

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 395  
5312242

BETWEEN                      CHRISTIAN PATRICK  
   JORDAN  
   Applicant

AND                              COMPASS  
   COMMUNICATIONS  
   LIMITED  
   Respondent

Member of Authority:        Yvonne Oldfield

Representatives:             Greg Bennett for applicant  
   Paul Woodhams, General Manager, for respondent

Investigation meeting        4 March 2011, 6 April 2011

Determination:                12 September 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Mr Jordan worked for the respondent company (Compass) as a New Business Development Manager until he was dismissed on 10 March 2010 for an alleged “breach of fidelity.” Mr Jordan says that the procedure which led to his dismissal was unfair and that the dismissal itself cannot be justified.

[2]     A determination dated 4 November 2010 has already dealt with the preliminary question of whether Mr Jordan raised a dismissal grievance within the 90 day statutory time frame. Paragraphs [4] and [6] of that determination recorded:

*“I began by asking Mr Jordan to clarify what grievance or grievances he purported to have raised. Although the principal concern in his statement of problem was his alleged unjustified dismissal grievance it appeared that other concerns ...remained live issues for him. Mr Jordan responded by saying that he saw all the matters as*

*connected. He said that even if they were not able to be brought as separate matters, they remained relevant background to the ending of his employment, because, he said, they demonstrated a pattern of unfair and unreasonable treatment from the employer...*

*Should Mr Jordan wish to pursue other grievances as claims in their own right he will need to provide evidence that they were raised in accordance with section 114. Unless he does so the Authority will be unable to investigate them as stand alone grievances. This determination deals only with the question of whether the alleged unjustified dismissal grievance was raised within 90 days of the termination of Mr Jordan's employment."*

[3] The outcome was a conclusion that Mr Jordan did raise a grievance of unjustified dismissal within the statutory timeframe. The determination also recorded that he was free to pursue a further apparent claim for unpaid commission since an arrears claim would not be subject to the requirements of s.114 of the Employment Relations Act.

[4] An amended statement of problem was lodged on 7 January 2011 in relation to Mr Jordan's grievance. The only claim in relation to commission was as a component of remuneration lost as a result of the grievance. There were no particulars of the raising of any grievance other than that of unjustified dismissal, however it did include the following amongst the matters Mr Jordan wished to have resolved:

*"whether the use of previous misconduct was unjustifiable; and*

*...whether previous warnings are unjustifiable when issued for failing to meet sales targets without proper process..."*

## **Issues**

[5] For the reasons already set out above this determination addresses only the question of whether Mr Jordan's dismissal was justified.

[6] I also record that it has not been necessary, in determining that issue, to consider whether any prior warnings were justified. The issues earlier on in the employment were of a completely different nature to those which led to the dismissal and are not relied upon by Mr Woodhams to justify the decision to dismiss.

[7] The questions for determination here are whether the dismissal was justified and if not, whether and to what extent contributory conduct should be taken into consideration.

### **The Dismissal**

[8] Mr Woodhams told the Authority that in the latter part of the week beginning 22 February 2010 he received an unsolicited phone call from a Compass franchise owner. He said this person told him that he felt he should report that he had heard that Mr Jordan planned to go out in competition with the respondent and take co-workers with him. Another staff member was sitting with Mr Woodhams when he took this call. He sat listening to Mr Woodhams' side of the conversation and when Mr Woodhams came off the phone he told Mr Woodhams that he had overheard Mr Jordan say the same thing very recently. (This staff member sat at a work station adjacent to Mr Jordan and had been able to hear Mr Jordan speaking in this way on the phone.)

[9] On the morning of Monday 1 March Mr Woodhams emailed Mr Jordan requiring him to meet with him at 2.00pm that afternoon. Several more emails passed between the two men over the course of the day. Although Mr Woodhams did not say specifically what the meeting was about he conveyed that it was an employment matter. At first Mr Jordan agreed to attend but then he asked that it be deferred to 2 March on the basis that he had not been given enough notice and could not arrange support. Mr Woodhams complied with this request.

[10] Mr Jordan's last email of 1 March contained a request for more detail about what he was required to respond to. On the morning of 2 March Mr Woodhams replied saying that the meeting was to discuss Mr Jordan's use of sick leave and an alleged breach of terms and conditions of employment.

#### *First meeting: 2 March 2010*

[11] The meeting of 2 March was attended by Mr Jordan, Mr Woodhams and Ms Vivera (Compass's payroll and human resources administrator.) Mr Jordan did not

bring a support person but when Mr Woodhams asked he confirmed that he wished to proceed and would record the meeting on his mobile.

[12] The meeting was very brief. Mr Woodhams presented Mr Jordan with a letter and went through what was set out in it. The letter reads, in its entirety, as follows:

*“The reason for today meeting is to advise you that I believe there may have been a breach of fidelity on your part. My reasons for concern are based on two separate conversations brought to my attention by two unrelated individuals.*

*The first instance relates to a Compass affiliate being advised by a Compass competitor that you had approached them to discuss possible employment and that you were able to bring with you Compass sales staff.*

*The second instance relates to a Compass employee overhearing a telephone conversation you had while in the Compass Auckland office. During said telephone conversation you advised the person on the telephone that you were interviewing at Call Plus (a direct compass competitor) and that you have told them (callplus) that you would be able to bring a full sales team with you.*

*Christian this is obviously very concerning to Compass and this is being treated as possible serious misconduct on your part. I will be carrying out an investigation into this matter and you need to understand that should the above allegation be proved to be correct it may result in the immediate termination of your employment at Compass Communications.*

*You will need to be available for another meeting to offer any explanations you have and I encourage you to bring a support person to this meeting. The meeting will be Wednesday the 3<sup>rd</sup> of March 2010, 2pm, at Compass.”*

[13] Mr Woodhams also explained to Mr Jordan his intention to carry on (after the Wednesday meeting) and complete an investigation and then to confer with the CEO before a final meeting on Thursday or Friday *“possibly with a decision in hand.”*

[14] Mr Woodhams also informed Mr Jordan that he would prefer Mr Jordan to return to the office only on completion of the investigation and meanwhile he would be on full pay. Mr Jordan agreed to meet the next day at 2pm and the meeting adjourned.

