Determination Number: AA 271/06
File Number: 5038733

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Multiserve Education Trust Limited
AND	Lynley Gayle Ross (First Respondent) Sharon McGee (Second Respondent) and Canterbury Education Services Society Limited (Third Respondent)
REPRESENTATIVES	Stephen Langton for Applicant Daniel Erickson for Respondent
MEMBER OF AUTHORITY	Y S Oldfield
INVESTIGATION MEETING	18 August 2006
DATE OF DETERMINATION	23 August 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 7 August 2006 the applicant (Multiserve) lodged an application for urgent compliance orders against the third respondent. It was claimed in that application that the third respondent's Chief Executive, Mr Chris English, had breached a direction of the Authority (being the terms of a summons dated 15 May 2006) by failing to deliver up specified classes of documents as set out in the summons.

[2] On 16 May, Mr English delivered up to the Authority two hard drives from the respondent's Christchurch office. (Clones had also been made of the hard drives used by Ms Ross and Ms McGee in Auckland.) He told me then, and continues to assert, that he considered that any further information CES had of any relevance to this matter, was on these two computers. It is the third respondent's position that this met his obligations in terms of the summons.

[3] In a telephone conference on 10 August 2006, I advised Counsel that I would abridge statutory timeframes to convene an urgent investigation meeting on 18 August to determine the application for compliance. During the same call, Mr Langton confirmed that in the alternative to the application for compliance he sought further directions as to discovery.

[4] On 17 August Mr Langton advised that his client reserved all its rights in relation to the application for compliance but would on 18 August:

"be seeking only the alternative orders (by way of summons or an order calling for evidence) that:

a. The third respondent and Mr English produce to the Employment Relations Authority at Auckland (and to verify by oath or affirmation that they have produced them) all documents (including electronic and hard copy documents) relating to matters in question in this proceeding that are presently in their possession or control; and

b. That the third respondent and Mr English deliver up to the Employment Relations Authority at Auckland within an urgent period fixed by the Employment Relations Authority their "computer systems" (as defined in section 248 of the Crimes Act 1961) including back up systems excepting those parts of their computer systems already produced to the Authority and having been cloned by it (and to verify on oath or affirmation that they have delivered them up) either by:

i. The third respondent and Mr English permitting Allan Watt reasonably unobstructed access to all of their computer systems to clone them within that urgent time period (Mr Watt's attendances being at the third respondent's cost); or

ii. The third respondent and Mr English attending before the Employment Relations Authority at Auckland at an urgent time and date fixed by the Authority and to bring those computer systems with them so they can be cloned by Mr Watt."

[5] At the investigation meeting on 18 August Mr Langton explained that the applicant was not requesting full disclosure of documents prior to mediation (acknowledging that I had already declined that request.) He told me that his objective was to complete the process begun on 16 May, by ensuring that any remaining relevant evidence was preserved. He said that there were reasonable grounds to believe that documentation relevant to matters in question in this proceeding and containing information owned by the applicant, was located on the third respondent's computer systems and back up tapes. He said it was not known whether the computers previously delivered up to the Authority contained all of the documents relating to matters in question in this employment relationship problem.

[6] Canterbury Education Services Society Ltd (CES) responded that any further orders (whether in the form sought by Multiserve or otherwise) are unnecessary, expensive and time consuming. It said that if orders were to be made, the applicant should bear the expense. The respondents are all, also, of the view that the matter should proceed to mediation without further delays.

[7] The question for determination here is therefore whether further orders should be made to preserve evidence at this stage of the Authority's investigation. To answer this question I must determine:

i. Whether it is likely that the third respondent possesses further relevant information beyond what is on the cloned hard drives;

ii. Whether there is a real risk of this material being removed (advertently or inadvertently) before the investigation meeting scheduled for 7, 8, and 9 November;

iii. If so, what form any orders should take in order to minimise disruption to the third respondent's business.

Is there likely to be further relevant information in the third respondent's possession?

