Determination Number :AA 53/07
File Number: AEA 1156/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND OFFICE

BETWEEN	Jeff McCarthy (Applicant)
AND	Centurion GSM Limited, trading as Digital Mobile (First Respondent) and Millennium 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
SUBMISSIONS RECEIVED	2 November 2006 (Applicant) and 21 November 2006 (Respondent) and 20 December 2006 (Applicant)
DATE OF DETERMINATION	1 March 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant alleges he was unjustifiably disadvantaged and dismissed by the respondents who also breached his employment agreement and failed to act in good faith towards him. He was made redundant by the first respondent on 10 June 2005 and finished work on 24 June 2005 with one month's notice paid in lieu. He seeks remedies of lost wages for 14 months ($145,833.32), payment of an additional two months notice, compensation for the loss of benefit of share rights which he values at $780,000, additional holiday pay of $5232.88, compensation for distress of $30,000, an unspecified award for loss through injury to reputation, compensation for loss of benefit of fuel expenses for 14 months valued at $17,500, interest on any amounts awarded to him, and his costs.

[2] The respondents deny termination of the applicant's employment was really a redundancy. Rather they say his employment – which was with the first respondent only – ended by the expiry of a fixed term employment agreement. Alternatively they argue that the applicant's employment was terminated for genuine reasons of redundancy in a procedurally fair way and with the payment of redundancy compensation. The respondents deny that the applicant has suffered loss of benefit in relation to shareholding rights and that such rights, if any, were outside of the employment relationship. The respondent also alleges that $30,000 was "incorrectly tended as redundancy compensation" to the applicant and seeks a declaration that the first respondent had no obligation to make that payment. The respondent has made demand of the applicant for return of that money.

[3] This problem was not resolved in mediation. The Authority's investigation comprised a one-and-a-half day meeting. It considered written statements and oral evidence from the applicant, his wife Kirsten McCarthy, a former colleague William Waterworth, the first respondent's managing director Avinaash (Ajay) Sharma, the first respondent's information director and second respondent's director Vinod Patel. The first respondent's former human resources consultant Vicki Wilson attended under a witness summons issued at the request of

the respondent. She would not endorse a witness statement prepared and lodged on her behalf by the respondent but instead answered questions put to her. All the witnesses also answered additional questions from counsel. The parties provided written closing submissions.

[4] During the investigation an issue arose regarding a company document provided to the Authority by the applicant. That issue was resolved by determination AA334/06 dated 31 October 2006.

Issues

[5] Resolving this employment relationship problem requires determination of the following issues:

(i) who was the employer?
(ii) what were the terms of the employment agreement?
(iii) how did the employment come to an end – by expiry of fixed term or by redundancy?
(iv) if by redundancy, was the redundancy for genuine reasons?
(v) if by redundancy, was the redundancy made fairly?
(vi) if the termination of employment was unjustified, to what remedies is the applicant entitled in the circumstances of this matter?

Who was the employer?

[6] Between November 1999 and September 2003 the applicant worked for Centurion GSM Limited, trading as Digital Mobile ("Centurion" or "the first respondent"). The business was a retailer of mobile phones and mobile phone calling plans through a chain of Digital Mobiles franchise stores. By 2003 the applicant held the post of General Manager, Operations at Centurion's head office.

[7] In this and earlier roles with Centurion the applicant developed a business relationship and friendship with Mr Sharma. Mr Sharma operated four Digital Mobile franchise stores through a company called Millennium Connections Limited ("MCL").

[8] Through 2003 the applicant was involved in discussions with Mr Sharma and Mr Patel about seeking the New Zealand franchise for a menswear chain called Politix. Plans were made for the franchise rights to be held by a company named SMP Investments Limited ("SMPIL"). The initials SMP stood for the first letter in the names Sharma, McCarthy and Patel. The applicant says the arrangement was that he would "pick up" a 26 per cent shareholding in SMPIL. In May and June 2003 the applicant was involved with meetings to secure the New Zealand franchise for the Politix stores. In August 2003 he spent time unpacking stock and stocking shelves when the first Politix store opened in New Zealand which he describes as "unpaid work".

[9] Companies Office records show a company owned by Mr Sharma and Mr Patel changed its name to SMPIL in August 2003. The applicant was appointed a director of that company on 5 September 2003. The 2003 Annual return shows the applicant as a director but all shares being owned by Mr Patel. A notice of change of director shows the applicant ceasing to hold office as a director from 3 August 2004. The company is now owned by the second respondent in which Mr Sharma and Mr Patel are the major shareholders.

[10] During 2003 the applicant talked with Mr Sharma about leaving his job with Centurion and working for MCL. Mr Waterworth, who had been the applicant's manager at Centurion, gave evidence that at that time the applicant told him he was to become a director and shareholder of both Millennium and the "holding company" of Politix (that was SMPIL).

[11] On 8 September 2003 the applicant started work for MCL. There was no written employment agreement. The applicant says he was employed under an oral agreement on the following terms: his post was Director of Sales and Operations; his salary was $125,000 a year (payable by MCL and SMPIL), and he was to be paid fuel expenses. These elements are

not disputed. Three other alleged terms of employment were that he would:

(i) get four weeks annual leave, and

(ii) get a shareholding of 23 per cent of MCL and 29 per cent of SMPIL in return for a payment of $50,000, and

(iii) be appointed as a director of MCL and SMPIL.