*Second meeting: 3 March*

[15] The meeting reconvened on the Wednesday as planned. Once again Mr Jordan was unaccompanied. He told Mr Woodhams that he had no explanation to give

regarding what was set out in the letter and queried whether asking about a job opportunity in another company was being treated as a breach of contract.

[16] Ms Vivera's notes of the meeting (which Mr Jordan has accepted as an accurate record) set out what happened after that:

*“Paul W clarified- No of course not...emphasised that this meeting is not about Christian looking for job, it was about Christian's solicitation of Compass' sales team while negotiating job offer with Compass' direct competitor Call Plus.*

*He asked Christian whether he has any explanation to give to which Christian replied No. Christian said- I really don't have anything to say. I am not going to say Yes it has happened or No it has not happened. Christian kept repeating that he didn't have anything to say or explain, he was not going to prove innocence against guilty or right against wrong.*

*Paul W says that he has investigated the allegations and it was confirmed true and that the witnesses were willing to give the report in writing as an affidavit if required. He reiterated that this second meeting was all about what Christian had to say or whether he had any explanation to give. Christian said he had nothing to say or explain now that it looked like a decision has been made. Paul W repeated that no decision was made and he was giving Christian ample time to say what he had to. Since Christian repeated that he had nothing further to add, Paul W said we could conclude the meeting and come back on Thursday at 2pm. Prior to that he would be meeting with...CEO for a discussion on the matter. Everyone agreed to meet back on Thursday and the meeting concluded.”*

[17] Mr Jordan told me that he did not answer the allegation (that he talked to Callplus about bringing the rest of the sales team) because he felt there was not enough to respond to. I asked Mr Woodhams why he did not provide more information to Mr Jordan. He told me that he felt sure that Mr Jordan knew exactly what he was talking about.

#### *Dismissal*

[18] Although the meeting ended with an arrangement to meet again the next day, this did not happen. In a series of emails over the next week Mr Jordan declined to attend and raised concerns about the fairness of the process. Amongst his concerns was the issue that:

*“I have been given no evidentiary discovery of any and all of the allegations that have been made.”*

[19] Mr Jordan maintained a position that without further information, he would not (and could not be required to) respond to the allegations against him. The exchange finally culminated in an email of 8 March in which Mr Woodhams required Mr Jordan to attend a meeting on the afternoon of 10 March. Problems with his password may have delayed Mr Jordan's receipt of this email but it was established that by the morning of 10 March at the latest he was on notice that he was required to attend a final disciplinary meeting. It was also confirmed to him that that the matters for discussion were as set out in the letter originally provided to him on 2 March.

[20] On 8 March Mr Woodhams had asked his two informants to confirm what they had already told him. Each did so by means of an email verifying the essential elements of what they had heard. Immediately before dismissing Mr Jordan, Mr Woodhams asked Ms Vivera to place a copy of each of these emails in Mr Jordan's file. Unfortunately, however, Mr Jordan did not have the benefit of seeing this information before he was dismissed.

[21] Mr Jordan did not attend the meeting scheduled for 10 March. At 4.05pm Mr Woodhams sent a final message to him attaching a letter confirming dismissal on the basis of a breach of fidelity.

### *Determination*

[22] Although there may be times when it is necessary to protect the privacy of third parties I have been given no basis for concluding that this was one of them. Mr Woodhams was not able to explain why he did not provide Mr Jordan with the emails from his informants or otherwise make available to Mr Jordan all the information that was being taken into account in deciding whether to dismiss him.

[23] It follows that Mr Woodhams withheld from Mr Jordan crucial information which informed the decision to dismiss. Mr Jordan was thereby deprived of the opportunity to comment on the information. This rendered the respondent's process unfair.

[24] I conclude that the dismissal was unjustified.

**Contributory conduct**

[25] The two individuals whom I have described as “informants” both gave evidence of what they told Mr Woodhams. A third former staff member also gave evidence that Mr Jordan had asked her (while he and she were both still employed by Compass) to go across to Call Plus with him. Mr Jordan was unable, in his evidence, to counter these statements or explain his actions.

[26] Only one of the informants had first hand knowledge of what he relayed to Mr Woodhams but I was given no reason to doubt his credibility. I also found the third witness to be disinterested and credible and accept that Mr Jordan did suggest she leave the respondent and come with him to Call Plus.

[27] The evidence therefore supports a conclusion that Mr Jordan did indeed attempt to solicit Compass employees whilst still employed by Compass himself. In this way, while the dismissal has been found to be unjustified it has also been shown that the allegations against Mr Jordan were well founded.

[28] The conduct in question amounts to a clear cut and serious breach of his duties of loyalty and of good faith. Had the respondent followed a fair procedure, with full disclosure to Mr Jordan of all the relevant information, the dismissal would have been justified. I am satisfied that Mr Jordan’s conduct was sufficiently serious for his contribution to be set at 100%.

[29] No order is therefore made for remedies.

**Costs**

[30] Costs are reserved. Any application for costs should be made within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority