

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Stephen David Holley (Applicant)

**AND** Leading Edge Communications Limited (Respondent)

**REPRESENTATIVES** Anthony Russell for Applicant  
Anthony Drake for respondent

**MEMBER OF AUTHORITY** Ken Raureti

**INVESTIGATION MEETING** 20 December 2006

**DATE OF DETERMINATION** 22 December 2006

DETERMINATION OF THE AUTHORITY

**Employment relationship problem.**

Mr Holley was employed by Leading Edge Communications Limited as a Corporate Accounts Manager up until 6 December 2006 when he was summarily dismissed. He says that his dismissal was substantively unjustified, and it was not carried out in accordance with the requirements of procedural fairness. Mr Holley is seeking urgent interim reinstatement, he has filed and signed an undertaking that he will abide by any order that the Authority may make in respect of damages as required by s.127 of the Employment Relations Act 2000.

Leading Edge is strongly opposed to Mr Holley being reinstated, even on an interim basis.

The parties have attempted to resolve their problem by way of mediation, however they were unsuccessful. The investigation into Mr Holley's employment relationship problem, and this determination was approached against the backdrop of the principles to be applied to address an application for interim reinstatement. The representatives for both parties were helpful to the Authority and have made submissions that address the key principles.

The legal principles to be applied to claims for interim reinstatement have been clearly set out in a number of Court decisions. In *Baker v Armourgard Security Ltd* [1998] at p.436 the court set out the criteria to be:

*Is there an arguable case?*

*Is there another adequate alternative remedy available to the applicant?*

*Where does the balance of convenience lie?*

*What is the overall justice of the case?*

## **Background.**

Mr Holley commenced employment with the company in January 2000. At that time it was owned by Telecom and was called Cellphone City. Subsequently the name changed to Telecom Retail Holdings and around 2004, Telecom sold the company and the name was changed to Leading Edge Communications Limited. Leading Edge Communications is a telecommunication company and provides communications solutions for its customers. It employs approximately 200 people. At the time of his dismissal, Mr Holley was employed as a Corporate Accounts Manager liaising/managing some very significant corporate accounts, providing mobile and wireless communication solutions such as handsets, mobiles, PDAs, data cards and the like.

### **27 November 2006.**

The events that lead to Mr Holley's employment being terminated came about as a result of an email, (*The detail that kills your photo*) he sent to a female employee, Ms Morgan Burns with the accompanying message to her, "Just for you :-). Ms Burns complained to her manager about the email. She said that the email contained images that she found inappropriate.

Ms Burns indicated that prior to receiving the *detail that kills* email, she was in the tearoom when Mr Holley got her attention and said something to the effect that, *I know I probably shouldn't say that*, and she asked "what were you going to say" to which he kind of leant in and whispered to her, *the reason you are not getting any comments on the brag board is because you are not kissing enough arse or sucking cock"* She says that while the images themselves were inappropriate, given his earlier remark, his reputation, and the fact that the email was sent just to her with the message *Just for you :-)* she was creeped out.

She decided to tell her manager Gwen Down-Stuart, as she felt extremely upset and uncomfortable about the whole situation and she didn't really know what to do. Ms Down-Stuart consulted with Mr Holley's manager and they in turn consulted with Mr Barry Samu, the Auckland City Branch Manager. Mr Samu established and clarified whether the complaint was a formal complaint, (which it was); he viewed the email, assessed the complaint, and decided to alert the Human Resources Department

### **29 November 2006.**

On the 29<sup>th</sup> November (9.19am), Ms Jo Calder, Leading Edge's Human Resources Manager sent Mr Holley an email advising him that they would like to hold a formal disciplinary meeting with him to discuss an official complaint about a pornographic email he sent to a Leading Edge team member. He was advised that given it was a formal disciplinary meeting he may have a support person or representation of his choice.

By late morning, Mr Holley had not responded to Ms Calder's email so she sent another one to him at 11.44am asking him to please confirm when he is able to meet with her and Mr Samu.

At 11.50am, Mr Holley rang Ms Morgan's private cellphone. She did not recognise the number and did not answer immediately as she was on her landline. When she returned the call, it was Mr Holley. He asked her if she was busy or had a chance to talk for a minute. She says that she became flustered and told him that she was busy but would call him back. She then talked about the events with a work colleague (Sarah Bishop) who sits next to her.