[12] Through 2004 MCL's business had grown and it developed a proposal to buy the first respondent. The proposal involved a reverse buyout of Centurion and MCL by the second respondent. MCL's operations were to merge with Centurion which continued to trade as "Digital Mobile".

[13] This buyout and merger took place in early 2005 and was formally effective from 1 March 2005. There is no dispute that as a result of that process the applicant was employed by Centurion in a similar position on similar terms and conditions as he had with MCL. This was agreed verbally in late 2004. It was confirmed in writing in a letter to the applicant dated 29 March 2005 and signed by Mr Sharma as managing director of Digital Mobile. The applicant did not receive this letter until 2 May 2005 but both parties accept that it records the basis of his employment with Centurion.

[14] His actual starting date with Centurion in late 2004 or early 2005 is not clear. In November 2004 the applicant was working at MCL's Botany Downs office but from January 2005 he worked from Centurion's Parnell offices. Mr Sharma says there was a "grey period" during integration of the companies but confirmed that by around March 2005 the applicant was employed by Centurion.

[15] I find that at the time of his dismissal the applicant was an employee of first respondent and the first respondent only. There is no evidence that the applicant was ever an employee of the second respondent, either directly or indirectly. He may have a moral view that as the majority shareholder of Centurion, the second respondent (whose shareholders include Mr Sharma and Mr Patel) benefited from his labour for MCL and then Centurion and should contribute to any remedies awarded to him. However that is not the position at law. The legal entity that employed him and dismissed him was Centurion. If there is a grievance within the terms of the Employment Relations Act 2000 ("the Act") about the circumstances of those events, it is with Centurion and not the second respondent.

Terms of employment

The shareholding issue

[16] I am satisfied that the 29 March 2005 letter from Mr Sharma records the basis on which the applicant was employed by Centurion. It states, in part:

> *As part of the sale and purchase process, Digital Mobile has agreed to offer you a similar position in the new business, on similar terms and conditions as you currently have.*

[17] It records the basis on which he was already working for Centurion from, most likely, January 2005.

[18] What is at issue is whether the terms of employment that the applicant then had "currently" with MCL included the alleged rights to shares and a directorship.

[19] It is the applicant's contention that he was offered and accepted employment on the basis of getting shares and a directorship in SMPIL and MCL but these were removed from him without his agreement. His evidence is that Mr Sharma made further promises to him in late 2004 that he would get a shareholding in Centurion following the buyout.

[20] I have carefully reviewed the written statements of the witnesses, their answers to questions at the investigation meeting, and more than 400 pages of copied documents

provided in evidence. With my best efforts I cannot see that the totality of the evidence supports the applicant's contention that as a term of his employment he had guaranteed rights to purchase shares in MCL and later Centurion.

[21] Instead I consider the evidence – both from the witnesses' evidence and their actions through the relevant period – supports a different interpretation of their discussions and arrangements about shares, one that is to do with a business and investment relationship, not an employment relationship. The applicant refers to Mr Sharma introducing himself on social occasions as the applicant's "business partner".

[22] The applicant had long sought the opportunity to own a stake in a business in the mobile telephone sales industry. Mr Waterworth gave evidence of the applicant asking to buy shares in Centurion or a franchise back in 2002.

[23] Through his friendship and business relationship with Mr Sharma the applicant saw an opportunity to gain a stake in MCL. He was also involved in the SMPIL business setting up the Politix menswear stores. That preceded any employment relationship with MCL.

[24] I do not accept the applicant's argument that it is not credible that he would have left a job at Centurion – where he says he was on target to earn $160,000 in the 2003/4 year – for the lesser salary of $125,000 at MCL without also having as one of the terms of employment being the right to a shareholding. Rather I consider it quite credible, and more likely than not, that he did take the job without such a term of employment. Instead he was chasing the long-sought opportunity to be an investor or partner in a business – and that was basis on which any arrangements regarding shares were made.

[25] He negotiated a 23 per cent shareholding in MCL and a 29 per cent share in SMPIL. The agreement reached with Mr Sharma was that he would pay $50,000 for the shares but did not need to pay that amount immediately. He says that Mr Sharma agreed that he would "finalise the transaction" – that is pay for the shares – before Christmas 2003.

[26] He signed consent forms for appointment as a director of the MCL and SMPIL and was given a share transfer certificate for 115 shares in MCL stating consideration for the shares to be $50,000 and signed by Mr Sharma. He was also given a statement of shareholdings showing his percentages along with Mr Sharma, Mr Patel and two other people and two companies.

[27] However the business investment plan went awry when the applicant took steps to raise a loan from a bank to pay for his shares. The loan conditions required providing the bank with financial reports and cash flow forecasts for both companies for the next two years.

[28] The applicant met a frosty reaction to his request for this information. It is apparent that Mr Sharma and Mr Patel did not expect the applicant to raise a loan to pay for his shares. They had believed he had unencumbered capital to invest in the business. Mr Patel refused to provide the information requested and effectively blocked the share purchase and transfer.

[29] Mr Sharma and Mr Patel had expected the applicant to put cash into the business. As Mr Patel explained in the investigation meeting, if the existing shareholders had wanted to use borrowed money, they could have got it from the bank themselves.