[8] Mr Erickson argued that further orders were not required. He said Mr English complied with the terms of the summons of 15 May and it has not been established that any further relevant information is available. In an affidavit prepared for the investigation meeting of 18 August, Mr English deposed:

"My understanding relating to the summons was that the relevant to the proceeding material was limited to correspondence between CES and Ms Ross and Ms McGee."

[9] I consider the class of "relevant material" to be wider than what Mr English has described here. My investigation must also extend to communications between the third respondent and former and current clients of the applicant. In addition, I will require to see communications within CES which concern current and former clients of the applicant. (This information will form part of the evidence relating to the damages claim against the first and second respondents and/or the penalty claim which has meanwhile been lodged against the third respondent.)

[10] Although some of this information may be on the hard drives that have already been cloned, that is a matter of chance since Mr English did not turn his mind to the full range of documents I require to see. I cannot be confident that the clones I have contain all the relevant information required for my investigation. I conclude that it is likely that there is further relevant evidence in the possession of the third respondent.

Is there a risk of removal?

[11] Mr Langton argues that there is a real risk of removal or destruction or dissipation of relevant information from the respondent's computer servers. He makes a number of assertions to the effect, quite simply, that Mr English cannot be trusted.

[12] Mr Erickson says it has not been established that there is a real risk that documents could be lost.

[13] I am not satisfied that there is a real risk of deliberate removal of relevant material. It has not been established that Mr English is untrustworthy. However, I have not been told of any steps taken by the third respondent to secure relevant information. Nor has it yet advised whether it has conducted any sort of search of its own. I consider that there is now, as there was on 15 May, a risk of accidental loss of information. I accept therefore that there is a need to secure further evidence and to do so before the parties embark on mediation.

What form should the orders take?

[14] The third respondent has in its Christchurch office 25 hard drives and four servers. Mr Langton accepts that it is unlikely that all 25 hard drives contain information of relevance to this matter. He notes that whatever relevant information there is is likely to be found on one or more of the servers.

[15] The third respondent has argued, and I accept, that the Authority has no power to order a forensic expert onto its premises to search or clone material on its computer systems. The process available to me is that used on 16 May, that is to require witnesses to attend and deliver up evidence for cloning and then to retain the clone in the Authority's safekeeping. However, the third respondent also protests that it would be hugely disruptive of its business for it to deliver up its servers to the Authority for searching or cloning. It has advised, through Counsel, that if the Authority were to reach the point of making orders requiring delivery of evidence to the Authority for cloning, it would be prepared as an alternative to permit access to its premises to an expert appointed by the Authority, so that the cloning could be conducted on site at a time which would cause the minimum disruption.

[16] Since receiving this advice I have made inquiries of the independent expert already appointed. He has told me that he has a "portable lab" and could use this to search and clone servers on site at the third respondent's premises in Christchurch. He has also advised that a "keyword search' can be used to identify whether there is relevant material on a server and so avoid the time and cost of cloning servers which do not contain relevant information.

[17] I have decided therefore that no further summonses will be issued at this stage. Instead, by consent of the third respondent, the Authority's independent expert, Mr Allan Watt, will attend the third respondent's premises, outside normal working hours for the purpose of preserving relevant information contained on the third respondent's servers. Mr Watt will begin by conducting a keyword search of the servers. Where these searches generate hits he will proceed to clone the servers concerned.

[18] The terms of Mr Watt's appointment, including the time at which he will attend, and the keywords to be used for the search will be the subject of a follow up teleconference.

[19] In the meantime, I remind the third respondent that it is under a responsibility to ensure that no information is destroyed, even accidentally. It should also produce hard copies of the relevant documents contained on the hard drives which have already been cloned.

[20] I also note that depending on what emerges from these processes, further orders to produce information may prove necessary at a later stage of my investigation.

Costs

[21] The expense of Mr Watt's services has so far been borne, on a cost-shifting basis, by the applicant. That arrangement will continue in place, subject to any final determination of costs or resolution of that issue in mediation. I record also that CES relies on the late notice of the withdrawal of the application for compliance order in relation to any determination on costs.

Y S Oldfield
Member of Employment Relations Authority