

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Stewart Goldstone (Applicant)
AND Cogent Communications Limited (Respondent)
REPRESENTATIVES Richard Harrison for Applicant
Jane Latimer for Respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 10 March and 27 May 2003
DATE OF DETERMINATION 13 May 2004

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] For a little over five months, until he was summarily dismissed on 25 October 2002, Mr Stewart Goldstone worked for Cogent Communications Limited (referred to as “Cogent”) as National Sales Manager. This was a senior executive role requiring Mr Goldstone to take direct responsibility for eight branch sales managers. They in turn, throughout New Zealand, had some 43 account managers under them.

[2] In a letter written a few days after his dismissal, Cogent told Mr Goldstone that the grounds for his termination were as follows:

As a result of the investigation which had been undertaken by the CEO regarding Mr Goldstone’s style of leadership (including allegations of bullying, victimisation and harassment of branch managers), the CEO formed the view that she could no longer have trust and confidence in Mr Goldstone in the senior and highly important executive role of National Sales Manager.

[3] Soon after, Mr Goldstone raised a personal grievance in relation to his dismissal, and about four days later he applied for an order of interim reinstatement from the Authority. In a determination dated 22 November 2002 (issued under AA340/02) the Authority, for the reasons given, declined to order interim reinstatement and directed the parties to resume mediation before returning to the Authority if final resolution of the employment relationship problem by investigation became necessary .

[4] The Authority was eventually required to conduct a full investigation to determine whether Mr Goldstone had been unjustifiably dismissed, as complained of by him. In relation to remedies or relief for his grievance, Mr Goldstone advised that after consideration of the Authority’s interim determination he no longer sought reinstatement. He is seeking reimbursement of lost earnings,

based on his salary of \$150,000, and bonus payments of \$60,000 he had anticipated receiving. Mr Goldstone is also seeking compensation of \$35,000 for humiliation, distress and injury to his feelings suffered as a result of his contended unjustified dismissal. He gave evidence to the Authority that following his dismissal on 25 October 2002, he eventually became self employed as a financial consultant, commencing in mid January 2003.

[5] The issues to be considered by the Authority in reaching a determination include, whether there were grounds upon which the employer could dismiss, and whether in reaching that decision Cogent acted fairly and reasonably to the extent required by the circumstances of the particular case. If Mr Goldstone's dismissal was unjustified, there is an issue as to the degree if any to which his actions contributed to the situation that gave rise to his grievance, and there is a further issue as to the appropriate remedies and levels of those for reimbursing and compensating Mr Goldstone for the actual loss and harm suffered by him.

"Style of leadership" of Mr Goldstone

[6] Soon after Mr Goldstone had started with Cogent in May 2002, the company's CEO Ms Elaine Ford, learned there was a problem with the way he was exercising managerial supervision over several of the branch managers for whom he had responsibility. Ms Ford considered that Mr Goldstone's manner and style did not reflect the statement of values issued by the company to its employees. This statement was centred on "integrity, people, and performance". Also, at about the time Mr Goldstone started with it the company had adopted and published to staff some so-called "success factors." These embraced "head, hands and heart". Ms Ford told the Authority that Cogent strongly emphasised the treatment of its staff with respect and integrity, and she said that Mr Goldstone had been fully aware of these guiding principles from the work he was required to do as a senior manager.

[7] It has been claimed by Cogent that almost from the day he started, in his manner and expression Mr Goldstone employed a direct, blunt, abrasive and aggressive approach towards several of the managers under his supervision. "Full-on" and "in your face" would seem to describe the way Mr Goldstone is said to have deliberately chosen to relate to some of his team. It is also claimed that he saw it as beneficial to deliver his messages unobtrusively to staff in an environment where a culture of alcohol and sex was promoted by him among his sales managers, all of whom were male. Cogent claims that he persisted with this style to such a degree that his behaviour amounted to bullying, victimisation and harassment. This conduct was specifically referred to by Cogent as a reason for his dismissal.

