IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 54A/08
5084097

	BETWEEN	JONATHAN DAVIDSON Applicant
	AND	Y3K ENERGY PTY LTD First Respondent
		Y3K ENERGY LTD Second Respondent

Member of Authority:	Yvonne Oldfield
Representatives:	Mark Ryan for Applicant Maria Dew for Respondents
Investigation Meeting:	18 April 2008, 27 June 2008
Determination:	21 July 2008

DETERMINATION OF THE AUTHORITY

Identification of employer parties

[1] There has been an issue between the parties as to the identity of Mr Davidson's employer. In a determination dated 20 February 2008 I concluded that the first respondent, Australian entity Y3K Energy Pty Ltd, was the employer rather than the New Zealand subsidiary Y3K Energy Ltd. The determination was challenged and for that reason I rejoined Y3K Energy Ltd as second respondent before commencing my investigation into the substantive employment relationship problem.

[2] That investigation began with the provision of witness statements and documents and a first investigation meeting on 18 April 2008. The meeting did not complete the investigation and it was arranged (by agreement with the parties) that it should resume on 27 June 2008. At the meeting of 27 June 2008 Ms Dew (who had been acting for both respondents up until then) advised that she had recently had

instructions that the second respondent had been wound up and was deregistered on 14 June 2008. This had been done in the interval since the 18 April meeting and without advice having been sought from her.

[3] I advised the parties of my view that winding up should not have been completed when the matter was effectively part heard. For this reason this determination will be issued with Y3K Energy Ltd still identified as second respondent.

Employment Relationship Problem

[4] The substantive employment relationship problem relates to the termination of Mr Davidson's employment as manager of what the parties have called "Y3K New Zealand." On Monday 11 December 2006 Mr Davidson returned to his Auckland office after two weeks leave to find Michael Kirwan, Managing Director of both respondents, and his associate Peter Oliver had arrived unexpectedly from Australia. Mr Kirwan sent the rest of the staff home and called Mr Davidson into a meeting (with Mr Oliver in attendance as a witness.). By the end of it, Mr Kirwan had told Mr Davidson that he had two days to decide if he wanted to resign, or be dismissed. Mr Davidson was required to return his laptop, company car and mobile phone, and was dropped off in the city.

[5] Mr Davidson sought legal advice and on 13 December his lawyer made contact with Mr Kirwan and requested a meeting. Mr Kirwan told him that it was too late as Mr Davidson had gone past the two days he had given him in which to respond. The following day Mr Kirwan confirmed by email that Mr Davidson had been dismissed. In the email he set out a list of reasons for the dismissal (including performance issues about which Mr Davidson had never been warned) however the respondent no longer relies on all the reasons given there as justification for dismissal. Michael Kirwan told me that by themselves the performance related matters would not have been insurmountable and would not have caused him to sack Mr Davidson.

[6] Mr Kirwan's principal concern related to allegations that Mr Davidson was providing confidential information to a shareholder without authorisation and that he was conspiring to assist that shareholder to take over the business. The shareholder in

question was the Managing Director's brother, David Kirwan. The two brothers had seriously fallen out over their business venture. As the 14 December email sets out:

"Confidentiality
I asked Jon did he understand the confidentiality clause in his employment contract. He told me that he did and asked "why."
I explained to Jon that the Admin manager in Melbourne (Tristrum Pradun) had approached me with a serious issue.
Tristrum had explained to me that Jon had stated that he had been conspiring with a shareholder in Y3K Energy Pty Ltd to take the Y3K business away from me Michael Kirwan sole director and 50% shareholder. Tristrum had explained to me that Jon had over the previous month boasted to him that this was going to happen
Jon totally denied that he had said anything of the sort to Tristrum. I then asked Jon to call Tristrum to ask him for clarification on this issue. Jon declined. I believe that Jon also gave absolutely no defence on the issue except to deny it. I also stated that my sister Alison Kirwan had hinted that Jon had been supplying David Kirwan with company confidential information without my knowledge."