[30] The dispute about shareholding continued in 2004 and the applicant was asked to resign from his directorships (although Mr Sharma says this request was to do with other necessary arrangements for reorganisation of the business, not the share dispute). Mr Sharma told the applicant that he would try to have their original arrangement honoured but there were difficulties in getting the agreement of Mr Patel and other shareholders.

[31] The applicant does not appear to have referred to the issue of shares as a term of employment until after his dismissal. Among many documents, an email of 4 May 2004 is a good example. Writing to Mr Sharma, the applicant refers to "*our agreement of my share*

purchase of [MCL]" and whether "*our original agreement may still be on the table*". It continues:

> *My first choice is to finalise that original agreement of course. I understand this was a verbal agreement but just the same a commitment that we both entered into. For me, as you know, it was the cornerstone to my decision in making a move to take control of my destiny and for you it was the cornerstone to building a successful business …*

[32] Conspicuous by its absence is any reference to a share agreement being a term or condition of taking the job of director of sales and operations at MCL. That is, in my determination, because the investment opportunity was not a term of employment.

[33] I am not dissuaded from that view by the existence of an offer to settle the share issue made by Mr Sharma on behalf of MCL in May 2004. This offer and the applicant's response to it was the subject of two pages in the bundle of documents lodged by the applicant and some parts of the written statements of the applicant and Mr Sharma. The first respondent asserted its privilege over disclosing the contents of the offer and the applicant's response as being "without prejudice" communications for the purpose of settling a dispute between the parties which should not be disclosed in litigation. The applicant was prepared to waive any privilege and asked the Authority to take account of those communications.

[34] For reasons discussed with the parties, and after hearing from counsel, I upheld the first respondent's privilege in the content of the communications, except to the extent that this was waived in Mr Sharma's statement. He acknowledged that an offer was made to settle any claims that the applicant may have had regarding shareholding. The applicant came back with what amounted to a counteroffer which Mr Sharma was not willing to accept.

[35] Having seen the content of the privileged documents and statements referred to, I gave the parties an opportunity to comment on whether I should withdraw from the investigation and arrange for another member to continue with it. Both parties consented to my continuing the investigation. Counsel for the respondents stated that the member's knowledge of an offer of settlement did not prejudice the respondents' case.

[36] I agree. The existence of an offer of settlement of the share issue does not necessarily add any weight to the applicant's case. A settlement offer, in a case of this type and on the aspect of shares only, may well be in relation to business interests rather than employment interests and does not confirm that there were actual rather than alleged rights breached.

[37] I accept the applicant's evidence that he pursued the issue of a shareholding in MCL or – once the buyout was in contemplation – in Centurion through repeated discussions with Mr Sharma during 2004 and into 2005. Mr Sharma told him that the issue "would be sorted one way or another". However there is nothing in that evidence that elevates the applicant's pursuit of a business interest into a term of employment or Mr Sharma's words of reassurance – as empty as they proved to be – into a commitment to the applicant as an employee.

[38] The applicant's submissions – and case law referred to – are not persuasive on this point. There are cases where employees have won compensation for the loss of a contractual right to shares in the company – see *Walker Corporation Ltd v O'Sullivan* [1996] 2 ERNZ 513 – or enforced a payment arising from an entitlement to shares – see *Paul v Waikato Honey Products Limited* (ERA Auckland, AA 109/06, 4 April 2006, Member Anderson).

[39] In both the *Walker* and the *Paul* cases the employees had written agreements which clearly set out the term relating to shares. The absence of a written employment agreement including such a term in the present case is not fatal to the applicant's argument. However, on the balance of probabilities and weighing commercial considerations as a guide to the intention of the parties, the absence of any written confirmation of such an important aspect (if it were to be taken as a condition of employment) is a factor supporting my view in the present matter that any arrangements regarding shares were with the applicant as an investor and not as an

employee.

[40] Another case referred to in the applicant's submissions – *Dowling v Eade and Haig* (unreported, HC Auckland, CP 806/88, 21 August 1989, Wallace J) – supports the proposition that oral agreements may be upheld regarding the terms of share transfers. However it relates to the circumstances of an employee who had purchased shares in a company and, on being asked to leave, could not get the defendants, who were the other shareholders, to buy back his shares from him at an agreed valuation. From my reading of that case, which clearly differs from that of applicant's counsel, it concerns enforcement of an agreement between shareholders – heard and decided in the High Court – and the relationship between the parties was as shareholders, not one of employment.

[41] For these reasons I find that there was no term of employment between the applicant and MCL, or subsequently Centurion, regarding shareholding in either company.

[42] If there are issues of shareholding rights – and the conduct of the directors and shareholders in removing the applicant as a director – they are not within the jurisdiction of the Authority.

[43] In light of this conclusion I need not refer to the document which is the subject of Authority determination AA334/06. A copy remains sealed on the Authority's file.

[44] However if I were wrong in my determination of the status of the alleged share holding rights, and the opportunity to buy shares for $50,000 were a term of employment, the evidence suggests that it was the applicant and not the respondent who failed to meet the terms of such an offer. The applicant sought to vary the arrangement by requiring the company to do certain things to assist the applicant raise the necessary funds to pay for the shares – that is to disclose its financial plans to a third party, the bank – and that was not part of the deal. I accept the evidence of Mr Sharma and Mr Patel that the situation would have been different if the applicant had in fact tended to them the cash amount discussed. They were bound to let him buy the agreed shares if he could provide the cash. They were not bound to assist him raise it from a third party. On that basis I do not find there was any breach of such a term of the applicant's employment agreement, if that is what it was.