July 2002

[8] Once Ms Ford came to hear of the problems with Mr Goldstone she met with him on 11 July 2002 to address these with him. It appears to have been a constructive meeting, for Mr Goldstone accepted a requirement to change his approach towards his staff and also agreed that on work related occasions he would not drink liquor. Because of his positive responses and assurances and also his relatively short time with the employer, Ms Ford felt it appropriate to leave matters as they had been discussed with Mr Goldstone and not to issue him with what she called a "warning". A letter had been prepared by Cogent's human resources manager for the meeting of 11 July, but it was not given to Mr Goldstone. Instead, although without him being told, it was placed on his personnel file as a record, Ms Ford said, of the fact that the discussion had taken place rather than as evidence that a formal warning had been issued. The letter expressly purports to be a communication addressed to a named individual, and it purports to "confirm" various points of discussion at the meeting. Therefore it should either have been given to Mr Goldstone, providing him with a chance to check whether indeed it reflected what had been said, or it should have been destroyed. Placed on a file without his knowledge, it did not at that time confirm anything to

anyone. Although Ms Ford described the letter as a “warning”, I do not find it to be such, as it neither expressly or impliedly gave any cautionary notice of any possible outcome, good or bad, in the event that Mr Goldstone did not change his conduct. In any event the letter could not and did not warn Mr Goldstone of anything, since he was not given a copy of it while he remained employed.

[9] Ms Ford told the Authority that after her meeting with Mr Goldstone in July 2002, there followed a period during which she received no further complaints from the branch managers. However she later discovered, she said, that this was not because Mr Goldstone had changed his behaviour but because his activities had created a climate of fear, suspicion, and distrust, causing the managers to suppress their concerns from her. Ms Ford told the Authority that in October 2002 upon further investigation of Mr Goldstone’s conduct, she was led to believe that he had maintained his earlier unacceptable ways and had also divisively undermined her authority and the trust that branch managers should have been able to have in her. It appeared to Ms Ford, she said, that rather than constructively leading his branch managers to better efforts and results, Mr Goldstone had engendered a fear in them that non-performers would be dealt with by being gotten rid of. Ms Ford was told by her branch managers that Mr Goldstone had talked of a “hit list” and had regarded some of them as his opponents by referring to them as “mafia”. Ms Ford also heard that behind their backs Mr Goldstone had identified some employees to their colleagues as being those whom he regarded as being of no use to the company and who he wanted to get rid of.

October 2002 enquiry

[10] The resurfacing of these apparent problems in October 2002 occurred after Ms Ford had become concerned about the way Mr Goldstone appeared to be dealing with a disciplinary matter involving his Christchurch sales manager. To keep a check on what was happening she asked another senior manager, Mr Glen Morrison, to be present at a meeting Mr Goldstone had arranged to have on 4 October with the Christchurch sales manager. After the meeting Mr Morrison reported back to Ms Ford, telling her that he had major concerns both with the way the meeting had been run by Mr Goldstone and with a display of dishonesty by him during the meeting. Mr Morrison, I accept, told Ms Ford that Mr Goldstone had lied to the branch manager during and after the meeting. Mr Morrison told Ms Ford he felt that his own integrity had been compromised by this conduct of Mr Goldstone and that as a consequence, I also accept, he offered to step down from his senior position. An increased level of concern felt by Ms Ford caused her to travel straight away, on 7 October, from Auckland to Christchurch where the branch manager told her about the disciplinary meeting he had had with Mr Goldstone and how it had been conducted. Her concern then grew even further, to the point where Ms Ford said she became “distressed” about Mr Goldstone.

[11] Ms Ford told Mr Goldstone of her renewed anxiety about his behaviour and received from him an acknowledgment of the problems and an undertaking to improve. On 9 October Ms Ford received another visit from Mr Morrison who told her about other problems some branch managers had said to him they were having with Mr Goldstone. After speaking to one of the branch managers her concerns were heightened still further, to the extent that she began to feel that the management unit was “unravelling” around her. Ms Ford decided to meet all the branch managers in person so that she could investigate with them the nature and extent of any issues they had with Mr Goldstone. For this purpose she used the occasion of a previously arranged branch managers meeting, planned to be held at Auckland on 10 October. The day before the meeting the branch managers were notified of the new matter to be discussed at it and that Mr Goldstone would not be present. He had been advised of the change of agenda and had agreed not to attend the meeting, as requested of him by Ms Ford.

