

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**CA 77/07  
5051506**

BETWEEN                      CORY ANDREW REEDY  
Applicant

AND                              MULTI MEDIA  
COMMUNICATIONS  
LIMITED  
Respondent

Member of Authority:        Helen Doyle

Representatives:             Murray Withers, Counsel for Applicant  
Tim McGinn, Counsel for Respondent

Investigation Meeting:      17 April 2007 at Christchurch

Determination:                10 July 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant, Cory Andrew Reedy, was employed in a sales position in the voice department (Telecommunications Division) of the respondent company.

[2]     Mr Reedy was given one months notice on 11 May 2005 that his position was redundant and that his last day would be 11 June 2005.

[3]     Mr Reedy says that his dismissal was unjustified.

[4]     The respondent, Multi Media Communications Limited (“Multi Media”) is a duly incorporated company that carries on the business of providing telecommunications and cabling services to the computer and communications industry.

[5] Multi Media say that Mr Reedy was justifiably dismissed for redundancy and that the process for implementing the redundancy was fair in all the circumstances.

[6] Multi Media say by way of counterclaim that Mr Reedy did not disclose he had new business interests and further that he was planning to work for a competitor when he asked for payment in lieu for the balance of his notice period on 19 May 2005. Multi Media say that Mr Reedy breached his duty of good faith and his duty of fidelity.

[7] Mr Reedy denies that he engaged in employment with the competitor, The Phone Guys Limited, when he was an employee of Multi Media Communications Limited. He denies he acted in bad faith.

[8] I prohibit from publication under clause 10(1) of the second schedule of the Employment Relations Act 2000 the financial records of Multi Media which were provided to the Authority.

### **The issues**

[9] The issues that the Authority is required to determine are:

- (i) Was Mr Reedy's dismissal justified?;
- (ii) If Mr Reedy's dismissal was not justified then what remedies are available to him;
- (iii) Did Mr Reedy breach duties of good faith and fidelity owed to Multi Media;
- (iv) If Mr Reedy did breach duties of good faith and fidelity which he owed to Multi Media then did it suffer loss as a result and what measure of damages, if any, should be awarded.

### **The individual employment agreement**

[10] Mr Reedy was party to an individual employment agreement with Multi Media. The agreement provided in clause 13 with respect to redundancy:

*13.1 Redundancy is a situation that occurs when the employment of an Employee is terminated by the Employer where the position filled by the Employee has or will become superfluous to the*

*needs of the Employer. Redundancy does not arise where the Employer sells, transfers or leases the business and the Employee transfers or is offered employment on substantially the same terms and conditions of employment.*

13.2 *If the Employee is declared redundant under clause 13.1 above he/she shall receive, where practicable, not less than one months notice of termination or by agreement shall be paid one months salary in lieu of notice or part thereof as the case may be.*

13.3 *The Employer shall not be obliged to make any further payment by way of compensation or otherwise beyond the expressed terms of this agreement.*

[11] The employment agreement also contained a conflict of interest provision and provisions relating to confidential information and non-solicitation and restraint.

### **Background to the redundancy**

[12] Multi Media was incorporated on 8 November 2000. The Managing Director of Multi Media, Michael Gardiner, gave evidence at the Authority investigation meeting. Mr Gardiner has a general management role and makes the day to day decisions for the company. The other director of Multi Media is Andrew Fowler.

[13] Both Mr Gardiner and Mr Fowler used to work at GDC Communications Limited in the business communications and cabling industry before Multi Media was incorporated.

[14] In 2002 Mr Gardiner thought that there was an opportunity to grow the business by expanding into the PABX systems market. He encouraged an employee who was still at GDC and was experienced in sales of PABX systems, Hayley, to come and work at Multi Media and assume responsibility for a new voice department at the company. The voice department was to run as a separate profit and loss centre. Hayley commenced employment at Multi Media in or about July 2002 and managed the voice department.

[15] Hayley knew Mr Reedy through a friend and recommended that he be employed. Mr Reedy duly commenced his employment with Multi Media in October 2002 in the voice department. Two other staff were subsequently employed in the voice department, Dan and Liam.

[16] By October 2004 the company had begun to experience significant trading difficulties. Mr Reedy was unaware of any difficulties the company was experiencing

but he was aware that the restructuring was undertaken at Multi Media in February 2005 which did not affect the voice department.

[17] Mr Gardiner said he and Mr Fowler were still hopeful in February 2005 that the voice department would remain viable but that this became less certain due to the department's deteriorating profit and loss account.

[18] Mr Reedy had a reasonably positive view of the performance of the voice department. Hayley would discuss the sales results and figures at sales meetings. Mr Reedy accepted that some months it would be apparent that the sales figures were not good but overall he felt that the voice department performed well and usually met or exceeded targets.

[19] Mr Gardiner said that he advised the team in the voice department in March 2005 that it was likely there would be further redundancies and they could be effected. Mr Reedy could not recall that discussion.