Annual leave

[45] I find that a term of the applicant's employment with the first respondent was an entitlement to four week's annual leave.

[46] It was not recorded as a term of his employment with MCL because there was no written employment agreement.

[47] However the respondent presented the applicant on 3 May 2005 with its proposed written employment agreement. That agreement, prepared by the company's human resources consultant Ms Wilson, included a leave clause providing four weeks annual leave. She had drafted the 29 March 2005 letter – not given to the applicant until 2 May – that referred to him being employed in a similar position on similar terms and conditions.

[48] Ms Wilson, who also had the benefit of legal advice throughout, knew that the proposed employment agreement was intended to restate existing conditions. There is, consequently, little credibility in the respondent's argument that the applicant only had an employment term of three weeks leave.

[49] He was "offered" four weeks in the draft written agreement presented on 3 May 2005 because that was a similar term to that which he had previously enjoyed with MCL.

Position

[50] I also find that the applicant was employed in the position or role of Regional Operations

Manager. The basis of that employment – fixed term or continuous – will be addressed shortly. However there can be no doubt that this was the role and the title of the role that the applicant carried out.

[51] He had a business card that stated his position. The later-offered employment agreement referred to that role. Various company memos and minutes of management meetings referred to the applicant's work in that role and he provided reports on retail operations – a duty of that role. He has staff reporting to him in that role regarding their retail operations activities. In answers to questions in the Authority's investigation, Mr Sharma accepted that the applicant had carried out the duties of that role.

[52] I also prefer the applicant's evidence that Mr Sharma promised him that role from early in the discussions about the merger and that there was no reason to believe that his appointment to the role was temporary. He had a permanent role with MCL and he was told that his employment with the first respondent would continue on the same terms and conditions.

End of the employment – expiry of fixed term or redundancy?

[53] Centurion ended its employment of the applicant by letter dated 10 June 2005. Addressed to the applicant and headed "Re Redundancy", the letter stated:

> *This is to confirm our discussion over the past 7-10 days whereby we have been unable to reach agreement on terms and conditions of employment for you in the permanent role of Retail Operations Manager with Digital Mobile. In particular, Digital Mobile is unable to meet your remuneration expectations of approximately $200 000 per annum for this role.*
>
> *Therefore, as per our letter to you of 16th May, we have now reached the point whereby we must give you notice of termination in respect of your role of Acting Retail Operations Manager. We hereby give you one month's notice and the termination of your employment will take effect from the 10th July 2005 … As has previously been mentioned to you, you have not had a written employment contract with Millennium Connections (with whom you were previously employed prior to the acquisition of Millennium Connections by Centurion GSM Ltd), nor subsequently with Centurion, T/A Digital Mobile Ltd. Therefore, there is no contractual requirement for Digital Mobile to pay you any redundancy compensation in lieu of being able to offer you ongoing employment.*
>
> *However, on an ex-gratia basis and to be fair and reasonable, Digital Mobile will pay you three months compensation in recognition of the service provided to both Digital Mobile and Millennium Connections Ltd, during your employment of approximately 20 months. This will be paid to you at the conclusion of your notice period above. …*

[54] Contrary to this clear documentary evidence of the time, the respondent submitted that the applicant's employment was the result of the expiry of a fixed term agreement and not by redundancy. It now says – through counsel's submissions and the evidence of Mr Sharma – that the applicant was appointed on a temporary basis and on a fixed term to the position of Retail Operations Manager. It says the earlier references to redundancy were a mistake. Mr Sharma's witness statement alleged that the applicant was told the nature and purpose of the fixed term agreement by letter. He was unable to produce a copy of any such letter.

[55] It is clear from the evidence of Ms Wilson that she advised Mr Sharma throughout this period – which included some negotiations over the terms to be included in the written employment agreement and a decision to end the applicant's employment on the purported grounds of redundancy. Ms Wilson, in turn and at the respondent's expense, had the benefit of legal advice from an experienced employment law specialist throughout. I am satisfied from

Ms Wilson's evidence that she understood how fixed term employment agreements operated, and how to set them up. If it had been the case at the time that there was a fixed term employment agreement in place between the applicant and the respondent, Ms Wilson and her legal advisor would have – more likely than not – advised Mr Sharma to use expiry of that term as a basis of ending the employment relationship. They did not do so because there was no such agreement in place. Ms Wilson's evidence was that she was not aware at that time of any suggestion of a fixed term agreement**.**

[56] In short I find no reliable evidence of the existence of a fixed term employment agreement at that time. In that light, Mr Sharma's evidence to the contrary also affects the credibility of his other evidence around the events of the ending of the applicant's employment.

[57] It also follows that there is no basis for the respondent's counterclaim for the return of $30,000 paid to the applicant. The respondent had no obligation to pay that money – there was no term of employment requiring payment of redundancy compensation. Rather, it paid the money to the applicant on the basis that declared at the time – as an ex-gratia payment in recognition of service to MCL and Centurion. That counterclaim is dismissed.

Was the redundancy for genuine reasons?