[7] Michael Kirwan told me that by the end of the meeting on 11 December his suspicions of Mr Davidson were confirmed. He told me that he terminated Mr Davidson's employment for what he saw as serious breaches of trust and confidence and of confidentiality.

[8] Mr Davidson says that the termination of his employment was not justified and seeks remedies of lost earnings ($59,505.00) and compensation ($8,000.00 reduced from an original claim of $25,000.00.)

[9] Mr Davidson also seeks the return of personal material which he says he was unable to retrieve from his laptop on his final day of work. Although the respondent had undertaken to send this material to him on a disk, he alleges that when the disk arrived some of the information was missing.

[10] As I discussed with Counsel at the investigation meeting, this matter may properly fall to be determined under the provisions of the Privacy Act 1993 which are of course outside my jurisdiction. Nonetheless Ms Dew gave an undertaking on behalf

of the respondent that copies of any remaining personal information will be provided to Mr Davidson as soon as possible.

[11] Finally Mr Davidson alleges that after his employment ended the respondent somehow hacked into his personal email. This allegation arose because the respondent provided in evidence email correspondence associated with Mr Davidson's private email address. The respondent said the email came into its possession when it came through to Mr Davidson's Y3K address and was automatically forwarded to a staff member for action along with all other incoming mail.

[12] Mr Davidson does not accept this explanation. He agreed that he had set it up so that private mail would come through to him on his Y3K account, but says he made sure this would stop, soon after he left, by changing his password. Unfortunately, he was unable to tell me when he did this. Mr Pradun, who had the job of dealing with Mr Davidson's mail after he left, agreed that mail from other accounts came in for only a short period and said that the email in question arrived during this time. I have concluded that I can take the issue no further without forensic evidence to establish just what happened. I also note that this too may be something that is more appropriately dealt with under the provisions of the Privacy Act, in relation to which I have no jurisdiction. I leave it to the applicant to consider his options.

[13] As for the respondent it counterclaims for the return of company property which it says Mr Davidson retained after his employment ended.

Issues

[14] Mr Kirwan acknowledged to me that Mr Davidson had no prior knowledge that there would be a disciplinary meeting on December 11, was not told that dismissal could be its outcome and was not offered the opportunity to obtain representation. He told me that because Mr Davidson's technical knowledge gave him the capability to "*disable the business*" he felt that he had to "*catch him by surprise.*"

[15] Given Mr Kirwan's admissions there can be no question that the Managing Director failed to conduct the disciplinary process in a procedurally fair manner. Mr Davidson was denied a satisfactory opportunity to be heard on the allegations. It

follows that the termination of the employment was unjustified, and Mr Davidson has a personal grievance. The key issue for determination in relation to the personal grievance is whether Mr Davidson's actions contributed towards the situation that gave rise to that grievance, if so, how much, and what remedies are appropriate.

[16] The only remaining issue then will be whether either party needs to return or reimburse for any property which has been retained.

Contributory conduct

[17] Mr Davidson's account of the meeting of December 11 is not very different from the accounts given to me by Mr Kirwan and Mr Oliver and summarised in the quote at paragraph [6]. Mr Kirwan told Mr Davidson that Mr Pradun had approached him to say that Mr Davidson had told him that he was in communication with David Kirwan and that they planned to take the business off Michael Kirwan. Mr Kirwan also put to Mr Davidson some examples of disloyal statements that had been ascribed to him.

[18] At first Mr Davidson said he had not spoken to David Kirwan, later he modified this to say that he had not discussed Y3K business with David Kirwan. He repeated several times that he had done nothing wrong. Overall his responses were brief and as non-committal as possible. To me he acknowledged that he understood at the time that Mr Pradun must have been "*disclosing conversations I'd had with him*" and assumed from what Michael Kirwan was saying that Mr Pradun had passed on things he had told him in confidence.