After talking with Ms Bishop, she rang Mr Holley back and said she had a minute to talk, but he said *not on the phone* and he asked her to meet him in the hallway. Ms Morgan said she also found this very strange and she was uncomfortable because the hallway is outside the ladies toilets. She decided to meet him in the hallway, but asked Ms Bishop to walk in the hallway in a few minutes, as a precautionary measure.

Ms Morgan says that Mr Holley's tone was very stern and he indicated to her words to the effect that he was *up against the wall and things were not looking to good*, and he told her to delete and discard all the emails he sent her. He apparently also said that the conversation

should go no further. Ms Morgan told Ms Bishop and Ms Down-Stuart about the conversation. Later that evening, Mr Holley tried to contact Ms Burns by ringing her cellphone.

She says she didn't immediately recognise the number but sensed she knew it from somewhere. She did not answer the call, but went back and checked her phone and worked out it was Mr Holley. She immediately sent a text to Messer's Burns and Down-Stuart. Ms Down-Stuart told her not to call him.

### **30 November 2006.**

When this development came to Ms Calder's knowledge, she was concerned that Mr Holley had possibly attempted to interfere with the company's investigation and she wrote a formal letter to Mr Holley requesting that he attend a formal disciplinary meeting to respond to some very serious concerns the company had, specifically, the *detail that kills* email, an allegation that he approached Ms Burns and asked her to delete the offensive material, and an allegation he made repeated calls to Ms Burns' mobile phone after hours. The letter gave him proper notice of the nature of the meeting, his right to representation and the possible consequences or outcome of the meeting.

### **Disciplinary meeting.**

The letter of 30 November summarised the three matters of serious concern to which the company sought Mr Holley's responses. Mr Holley attended the meeting with professional representation, (Mr Anthony Russell) Ms Calder was representing the company in her senior HR/Management capacity and authority and Mr Samu was in attendance as a witness.

Both parties openly recorded the meeting with the knowledge of the other. I have viewed a typed transcript of the meeting provided by Mr Holley. The content of the transcript is not disputed, other than the acceptance of both parties that it is not a full transcript because some words were difficult to pick up, and there was an interruption with Mr Holley's recording device. Ms Calder assures the Authority that she has the company's recording of the meeting and will guarantee its safe keeping for copying and transcribing.

While I have not heard a recording of the meeting, it appears to me from the transcript that Mr Holley's line of defence was offence. Ms Calder in her opening statement raised the email that was of a sexual nature, Ms Burns' discomfort and extreme discomfort with receiving it, and the comments around the brag board. This prompted Mr Drake to seek clarification of the allegations which made no mention of the brag board conversation.

During the meeting, Mr Russell asked Ms Calder if Ms Burns' complaint was in writing which she confirmed that it was, but she apologised that he wasn't provided with a copy as she thought she had copied it to Mr Holley.

Mr Holley's responses to the allegations are generally summarised as, in his view there is a predominant prevalent culture of such emails containing images, slide shows and videos of an offensive or risqué nature being regularly circulated and viewed within Leading Edge. Mr Holley produced copies of other such emails and attachments with the names of other employees who have received or forwarded on similar material. It would appear that some of the other staff were senior or had management responsibilities. He says that he is being singled out and being treated differently.

Mr Holley indicated that prior to sending his email to her; on November 21 Ms Burns sent an email attachment (MasterCard) to him and other people, three of whom are employees of Leading Edge.

In respect of the repeated phone calls to Ms Burns after business hours, it was very quickly established that he made only one phone call and it was not answered by Ms Burns.

Mr Holley's response to the hallway meeting was he talked to her for about two minutes while

he was leaving the office. He told her he was being disciplined for forwarding email attachments and suggested that it would not be wise for her to forward anymore in the future, and that she delete any that she has. (the underlined statement is taken from Mr Anthony Russell's letter of 7 December, page 2, paragraph # 4, 4<sup>th</sup> line).

The meeting lasted about 30 minutes before Ms Calder took an adjournment, and approximately 15 minutes later she reconvened the meeting and advised she had had a chance to review his feedback.

She said she had one other concern which she failed to raise earlier being the fact that the email he sent Ms Burns was sent to one individual *Just for you* :-) Ms Calder said, in essence she has a real concern about the nature of the email, the cornering or confronting of Ms Burns, and the phone calls to Ms Burns. Ms Calder said it was her decision based on that, and the seriousness of the complaint, to dismiss him with immediate effect.