[58] Lacking a written employment agreement the applicant did not have specific terms of employment regarding redundancy. However these were addressed in the draft employment agreement offered to him on 3 May 2005. Mr Sharma accepted during the investigation meeting that as the draft employment agreement was supposed to represent the applicant's existing terms, its definition of redundancy could be used to assess the respondent's decision to terminate the applicant's employment for redundancy.

[59] It contains a relatively standard definition of redundancy as:

> *… a condition in which the Company has employee(s) surplus to its requirements because of the closing down of the whole or any part of the Company operations, or to a change in methods, materials, products, reorganisation, and reduction in business activity or like cause requiring a reduction in the number of its employees.*

[60] It provides for payment of four week's "base salary" as compensation in the event of termination for redundancy but excludes any other payments for redundancy.

Legal framework

[61] In addition to any contractual obligations, the respondent had a statutory duty to act in good faith in making any redundancy proposal and dismissing the applicant for redundancy, including providing access to relevant information and an opportunity to comment of the information before the decision was made.

[62] Redundancy is determined in relation to the position not the incumbent.[1] An employer is entitled to make its business more efficient and a worker does not have a right to continued employment if the business can be run more efficiently without that position.[2] Where an employer decides as a matter of commercial judgment that there are too many employees in a particular area, it is for the employer as a matter of business judgment to decide on the restructuring strategy, what positions should be dispensed with and whether an employee whose job has disappeared should be offered another position elsewhere in the business.[3]

[63] While the Authority or Court does not substitute its view for the business judgement of the employer, the genuineness of any redundancy determination may be reviewed. If it is not

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[1] *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739, 747 (CA)
[2] *GN Hale and Son Ltd v Wellington Caretakers and Cleaners IUW* ERNZ Sel Cas 843, 848 (CA)
[3] *Aoraki v McGavin* [1998] 1 ERNZ 601, 618 (CA)

one an employer acting reasonably and in good faith could have reached, it may be impeached.[4]

[64] An employer must provide an adequate commercial explanation for the course adopted.[5] The usual rule, subject to any contractual duties, is that an employer justifying the disestablishment of an existing position must show that the work being done by the holder of the position is no longer needed by the employer. The inquiry is not as to whether there is merely a rearrangement or renaming of functions but whether the work to be performed has disappeared. The mix of activities making up the job content may alter but if the work is still there and needs to be done, it cannot be said that the incumbents are redundant. Whether a job is the same with a change of focus or emphasis or is a different position, requiring different work, different skills or a different kind of worker, is a question of fact and degree to be determined exclusively and conclusively by the evidence.[6] The test developed by the Courts to assist in making this assessment asks the question: *Would a reasonable person, taking into account the nature, terms and conditions of each position and the characteristics of the [worker], consider that there was sufficient difference to break the essential continuity of employment?*[7]

[65] Inadequate consultation and inadequate exploration of redeployment possibilities may cast doubt on the genuineness of an alleged redundancy.[8] However the genuineness of the redundancy of a position once established cannot be negated by a failure to offer a different position.[9]

[66] The integrity of a restructuring scheme, even where motivated by genuine operational requirements, may be compromised by its application to particular individuals for reasons other than that their jobs have gone. Where the selection of an employer for redundancy is "tainted by some inappropriate motive" and the redundancy is "masking another and different reason", the worker will have a valid grievance.[10]

[67] The grievant raising an allegation of an engineered dismissal has the burden of convincing the Authority that the theory has substance.

[68] Where the Authority finds "mixed motives" – such as genuine business reasons but with underlying personality or performance concerns[11] – the employer bears the burden in justifying a redundancy dismissal of persuading the Authority that the redundancy was both genuine and the predominant motive or reason for dismissal. If the predominant motive was a genuine commercial decision, the dismissal will be justified if carried out in a fair manner. If the predominant motive was for another reason, the dismissal will be unjustified.[12] An important indicator of whether a redundancy was for genuine commercial reasons is whether the employer can show "a significant paper trail or other solid foundation of evidence demonstrating its consideration of a reorganisation".[13]

Explanation and motives

[69] In the present case, in addition to good faith obligations, the respondent's contractual scope for redundancy required that it show a need to close operations, change methods or reorganise that in turn required a reduction in the number of employees.

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[4] *NZ Fasteners* above at 747 (CA)
[5] *GN Hale*, above, at 851 (CA)
[6] *McCulloch v NZ Fire Service Commission* [1998] 3 ERNZ 378, 390-2 (EC)
[7] *Auckland Regional Council v Sanson* [1999] 2 ERNZ 597, 604 (CA)
[8] *Aoraki*, above, at 618; *NZ Fasteners Stainless Ltd* , above, at 747
[9] *NZ Fasteners*, above, at 747
[10] *Savage v Unlimited Architecture Ltd* [1999] 2 ERNZ 40, 49-50 (EC)
[11] The example given in *Nelson Aero Club Inc v Palmer* (unreported, EC Wellington, 7 March 2000, WC10A/00, Judge Shaw)
[12] *Forest Park (NZ) Ltd v Adams* [2000] 2 ERNZ 310, 322 (EC)
[13] *Rolls v Wellington Gas Co* [1998] 3 ERNZ 116, 123 (EC)

[70] The respondent's evidence – through Mr Sharma – of the commercial rationale for its restructuring in June 2005 was weak. It referred to a reorganisation chart but did not produce it or any internal documents which analysed or explained any reason to disestablish the Regional Operations Manager position.

