

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Jeff McCarthy (Applicant)

AND Centurion GSM Limited (First Respondent) and Millenium Group Holdings Limited (Second Respondent)

REPRESENTATIVES James Turner for Applicant
Chris Patterson for Respondents

MEMBER OF AUTHORITY Robin Arthur

INVESTIGATION MEETING 18 September 2006 and 11 October 2006

DATE OF DETERMINATION 31 October 2006

DETERMINATION OF THE AUTHORITY

[1] During investigation of Mr McCarthy's claim an issue has arisen concerning his possession of a particular document. The respondents have sought an order for its return.

[2] A timetable has been set for counsel to file closing written submissions on the substantive issues involved in the claim. I am able however to deal with the application in relation to the disputed document now.

[3] Mr McCarthy's substantive claim is a personal grievance for what he says was an unjustified dismissal for redundancy in July 2005. Amongst other claims for compensation, he seeks compensation for loss of shareholding rights.

[4] The respondents dispute Mr McCarthy had shareholding rights capable of compensation and say that any arrangements regarding shares were not anyway part of the employment relationship.

[5] Against this background the respondent filed an amended counterclaim in relation to a document included in the bundle of documents lodged by the applicant in support of his claim and for use in the Authority's investigation.

[6] The disputed document is a 56-page report prepared by KPMG and titled "Project Virage Draft indicative valuation Centurion GSM, Millenium Connections and Merge Co" ("the project report"). It bears the date December 2004.

[7] The respondent says the project report was commissioned by the second respondent as part of a due diligence process. It discloses the complete revenue stream of the first respondent and values its business. It was intended for four participants in the share purchase, none of whom were the applicant. The respondents consider the project report remains commercially sensitive and contains information which might damage its interests if it found its way into the hands of a rival business, franchisee or a potential or present landlord.

[8] The applicant denies the respondents' evidence that the project report was not available openly in its offices. However he accepted, in answers to questions at the investigation meeting on 11 October 2006, that he was not provided with a copy by the managing director

or another shareholder and that he did not reveal to any manager that he had taken a copy of the project report for his own reference.

[9] The applicant was an employee of the first respondent at the time in May or June 2006 that he made a copy. He says that he has not shown that copy to anyone else apart from his lawyer, not even his wife.

[10] The applicant also argues that he knows that at least one former director of the first respondent company has shown a copy of the project report to another business and that for this reason it cannot be commercially sensitive.

[11] He also argues that the contents of that document are relevant to the value of shares that he was entitled to have and therefore are relevant to part of his claim for compensation raised in this matter.

[12] That issue is yet to be determined but I am satisfied that the applicant was not entitled to take a copy of the project report at the time that he took it, particularly in the circumstances of having done so without disclosing the fact to the first respondent's managing director Ajay Sharma or the second respondent's director Vinod Patel.

[13] I encouraged counsel to resolve this matter pragmatically between themselves but in the contested litigation context that has not proved possible. I now determine it on the following basis.

[14] I find that the applicant's making a copy of the project report in the period of May or June 2006 and then keeping that copy following his dismissal in July 2006 was a breach of the implied duties of trust, confidence and fidelity in his employment agreement. He also has certain on-going duties of confidentiality in respect of any information truly confidential to his former employer. That others – former directors or former employees – may have had copies of this document and wrongfully disclosed it to third parties does not change or diminish those duties, and there were only allegations but no real evidence from the applicant of such disclosures in any event.

[15] Under s137 of the Employment Relations Act 2000 the Authority may order any person who has not observed or complied with a provision of an employment agreement to do certain things to prevent further non-observance of that provision.

[16] I am satisfied that a compliance order for the return of the copy of the project report in the applicant's hands is appropriate in these circumstances.

[17] As discussed with the parties during the investigation meeting on 11 October I now have taken the copy of the project report from the applicant's bundle and placed it on the file in this matter in a sealed envelope with a printed instruction that it is not to be opened or disclosed without prior reference to an Authority member. I will refer to the project report if necessary as part of determining substantive issues, should that prove necessary and relevant to any matter being determined (particularly compensation). Otherwise it will remain sealed on the file.

[18] One of the reasons that I am satisfied that a compliance order for return of the document is appropriate is that it will not disadvantage the applicant either in this forum or if he pursued aspects of his claim in the Employment Court or the civil courts. In each case the relevant judicial forums have rules enabling parties to obtain relevant documents. The applicant knows of the existence of and contents of this document so that it can be precisely identified for discovery if required. If needed he should obtain a copy through the proper procedures for that purpose and where the respondents will also have the protection that documents released through that process may be used only for that proceeding and no other improper collateral purpose.

Compliance order

[19] **The applicant is hereby ordered to:**

- 1. Within seven days of the date of this determination to deliver to the respondents any and all copies of the project report which he holds.**
- 2. Make no further copies of the project report.**
- 3. Make no disclosure of the contents of the project report to any third party.**

Costs

[20] Costs in respect of this determination are reserved to be dealt with in any costs issues in respect of the determination of the applicant's claims.

Robin Arthur
Member of Employment Relations Authority