[12] The 10 October meeting was described to the Authority by Ms Ford as follows:

I have never in my career been in a management meeting where so many grown men have been so emotional and fearful. Two of the seven branch managers were in tears at various points during the meeting, and others showed severe stress.

[13] Minutes of the meeting were made in handwriting by Ms Latimer who was present with Ms Ford. These were typed up and a copy of them given to Mr Goldstone. The meeting was also recorded on tape, with the knowledge of those present. The typewritten minutes, the tape and transcript made from it have been given to the Authority, although the tape is not a complete record because for a period the tape machine for some reason was not playing.

[14] Immediately after the 10 October 2002 meeting Ms Ford spoke to Mr Goldstone and told him of the nature of complaints that had been raised against him by branch managers at the meeting. She advised him that an investigation would be held, that it would involve him and that he would be given a copy of the meeting minutes for his comments, once they had been typed up. I accept that Mr Goldstone was told then what the complaints were about; namely, bullying, victimisation and harassment of other employees by him.

[15] On 11 October, the next day, Cogent's solicitors received a letter from solicitors acting for a branch manager, one of the two who had become emotional during the meeting of 10 October. His lawyer complained that Cogent had failed to provide and maintain a work place that was free from harassment and victimisation. Later on a personal grievance was raised against the employer in respect of this complaint. Mr Goldstone was advised that this grievance, which was not formally raised until after his dismissal, and another had led to his dismissal.

[16] The typewritten minutes of the 10 October meeting were duly provided to Mr Goldstone and his representative Mr Harrison at a meeting with Ms Ford and Ms Latimer held on 15 October 2002. A further concern of Ms Ford was raised then with Mr Goldstone that he had breached confidentiality by discussing with a branch manager a particular business matter she had been considering and had mentioned to Mr Goldstone. He asked for and was given time to formally respond in writing to Ms Ford's concerns about his conduct.

[17] Following a further exchange of letters between Mr Harrison and Ms Latimer clarifying the nature and relative seriousness of the several concerns expressed by Ms Ford, on 22 October a detailed written response from Mr Goldstone was sent by Mr Harrison to Cogent. After considering what Mr Goldstone had to say, Ms Ford concluded that she could no longer trust him and that he had in fact bullied, victimised and harassed a number of his branch managers. Ms Ford met with Mr Goldstone on 25 October and told him she had decided to dismiss him immediately and that the full reasons for that action would be supplied to him in writing. For this purpose a letter was duly written to him by Ms Latimer on 1 November 2002.

A full and fair enquiry?

[18] The procedure as outlined above for investigating Ms Ford's concerns of misconduct on the part of Mr Goldstone appears, outwardly at least, to have been a full and fair one that was undertaken carefully by the employer. However as well as the existence of adequate grounds for dismissal, Mr Goldstone has put in issue particular aspects of the procedure which he contends led to it becoming materially flawed. He has claimed that the 10 October meeting minutes on which his response to the employers concerns had been based, contained several significant misstatements as to what in fact had been complained of about him by some branch managers to Ms Ford. Further, he has claimed that the employer partly relied on grounds for dismissal which he had not been notified of and therefore had no fair opportunity to answer. These claimed additional grounds were

dishonesty in the course of the disciplinary meeting held with the Christchurch branch manager, and disloyalty or disrespect shown towards Ms Ford the CEO of Cogent. Mr Goldstone also claims that regardless of what Ms Ford was told by branch managers about these things, there had been in fact no dishonesty or disrespect on his part. Further Mr Goldstone claims that the company unfairly relied on earlier matters about which it had fully informed itself at the time they arose and which it had dealt with in July by way of counselling, reprimand or warning. He contends that these matters could not fairly be revived later as grounds for his dismissal.