[71] A letter to the applicant dated 16 May 2005 described a "*final organisation structure*" as having been confirmed and including a permanent role of Retail Operations Manager. That role was offered to the applicant. At issue was not the existence or need for the position but the salary which would be paid for it.

[72] It refers to the applicant being offered a base salary of $80,000; a fuel and vehicle allowance of $15,000 and commission of $45,000 to provide "*total remuneration*" of $140,000 with an additional discretionary bonus of $10,000 making the "*total potential available*" of $150,000. It refers to the applicant having stated an expectation of a total remuneration package "*in the vicinity of $200,000*". It continues with the statement that "*in the event that we cannot agree on the above, we will have no option but to make you redundant from your current temporary role*".

[73] The employment agreement offered to the applicant on 3 May 2005 had included a base salary of $75,000 and an incentive payment of $40,000 plus allowances to provide a "total package" of $130,000.

[74] The applicant's evidence was that he was shocked by the offer of an employment agreement which would have reduced his base salary from $125,000 to $75,000. Over the following weeks, the applicant met several times with Mr Sharma, usually with Ms Wilson in attendance, to discuss the remuneration package for the Retail Operations Manager role. At one point the applicant also tried to secure appointment to a more senior position in the respondent's management structure – as General Manager, Sales – but this was rebuffed.

[75] The applicant says that he did not seek a salary package of $200,000 but it is clear from his own notes that such a figure had been mentioned at some stage. However it is also clear that the applicant was asked what he considered should be a "*bare minimum base*" and he replied that he "*would consider anything over $125[000]*". This is taken from a note made by the applicant at a meeting on 13 May 2005 with Mr Sharma and Ms Wilson. Given it was made at the time, and in the absence of any notes made around that time by Mr Sharma and Ms Wilson, I accept it most likely reflects what was said.

[76] Its importance is this. A few days later the 16 May letter gave the applicant an ultimatum – accept the pay level offered ("total remuneration" of $140,000) or face redundancy. He replied in a letter dated 30 May 2005. He disputed why he was being offered a job which he considered he was already employed to do. However his key point was a response to the proposed salary level. He noted that the total remuneration now offered was $140,000 and stated that if the commission is to be "*payable as of right then this is more in line with my expectations, responsibilities and obligation, and the current oral contract between us*". He then asks for more information about the criteria on which the discretionary bonus of $10,000 would be paid.

[77] Despite saying that the total package – as offered by the company in its 16 May letter, and at most amounting to $150,000 a year – was "*in line*" with his expectations, the redundancy letter states a "*particular*" reason for the company's decision being the applicant's "*remuneration expectations of approximately $200,000 per annum for this role*".

[78] Mr Sharma could not remember when he first saw the applicant's 30 May letter but accepted that it was around about that date.

[79] Neither Mr Sharma nor Ms Wilson could explain why neither had replied to the applicant's 30 May letter which clearly does not state an expectation of a salary at the level of $200,000. Neither could they explain why they had given that as a reason for the redundancy when, if it had ever been true, it was no longer so at the time that the respondent made the redundancy

decision and told the applicant on 10 June.

[80] The 10 June letter of redundancy failed to set out any genuine reason for the redundancy, other than its incorrect or outdated position on remuneration expectations. Notes made by the applicant in mid-May meetings record some discussion about his job description and whether it included sales and marketing work or focused solely on operational duties. However there is no real evidence that the declared redundancy of the applicant's position was because there was no longer a requirement for such as a position or the duties of that position were no longer required in the respondent's business.

[81] In that light I find that the respondent has failed to provide 'a significant paper trail' which indicates genuine commercial reasons for the redundancy. There is no adequate commercial explanation for the redundancy decision taken, as expressed in the respondent's 10 June letter, because the applicant had by his letter of 30 May accepted the ultimatum (and offer) put to him on a salary level by the respondent's 16 May letter.

[82] I need not go further to consider whether the respondent had "mixed motives" for its redundancy decision – those are the inferences that the applicant's case invites, that he was really dismissed for not accepting a pay cut and for continuing to argue over shareholding matters. Rather I am satisfied that the respondent has failed to show there were genuine commercial reasons for the redundancy of the applicant's position. It follows that the applicant's dismissal for redundancy was unjustified.

Fairness of the redundancy

[83] A just employer – subject to mutual obligations of confidence, trust and fair dealing and the statutory duty of good faith – will consult on a redundancy proposal and implement any redundancy decision in a fair and sensitive way. Fair treatment may call for counselling, career and financial advice, retraining and related financial support.[14] This requires more than "going through the motions" and will not justify a course of conduct carried out in a way that bruises rather than reasonably minimises the impact on the employee.[15]

[84] The respondent's unexplained failure to respond to the applicant's 30 May letter is testimony to its failure to properly consult him about a redundancy proposal. Rather, through its 16 May letter, the respondent simply raised redundancy as a prospect if the applicant did not accept its position in salary negotiations.

[85] In the days before the applicant was given the 10 June letter notifying him of redundancy, he had spoken with Mr Sharma and Ms Wilson about the terms of an exit package. However there is no evidence that the applicant was properly advised of a redundancy proposal or given sufficient information for him to reasonably comment on it. Throughout, the respondent's discussions with him had the character of pay negotiations not redundancy discussions.

