" manual. It therefore follows that for Mr Donselaar to succeed in his claim for an interim declaration stopping the disciplinary process, then there must be some serious risk of these policies being breached.

### **Determination**

24. I note that Mr Donselaar's claims for interim declarations must be based on the claims associated with Mr Donselaar's alleged misuse of the internet and Corrections' investigations into it. His claims about the failure to be provided with work are ancillary in the context of the interim declarations sought.
25. I find that Mr Donselaar does have a tenable, arguable case over these matters (*Cliff* applied). If Mr Donselaar can make out his claims in fact (which we must assume at this interim stage), then he would be able to seek the sort of remedies that he claims, including a permanent declaration. In particular, there are issues about whether Mr Donselaar was singled out unfairly over his internet use compared with other users, most importantly because Ms Heywood may have had a negative perception of his performance. There was therefore an important matter of credibility and other evidential issues that can only be determined in a full investigation meeting.
26. I turn now to the balance of convenience. This is a matter of examining the question of relative hardship as between the parties. I accept that Mr Donselaar is unable to work at the present because of stress over the threatened disciplinary investigation. Furthermore, he has had no income over a long period as a result of him taking stress leave. He is also concerned about the potential loss of his employment. By contrast, while it would be inconvenient for Corrections to hold off on holding its disciplinary meeting for another two months at least, it will not suffer undue hardship as a result,

even although it would prefer to have the matter sorted out so that Mr Donselaar could come back to work. Furthermore, If Mr Donselaar is shown to be successful in his claim, which the Authority will deal with in two months time, that there should never have been an disciplinary investigation, yet did not gain the interim declaration, he would have had to have gone through the stress of the disciplinary investigation unnecessarily.

27. On the other hand, Corrections wants to assert what it sees as its rights under the agreement (as per *Russell*) and has made undertakings as to how it will deal with Mr Donselaar fairly throughout this process, as well as appointing a manager other than Ms Heywood to investigate the matter. Mr Donselaar has had an opportunity already to try and convince Corrections that the matter should not be progressed to a disciplinary one and the benefit, following the Authority's intervention, to raise all his concerns in a confidential, without prejudice environment, namely mediation. Furthermore, Mr Donselaar will not be under any threat of termination of employment on medical grounds, for reasons given below, during the Authority's investigation of these matters. In addition, Mr Donselaar has delayed significantly in making these claims for interim relief, as described above. Overall, I conclude that the balance of convenience favours Corrections, albeit by a small margin.
28. I now turn to the criterion of overall justice. The only new factor applicable here is the relative strength of the parties' cases. It will be for Mr Donselaar to satisfy me that the Authority should intervene to stop Corrections from pursuing a disciplinary investigation into his conduct. Given that the right to conduct a disciplinary investigation is not merely one of management prerogative, but is also provided for in the parties' employment agreement, Mr Donselaar's task will not be an easy one.
29. Having reviewed the material provided by Ms Heywood and the IT contracting firm, it is clear that there are issues raised that require an explanation by Mr Donselaar. It is entirely possible that he may have a complete explanation for all the matters raised, particularly if he had never been cognisant of the amount of internet use that he was allowed and if he was not given work to do and therefore made work by utilising the internet. A formal investigation of these matters, fully involving Mr Donselaar, still seems appropriate, I find, because of the material already made available and the

complexity of the issues. There also appears to be nothing on the face of the record to indicate that Corrections had ever concluded its investigation and should therefore be prohibited from effectively seeking to conduct it again. In coming to the conclusion that the overall justice favours Corrections, I also note the use of a different manager to investigate the matters and the undertakings given by Corrections about how it will treat Mr Donselaar. I therefore dismiss the claim for an interim declaration against Corrections proceeding with its intended disciplinary investigation into Mr Donselaar's conduct.

30. I turn now to the application from Mr Donselaar to be reinstated to the payroll. For the same reasons as above, I find that Mr Donselaar does have a tenable, arguable case.
31. The balance of convenience here favours Corrections. I find that damages will be an adequate remedy in relation to the lost remuneration that Mr Donselaar will suffer in the next two months if he is still unable to return to work. In this regard I note the difficulty of an employee in claiming lost remuneration when they are unable to work, unless they have been arguably unjustifiably suspended, as I determined in *Vailima v. General Distributors Ltd*, unreported, WA39/06, 20 March 2006. Furthermore, for all the reasons given above, I also find that the overall justice of the case favours Corrections. I therefore dismiss Mr Donselaar's application for an interim declaration that Corrections should pay Mr Donselaar for the period of his absence through illness when his paid sick leave had run out.
32. Turning to the third claim for a declaration, Ms Heywood gave evidence that there was a business need to resolve the matter as soon as possible and determine if Mr Donselaar was going to be medically able to return to his job. Furthermore, Corrections only gave an undertaking that it would not advertise Mr Donselaar's position until his present claims had been resolved by the Authority. This was in response to a request for an undertaking not to take any steps in a process that might lead to the termination of Mr Donselaar's employment on medical grounds.
33. The problem here in terms of an arguable case is that the present case does not relate to the potential termination of Mr Donselaar's employment on medical grounds. However, it is evident to the Authority and the parties that Mr Donselaar's absence

cannot continue forever. Thus, while it cannot be said that there is an arguable case that Mr Donselaar will not have his employment terminated on medical grounds, because there is no such claim before the Authority, the Authority must be astute to ensure that it resolves employment relationship problems and not focus merely on legal causes of action.

34. I therefore consider it appropriate for the Authority to determine whether or not a declaration in the terms sought should be granted, even although there are no specific proceedings presently before the Authority on the point. I find that Mr Donselaar's concerns about losing his employment on medical grounds are inextricably intertwined with his present claims, for which he does have an arguable and tenable case, particularly as these are said to be the cause of his ill health.
35. The balance of convenience also favours Mr Donselaar in this regard, as it is quite possible that he will be able to return to work once the Authority has dealt with his concerns on a permanent basis. Furthermore, the interests of justice would not be served by Corrections progressing medical issues when the very causes of Mr Donselaar's absence from work are currently being addressed by the Authority. I therefore find that the balance of convenience and the overall justice of the matter favour Mr Donselaar.
36. I therefore declare that the respondent, the Attorney-General in respect of the Department of Corrections, should take no steps in any process which might lead to the termination of Mr Donselaar's employment for incapacity or through medical retirement until the Authority has determined, apart from costs, the proceedings WEA387/05.

### **Costs**

37. Costs are reserved.

**G J Wood**  
**Member of Employment Relations Authority**