Misstatement of complaints

[19] I have examined the meeting minutes to see whether in material respects they accurately represented or conveyed what had been said to Ms Ford about Mr Goldstone on 10 October. While I do not consider that anyone has attempted in any way to mislead the Authority as to what was said at the meeting, I have been presented with contradictory versions in this respect. I consider that the tape recording contains the more accurate account, where there are differences. The following are significant discrepancies I have found between the typewritten minutes given to Mr Goldstone and what can be heard (or not heard) when the tape recording made of the meeting is played back;

- Brent (Jackson) does not say on the tapes that there had been victimisation of managers, including himself
- Brent does not say that Stewart (Goldstone) had threatened him with the words “if you bring a sexual harassment claim, you’ll be sacked”. Neither does Brent use any similar words to say that such a threat was made
- Brent does not say that he was abused and chastised by Stewart for talking to Steve Simons (HR manager)
- Matt Coppen does not say that he feels if he challenges Stewart it will be ugly

The minutes purport to be a verbatim record of course only where some phrases or expressions have been put inside speech marks. However it is not just that the exact same words above are not on the tape, there are not even any similar words heard which could reasonably have been paraphrased into the words of the minutes.

[20] The minutes at another part contain the following;

***Brent** says that he fears for his safety and even checked his hotel room when he arrived last night – he was so fearful that Stewart would take things out on him.*

On tape Brent does not use the words fear or safety, although it is a reasonable implication from what he says that he is quite apprehensive of Stewart. What is not made clear by this part of the minutes is that he intended by his words to introduce some humour into the discussion, because on tape his short comments are preceded by laughter and they end with laughter. As the transcript accurately records, on the tape the following words and sounds are heard as his comments come to an end at this part;

.....I rang Flynn from Dunedin airport saying hey mate I think Stewarts going to be waiting for me when I get to Auckland airport. You know that is honestly how I felt, its like you know I was suspicious of my room last night, I checked

Laughter

A release of tension by Brent as he speaks is audible - the laughter is not particularly nervous. In Mr Goldstone's response to this particular matter he readily construed the minutes, reasonably so in my view, as saying that Brent had raised a concern about "a threat to his personal safety". It is telling that Mr Goldstone responded by saying such a claim or fear was "bizarre". In the circumstances that word is appropriate, for no such claim or fear had been spoken of, I find, in the way conveyed by the minutes. However Mr Goldstone was not in a position to know that, or that what had been said was intended in part to be jocular. By contrast he should readily have been able to understand the jesting in what Matt was reported as saying; he was afraid that if he fell out with Mr Goldstone he would be "killed", like a character in a John Grisham novel he referred to.

[21] The threat to the personal safety of a branch manager which the minutes claimed had been raised as a matter of concern, went right to the heart of the type of misconduct under investigation by the employer, as did the threat of dismissal for exercising a legal right to bring a personal grievance, also purportedly complained of. I find that in respect of these and the other significant discrepancies as outlined above in the meeting minutes, which were supplied to Mr Goldstone by Cogent for a vital purpose, the employer acted in a way that was likely to mislead or deceive him. It seems highly improbable that this was intentional, but whether deliberate or innocent, and whether it was done directly or indirectly, this action constitutes a breach by the employer of the requirement under s.4(1) of the Employment Relations Act 2000 to deal in good faith with an employee. The breach was not coincidental or connected only remotely to the employer's investigation of misconduct but occurred during the performance by the employer of an obligation to act fairly and reasonably in relation to an employee. Section 4(1) is intended to prohibit behaviour that is inimical to the employment relationship and in this case the test of good faith is not whether Mr Goldstone was or was not misled or deceived as a consequence of the misstatements.

[22] I find there was a serious flaw in the employer's disciplinary procedure. Wrong or inaccurate minutes were produced from the 10 October meeting. Cogent required Mr Goldstone to place reliance upon these minutes in the course of a disciplinary enquiry into his alleged misconduct. In one respect the minutes elevated the seriousness of the misconduct from threats against security of employment to threats against personal safety.

Dishonesty and disloyalty/disrespect

[23] I find that Mr Goldstone was not told that dishonesty was among the concerns Ms Ford had about him. He was told that the matters she was concerned about were contained in the meeting minutes given to him, and Mr Harrison asked for and received confirmation of this. I am satisfied that Ms Ford did receive information from Mr Morrison about dishonesty on the part of Mr Goldstone during the disciplinary meeting held with the Christchurch branch manager. I am also satisfied that it was reasonable for her to regard that information as truthful and accurate. Further I am satisfied that during the 10 October meeting a branch manager said the following to Ms Ford;

.....I didn't believe I could trust anybody in Cogent and that was put across to me by people like Linda (Peters). Stewart (Goldstone) basically told us that we couldn't trust people like Elaine (Ford).