[86] Mr Sharma did offer the applicant a franchise opportunity but he rejected it. However there appears to have been no real consideration of redeployment or exploration of other employment options within the company.

[87] For these reasons I also find that, as well as not genuine, the redundancy was not the result of a fair process, and is therefore unjustified.

Remedies

[88] Having established a personal grievance on the grounds that the purported redundancy of his position was neither genuine nor fair, the applicant is entitled to certain remedies. I have already indicated that this does not, in the circumstances of this case, include any

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[14] *Aoraki*, above, at 619 and 631 (CA)
[15] *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660, 673 (CA

compensation for alleged share rights. However consideration of remedies must include reimbursement for lost salary and benefits, holiday pay, compensation for distress, and costs. There is a claim for compensation for injury to reputation, however, if I could award additional compensation under that head I would not, on the evidence heard, be satisfied that such a loss was established.

Lost salary

[89] Compensation for economic loss, such as lost salary, must be fixed with regard to the actual loss suffered by the employee. Such compensation must be assessed in light of all contingencies which might, but for the unjustifiable dismissal, have resulted in the termination of the employee's employment: *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315, 331-332 (CA).

[90] The applicant submits his lost wages are $72,916 for a seven month period from July 2005 up to February 2006 when he started a new job. However he says his income since has been lower than his lost salary and this should be factored in to an award of full remuneration lost over a 14-month period totalling $145,833.

[91] I do not accept that an award at such a level is justified when assessed against all the contingencies which might, but for his unjustifiable dismissal, have resulted in the applicant's employment being terminated, including by his resignation.

[92] In making that assessment of contingencies, I consider the following factors:

- In late May 2005, the applicant's own evidence – in the form of meeting notes he took – show that he was prepared to leave the job for an exit package of seven months salary.
- The applicant's intense dissatisfaction over the failed share arrangements made it more likely that he would leave in any event.
- The evidence – particularly of Mr Waterworth, a senior manager with a large mobile phone retailer – was that experienced managers in this sector of the telecommunications industry were very much sought after at this time, as they still are now. In short, the job market was good so there were likely to be attractive opportunities elsewhere.
- Mr Waterworth's evidence that managers such as the applicant could likely find a new job within two months.
- Of the respondent's ten-strong management team in May 2005, four had left by the end of 2005, including one other manager who accepted what was described as a voluntary redundancy.

[93] Weighing those contingencies, I consider that the applicant's loss cannot reasonably be assessed at more than six months salary – that is $62,500 less applicable tax.

[94] While I accept what Mr Waterworth said – while giving evidence in support of the applicant – about good demand for experienced managers, I accept that the applicant lost confidence in his business skills as a result of his dismissal. He took some months to actively seek and gain work. Since October 2005 he has worked as an independent contractor to another major mobile phone company. This involved setting up his own company, which as a start-up incurred initial expenses and losses. There was no real income in those months to offset against the lost salary awarded to the applicant.

[95] In considering compensation for economic loss I also take account of the payment of compensation made to the applicant on his dismissal. This was described in the 10 June letter as an "ex gratia" payment of three months compensation recognising service with MCL and the first respondent over 20 months. There is no evidence that, contrary to the respondent's submission, this payment was offered and accepted on a "full and final" basis. Certainly the 10 June letter drafted by the respondent's human resources consultant, with input I was told from its employment law advisor, makes no such reference in it. The letter also describes this payment as a "redundancy compensation package". The letter states that the applicant has a

one month's notice period but did not have to work it out, so this payment must be taken to include one month's pay in lieu of notice.

[96] That arrangement – imposed on the applicant – is different from what is stated in the draft employment agreement given to him in early May, which is relevant if it is taken to be an encapsulation of his terms of employment at that time. It provided for a maximum redundancy compensation payment of four week's salary but also provides for three months notice of termination of employment and discretion for the employer to pay in lieu of notice.

[97] The applicant argues he was entitled, in any event, to reasonable notice at common law which he puts as being three months. I do not accept that and consider that, if the issue were one of reasonable notice only on that basis, the period would be one month.

[98] Either way, standing back and looking at remedies as a whole, I exercise my discretion to reduce the remedy under this head by the amount of the ex-gratia payment made following the termination of the applicant's employment. It was not paid as a single payment but in four separate and different amounts on 30 June, 8 July, 31 July and 31 August 2005. The amounts of $5208.33 ($3494.46 nett) paid on 30 June and $7058.90 ($4623.40 nett) on 8 July appear to be for the period of paid notice. The amount paid on 31 July was for $15,000 ($9150 nett) and labelled "part payment on redundancy". The amount paid on 31 August was for $15,000 ($11,850 nett) and labelled "final redundancy payment". The gross total is $42,267.23.

[99] Deducting that amount from the six month's salary assessed as the applicant's loss under this head leaves the amount of $20,232.77, less applicable tax. Under s123(1)(b) of the Act, the applicant is awarded that amount as reimbursement of wages lost as a result of the grievance.

Fuel expenses

[100]The applicant's evidence was that he was entitled to fuel and other vehicle expenses totalling $15,000 a year. It was not challenged by the respondent. I accept that he lost this benefit as a result of the grievance and is entitled to compensation for it for a six month period. Accordingly, under s123(1)(c)(ii) of the Act, the applicant is awarded an amount equivalent to his fuel expenses for six months – this is $7500, less any applicable tax.