[19] Mr Pradun attended the Authority investigation meeting and gave the following evidence as to what he had relayed to Michael Kirwan:

"I said that Jon had told me that they had plans to bring Mick "down" and put him out of business and that the plan centred around loans that David Kirwan had outstanding to Y3K Energy. These discussions had started as early as November 2005…

…Jon told me the word from David was to hold up development of everything as he was going to make his move and get Mick Kirwan removed from the company…

…in April 2006 Jon had asked me to get as much information as I could to help bring Mick down…

Jon…had plans to compete against Y3K in New Zealand and that he hoped David Kirwan would put up the money…"

[20] Mr Pradun told me that because Mr Davidson was his friend he had initially been reluctant to tell Michael Kirwan what he had heard. He eventually felt he had to do so, however, because he had come to the view that Mr Davidson was putting everyone's job at risk.

[21] After hearing this evidence from Mr Pradun Mr Davidson told me he had no major disagreement with it.

[22] David Kirwan was a 50% shareholder at the time of the events in question. He had resigned as director of the first respondent in October 2005 and was thereafter removed as director of the New Zealand subsidiary. By early 2006 Mr Davidson knew that David Kirwan was no longer a director of either company, and was also under instructions from Michael Kirwan that company information was not to be provided to David Kirwan.

[23] In submissions for the applicant Mr Ryan noted that Mr Davidson accepted critical parts of Mr Pradun's statement and acknowledged that this was a matter "*that may concern the Authority in relation to contribution.*" It was his submission however that the communications between Mr Davidson and David Kirwan "*do not exceed a threshold point where contribution can be found against the applicant.*" At most, he said Mr Davidson's actions warranted a reduction in remedies of 10%.

[24] I do not accept this submission, for the following reasons.

[25] Mr Davidson reported to Michael Kirwan as Managing Director and was bound to follow his instructions. This included the direction that information was not

to be supplied to shareholders. Responsibility for meeting relevant obligations to them lay with the Managing Director, not with Mr Davidson. Although I was given no evidence of specific information being passed to David Kirwan, I consider it a breach of duty for Mr Davidson to have discussed the affairs of the company with him at all.

[26] Even more grave is the evidence that Mr Davidson was actively involved in plans to undermine not just the Managing Director but the business itself. The most that can be said in mitigation of what Mr Davidson did is that he foolishly allowed himself to get caught up in a very bitter dispute between the two brothers. This is a case where a fair procedure would inevitably have resulted in a justified dismissal. I am satisfied that what Mr Davidson has done amounts to serious misconduct, and warrants a reduction in remedies of 100%.

Counterclaim

[27] The respondent counterclaims damages for items it says remained in Mr Davidson's possession after the end of his employment. Specifically these were software, a desktop, a server and a laser keyboard. Mr Kirwan provided invoices for the first two items. The combined current value of the property was estimated at $500.00 although Michael Kirwan told me that the value was higher when the employment relationship ended.

[28] Mr Davidson agreed that the first three items had been in his possession before he came to New Zealand but said he had not seen them for years and did not know where they were. He conceded that it was possible that he had packed them with his own belongings before he left to take up the job in New Zealand. If so, they had been left behind in Australia in storage and were still there. As for the fourth item, Mr Davidson told me that as far as knew it was in the Auckland office or his vehicle when he left.

[29] The evidence does not satisfactorily establish that the property in question remains in Mr Davidson's possession. Ms Dew argued in submissions that even if he did not have the items, Mr Davidson has been careless in failing to return company property and should be liable for damages on that basis. I am not persuaded of this however. His employment ended suddenly without opportunity for him to arrange an

orderly departure. By then it was already some time since any of the items in question had been discussed or even thought about by either party, and they were already rapidly depreciating in value. I do not accept the Mr Davidson should bear responsibility for the fact that these items have been lost track of.

Costs

[30] This issue is reserved. In the event that the parties cannot agree on costs and require the Authority to determine the issue submissions should be lodged within 28 days of the date of this determination.

Yvonne Oldfield
Member of the Employment Relations Authority