Mr Russell protested at the decision and sought a reconsideration of the decision, raising the series of other emails that Mr Holley presented which included Mr Samu in the circulation/receiver list, but the company was not prepared to reconsider its decision. Mr Drake made a further request for a copy of the written complaint and the meeting ended.

### **Arguable case.**

There was some opportunity for Mr Holley to respond to various matters raised by the company; however it is apparent he was not provided with a copy of the written complaint specifying the detail. During my enquiries at the investigation meeting, I was advised that the company had three written statements, one from Ms Morgan, one from Ms Bishop, and one from Ms Down-Stuart. It is my understanding that each of these written statements formed part of the material gathered by Leading Edge prior to the disciplinary meeting. I was told by Ms Calder that those statements were not provided to Mr Holley at the disciplinary meeting.

Mr Holley has raised questions around possible disparity of treatment and an alleged pervading email culture.

Ms Calder's primary evidence at item #4 of her brief was *that the images themselves are not the issue. It is the inappropriate personalising of the email to a junior member of staff .....* From the information available to me at the investigation meeting, it is not apparent that that matter, and the acute weighting placed upon it having been squarely put to Mr Holley for his response.

It is my view that Mr Holley has an arguable case in terms of possible procedural fairness principles and the opportunity afforded to him to respond fully to all of the allegations. I am also inclined to the view that Mr Holley has an arguable case in respect of the other matters identified above.

### **Balance of convenience.**

I have had regard for the nature of the allegations against Mr Holley being associated with images and email content of a sexual/pornographic nature, the alleged interference by him into the company's investigation, and how in the whole scheme of things Ms Burns' evidence about being creeped out, nervous, and extremely uncomfortable.

Leading Edge's workplace is predominantly an open plan workplace, and I am told that it employs a lot of young female staff. The company opposes reinstatement not only because of the situation it would place Ms Burns, and Ms Bishop in, but also in relation to the welfare of its other staff.

Mr Holley's view is that arrangements could be made where he would have little or no contact with those employees, and he says he does not pose the risk that has been suggested. He also maintains that it is important for the work he does to maintain continuity with his clients.

He has indicated the difficulties of being out of work over the Xmas/New Year period.

Given that the nature of the misconduct hinges on allegations that relate to possible inappropriate/offensive emails, and alleged elements of a common thread of behaviour of an unwelcomed sexual nature, in my view the balance of convenience of not reinstating Mr Holley to the status quo of being back in the workplace performing his normal work favours Leading Edge. I am inclined to favouring Leading Edge has sufficient concerns around the interests of its female staff to not reinstate Mr Holley in a full capacity back into the workplace

### **Alternative remedy.**

I am satisfied that the remedies available to Mr Holley under the Employment Relations Act 2000 are adequate remedies in an ordinary situation of an alleged unjustified dismissal matter. In the circumstances of this matter, combined with Mr Holley's personal circumstances, the remedies referred to above are appropriate remedies if he was not reinstated and perhaps found at the substantive investigation to have been unjustifiably dismissed.

### **Overall justice.**

In Baker v Armourguard (supra) at p.436 Goddard CJ said:

*By overall justice is meant a process during which the Court stands back from the details of the case and has regard in a more general way to the situation disclosed by it including, in an appropriate case, the strength or weakness of the applicant's substantive case or the respondent's defence to it, so far as these are apparent at this early stage of the proceeding, and whether the grant or the refusal of an interim injunction may have the practical effect of granting one party or the other final judgment without a full hearing.*

Standing back from the whole matter and considering all the information, it is my view that Mr Holley has an arguable case, the inconvenience of reinstating Mr Holley fully into the workplace favours Leading Edge, and while there are suitable alternative remedies available to Mr Holley, it is my view that the overall justice of the case lends toward Mr Holley's application for interim reinstatement being partially successful.

### **Determination.**

On 21 December 2006 I gave the representatives an oral determination of this matter. I now confirm it in writing.

Leading Edge Communications Limited is required to immediately reinstate Mr Holley on the following conditions. He is to be put back on the payroll on the basis of his base salary and car allowance. For the avoidance of doubt, there is no requirement to attach any commission component to the salary calculations. Mr Holley shall be placed on paid garden leave, and is not required to perform any work, nor shall Mr Holley visit or go to his previous workplace premises.

### **Costs.**

Costs are reserved.

Ken Raureti  
Member of Employment Relations Authority