Holiday pay

[101]The respondent was not able to provide a clear and satisfactory breakdown of holiday pay records for the period of the applicant's employment with it, and, earlier, MCL. A pay record dated 8 July 2005 records an entitlement of 9.15 annual leave days, presumably accrued for the period of his employment with Centurion and presumably on the basis of an entitlement to three weeks leave, not four weeks as I have found his terms of employment to provide.

[102]I have insufficient evidence to deal with the issue of any previous entitlement to holiday pay for the applicant's service with MCL from September 2003 until he began employment with the first respondent. However I consider that I have sufficient information to deal with his entitlement to holiday pay from the first respondent. I take the starting date, best as can be established in what Mr Sharma called the "grey period" between MCL and Centurion, as 1 January 2005. To 10 June 2005 this amounts to 161 days of service. Calculated on the basis of 8 per cent of annual salary (that is allowing for four weeks leave), the applicant is entitled to holiday pay of $4410 for that period of service. As the respondent failed to establish that it had properly paid holiday pay to the applicant on termination of his employment, the amount of $4410 is awarded to the applicant under s123(1)(b) of the Act in reimbursement of holiday pay.

Compensation for distress

[103]The applicant seeks $30,000 compensation for the hurt and humiliation of his dismissal.

His wife gave evidence of the effect of dismissal on the applicant, including dry retching in the morning and sleepless nights. He felt bewildered and lost confidence in his abilities and his trust in other people.

[104]He says he has now "gotten over it". His new business is now making money and generating an income.

[105]Having regard to the range of compensation awarded in cases of this type, and the particular circumstances of this case, I consider the appropriate level of compensation for the hurt and humiliation at the time of and following the applicant's unjustified dismissal to be $8000.

Contribution

[106]Section 124 of the Act requires the Authority, while assessing remedies, to consider the extent to which actions of the applicant contributed to the situation giving rise to the personal grievance. Where such actions amount to blameworthy conduct, reduction of remedies is required.

[107]The respondent submits that the applicant contributed to the circumstances by failing to continue negotiations and maintaining an uncompromising position. It also suggests that failing to suggest or propose mediation in an attempt to resolve the impasse between parties amounts to conduct which warrants reduction of remedies. It relies on *Crilly v Vending Technologies Limited* (unreported, EC Auckland AC 14/03, 21 February 2003, Travis J) where the Court found failing to continue negotiations and maintaining an uncompromising position required reduction for contribution.

[108]That principle does not apply to the facts of the present case. By 30 May, as evidenced by his letter of that date, the applicant was not failing to continue negotiations. Rather he had accepted that the terms of the respondent's salary offer were "in line" with his expectations and had asked for more detail about the criteria for payment of a $10,000 discretionary bonus that was part of the offer. He was no longer, if he ever had, maintaining an 'uncompromising' line of seeking a $200,000 salary package as erroneously stated in the redundancy letter of 10 June. If it were a matter of compromise, he had already done so but this was to no avail. That is not conduct on his part, in my assessment, which was blameworthy so as to require reduction of remedies.

[109]I do not read the *Crilly* case as suggesting that failure of employees to propose mediation in circumstances of an impasse with their employers could amount to blameworthy conduct. At the very least, the burden of making sensible attempts to properly talk through such situations – perhaps with a mediator's assistance – must fall equally on the parties. Refusal by one party to participate in such a process, once earnestly requested by one party, might, in certain circumstances, be so unreasonable as to amount to blameworthy conduct but does not arise on the facts of this case.

[110]I find no actions of the employee contributed to the situation giving rise to the personal grievance to an extent requiring reduction of the remedies awarded.

Summary of orders

[111]In resolution of this employment relationship problem, the respondent is ordered to pay to the applicant, the following amounts:

(i) $20,232.77, less applicable tax, under s123(1)(b) of the Act in reimbursement of wages lost as a result of the grievance; and
(ii) $7500, less any applicable tax, under s123(1)(c)(ii) of the Act in compensation for the loss of the benefit of his expenses for six months; and
(iii) $4410 holiday pay; and
(iv) $8000, without deduction, under s123(1)(c)(i) of the Act in compensation for the

hurt and humiliation of his dismissal.

Costs

[112]The applicant seeks costs. The parties are now encouraged to resolve this matter between themselves. If they are unable to do so, the applicant may apply for the Authority to determine the matter. If such an application is necessary, it must be made within 28 days of the date of this determination and an opportunity for reply by the first respondent will be provided before costs are determined by the Authority.

Robin Arthur
Member of the Employment Relations Authority

File Number: AEA 1156/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Jeffrey McCarthy (Applicant)
AND	Centurion GSM Limited (First Respondent) **AND** Millennium Group Holdings Limited (Second Respondent)
REPRESENTATIVES	James Turner, Counsel for Applicant The Managing Director, Advocate for Second Respondent Chris Patterson, Counsel for First Respondent
MEMBER OF AUTHORITY	Robin Arthur
INVESTIGATION MEETING	18 September 2006 11 October 2006
DATE OF DETERMINATION	1 March 2007

DETERMINATION OF THE AUTHORITY

<Type your text here>

Robin Arthur
Member of Employment Relations Authority