I find that the above words in the tape transcript are indeed words that were spoken and became recorded on the tape. Also, it was reasonable for Ms Ford to regard this statement as truthful and accurate.

[24] The meeting minutes say nothing of dishonesty on his part as a matter raised against Mr Goldstone during the meeting and neither was that confirmed to Mr Harrison to be expressly a concern for Mr Goldstone to respond to. Dishonesty would seem to be a distinct category of

misconduct from, bullying, harassment and victimisation. It follows that dismissal could not be justifiable to any extent that dishonesty was relied upon as ground, as Mr Goldstone was not given an opportunity to give an explanation about a form of misconduct usually regarded seriously. I find after reviewing the evidence of Ms Ford in particular that dishonesty by Mr Goldstone was very much in her mind when deciding to dismiss him. She said his lying was a factor she had taken into account.

[25] On a balance of probabilities I consider that no gross or blatant dishonesty occurred and that Mr Morrison over-emphasised to Ms Ford this aspect of the Christchurch disciplinary meeting. His offer to step aside from his job seems an over-reaction as well, since he had done no wrong and had not been Mr Goldstone's keeper. At the Christchurch meeting Mr Goldstone was asked a question whether he remembered certain acts or movements of the questioner while they had been together on a previous occasion. Mr Goldstone is supposed to have replied to the questioner that he did not remember, but had later told Mr Morrison he had remembered at the time he replied to the questioner that he could not. However the questioner knew what his own act or movement had been and could hardly have been influenced by Mr Goldstone saying he could or could not remember that act.

[26] The meeting notes do however fairly and accurately record the comments reproduced above from the transcript which were made about disloyalty or disrespect shown towards the CEO Ms Ford. Mr Goldstone had an opportunity to respond to this concern and did so by saying it was "complete nonsense" that he had said Ms Ford could not be trusted. While it could be inferred that Ms Ford must have been concerned about Mr Goldstone allegedly saying to Cogent employees that she, the CEO, could not be trusted, and while it could also be inferred that she rejected his denial that he had done so, I am not persuaded by the evidence that this was relied upon as a ground for dismissal. It is not expressly referred to as such and at best it could only be within the wide ambit of "style of leadership". I consider that disloyalty or disrespect has not been relied upon as a particular form of misconduct, as it is likely to have been referred to as such in the dismissal letter. At best I find that disloyalty has been included in a matrix of behaviours making up the "bullying, victimisation and harassment" of branch managers. Ms Ford lost trust and confidence, I find, because of a range and combination of different behaviours displayed by Mr Goldstone towards other Cogent employees. The dismissal cannot therefore be justified merely by singling out disloyalty or disrespect from other conduct that together props the grounds for dismissal.

[27] In view of my other findings and conclusions it is not necessary to make a finding as to whether in fact Mr Goldstone did tell employees that they could not trust Ms Ford.

Revival of pre-11 July conduct

[28] In the unstructured way the 10 October meeting proceeded, leading to something of a free-for-all group complaints session against Mr Goldstone, there was a danger that he would be ganged-up on and that mass hysteria would capture the concern of the employer rather than intelligence carefully collected and analysed. As the tape recording verifies, stories and comments given by the branch managers at the meeting did revisit in detail the pre-11 July conduct. This had been dealt with at that time, as Ms Ford can be heard to say on the tape. However I find that this earlier conduct was not purportedly retrieved in October as justification for the dismissal. I consider that from what she heard at the meeting it was reasonable for Ms Ford to believe that Mr Goldstone had not curtailed his earlier conduct after being counselled about it in July. There is no lack of justification for the dismissal in this regard.

Justification

[29] I therefore find that the dismissal of Mr Goldstone was unjustified for the reasons given above, that in the course of conducting a disciplinary inquiry into his behaviour it was unfair to him and unreasonable for the employer to represent that certain adverse statements material to the inquiry had been made about him, when that was not so. This was likely to mislead or deceive him and was therefore expressly a breach of good faith under the Act as well. Whether this flaw was substantive or procedural makes little difference, as it was a matter of substantial and significant unfairness, I find, taking the termination outside the parameters of a justified dismissal. Also I find that dishonesty on the part of Mr Goldstone was suspected by Ms Ford, but without putting that allegation to him and allowing him an opportunity to explain, the employer had no reasonable grounds for believing such misconduct had occurred.

Contribution

[30] It follows that Mr Goldstone is entitled to have the Authority consider what remedies he should have for his unjustified dismissal. As part of this exercise and in any grievance claim, the Authority is bound to look at whether and to what extent the grievant contributed to the situation that gave rise to the grievance. A finding of contribution, depending on the degree of that, will usually lead to a corresponding reduction in remedies. What must be considered is any blameworthy conduct that was causally linked to the employer making the decision to dismiss.

[31] I find there was significant contribution present in this case. Mr Goldstone and his branch managers had clearly become a dysfunctional team. Not only must Mr Goldstone as team leader take responsibility for that situation, he must also take some blame for bringing it about as I consider it unlikely that he was completely innocent of fault and that several branch managers were to blame. I find it probable from the evidence that Mr Goldstone did to some degree after July 2002 behave in an intimidatory and coercive way, contrary to the requirement that he maintain trust and confidence between himself and the branch managers.

[32] Mr Goldstone did not however cause partly incorrect meeting minutes to be presented for him to rely on, and he did not cause Cogent to omit to ask him for an explanation about dishonesty suspected of him.

[33] His contribution to the situation that gave rise to the grievance was the creation of a climate of fear and mistrust among managers. I find that Mr Goldstone's reprehensible conduct or behaviour in this regard was as least as much to blame for his dismissal as the actions of Cogent in its handling of the disciplinary process - contribution was at least 50% on the part of Mr Goldstone.

Remedies

[34] Because of his contribution the remedies to be ordered in favour of Mr Goldstone for his unjustified dismissal must be reduced. I consider that this can justly be done by awarding Mr Goldstone payment plus some interest for the full period of notice required to be given under his employment agreement, but no other remedy. There is no evidence to support the claim for loss of bonus. Even without contribution an award for hurt feelings and humiliation would not have been large. Mr Goldstone gave me the impression of a man who does not feel shame or embarrassment easily and he made derogatory remarks about Cogent in his email to his friend in America, calling Cogent an underperforming dog staffed by Wallys he was firing *en masse*. The email was not known about by Cogent until after Mr Goldstone had been dismissed. He admitted he lied to his friend in saying he was in charge of the business and that he had fired a number of staff and would continue doing so. There is an underlying cynicism towards Cogent shown by Mr Goldstone in his

email. He cannot have it both ways and claim to have been humiliated by an employer he professed to have no respect for anyway and did not show good faith towards.

[35] The express period of notice in the employment agreement was three months. Actual notice or payment in lieu was an expected benefit of the employment, the full value of which became an entitlement at the moment of termination. Subsequent earnings within the three month notice period are irrelevant and not required to be deducted from compensation for the loss of this benefit. Accordingly Cogent is required to pay compensation of \$37,500 (being one quarter of the \$150,000 salary) under s.123(c)(ii) of the Act. Under clause 11 of Schedule 2 of the Act interest at 4.5% is to be paid on the compensation, but only for the period from 1 August 2003 until payment. Contribution precludes interest before that date and after August 2003 the Authority and not Mr Goldstone was responsible for the delay in giving this decision. Cogent has had the use in that time of money which he should have had paid to him.

Costs

[36] If Mr Harrison and Ms Latimer are unable to resolve the question of costs, including the earlier reserved costs on the interim reinstatement application, then an application may be made on behalf of Mr Goldstone to the Authority in writing within 21 days of the date of this determination. A copy is to be sent to Ms Latimer who shall have 21 days from that time in which to send into the Authority any response on behalf of Cogent.

A Dumbleton
Member of Employment Relations Authority