[20] Hayley handed in her notice and resigned on 13 May 2005. The Phone Guys Limited was incorporated on 19 May 2005 and Hayley was named as a director. Mr Reedy said that Hayley giving notice did have some impact on him because he saw himself as second in charge and thought that he may then become manager. Mr Gardiner did not share the view that Mr Reedy was second in charge and he felt that Dan was the more technically minded employee with more sales experience.

[21] Mr Gardiner said that the overall financial position of the company became critical by May 2005. He and Mr Fowler went to see their accountant who recommended that they consult a specialist liquidator. The accountant advised Mr Gardiner and Mr Fowler to stop making advances to the company in an attempt to prop it up. Mr Gardiner said that at this time it was clear the company was in a real crisis situation and the survival of the business depended on prompt decisive action.

[22] Mr Gardiner and Mr Fowler attended several meetings in the first week of May 2005 with their accountant and specialist liquidator. During these meetings they were given frank advice to the effect that they should consider liquidating the company or undertaking radical cost reductions. Mr Gardiner said that this was verbal advice although the whiteboard was also used.

[23] Mr Gardiner is not a note taker and has not retained any notes from the meeting. He produced two invoices with his evidence. One invoice is from the company accountant to Multi Media and refers to attendances and discussion regarding the ongoing operation of the business on 2 and 3 May 2005, including meeting with Ashton Wheelan & Hegan. The other invoice is from Ashton Wheelan & Hegan to Multi Media's accountants referring to attendance with the directors of Multi Media regarding the financial position of the company and order of priority on winding up and associated issues and options.

### **Consultation**

[24] There is a dispute about the number of meetings Mr Gardiner had with Mr Reedy before Mr Reedy was advised of the decision to terminate his employment on 11 May 2005. Mr Gardiner says that there were two meetings on 9 and 10 May 2005 but Mr Reedy says that there was one meeting.

[25] There are no notes of any meetings between the parties and the meeting or meetings took place a considerable period of time ago. I do have the benefit of letters written raising the grievance and Mr Gardiner's response in June 2005. There are also sufficient similarities between the respective accounts of Mr Reedy and Mr Gardiner for me to conclude that they must have been talking about the same meeting. If there were two meetings as Mr Gardiner says, the first meeting was clearly the more significant of the two.

[26] The evidence supports that on 9 or 10 May 2005 Mr Reedy and another employee Liam were asked to go into a conference room by Mr Gardiner. Mr Reedy did not know what the meeting was to be about.

[27] Mr Reedy and Liam were told that the company was in financial difficulty and that accountants were involved in the situation. Mr Reedy said that he was advised that the company was looking at options of redundancy or shuffling around departments. Mr Gardiner did not accept that he said anything about shuffling around departments because the company did not have the ability to put Mr Reedy elsewhere. Mr Gardiner felt that the meeting on that day took about ten minutes. Mr Reedy said that the meeting was two or three minutes long. Mr Gardiner said that he invited *bright ideas* from Mr Reedy and Liam so that the voice department could continue but there were none forthcoming. Mr Reedy could not remember Mr Gardiner asking him

for suggestions or comments on a possible way forward. Mr Gardiner said that neither Cory nor Liam had any questions or wanted any further information. Mr Reedy recalls Mr Gardiner then left the meeting to go to the accountant. Mr Gardiner said in his evidence that there were no questions because both Mr Reedy and Liam knew that the company was in financial difficulties. I am not satisfied though that Mr Reedy was aware of the extent of any financial difficulties or that they may impact on his continued employment prior to that meeting.

[28] Mr Gardiner may well have asked Liam and Mr Reedy for ideas although there was in my view insufficient information presented to give Mr Reedy a real opportunity to respond. My view on this is strengthened by Mr Gardiner's letter of 30 June 2005 in which he refers to an initial consultation with Mr Reedy and one other staff member on 9 May 2005. He says: *at this juncture I pointed out that no decisions had been made and Cory knew as much as we did, in respect of his position.*

[29] Mr Gardiner says there was then a further meeting with Mr Reedy individually on 10 May when there was an idea of the number of redundancies and that sales positions would be affected. Mr Reedy denies that there was a second meeting.

[30] Mr Reedy says that the only individual meeting he had with Mr Gardiner came after he was handed the letter of termination on 11 May. At this individual meeting Mr Reedy says he was told that Dan would be carrying out a caretaker role in the voice department to dispose of any existing sales.

[31] I find that it was probable there was a further discussion with Mr Reedy prior to 11 May 2005. This discussion was to confirm that there would be a number of redundancies at Multi Media including in the voice department.

[32] Mr Reedy was handed his termination letter on 11 May and told that the company wanted him to work out the notice period. Mr Reedy was also told that he would be paid out his commissions.

[33] Mr Gardiner said that he had met with Dan separate from Liam and Mr Reedy because there was a possibility of some tension between Dan and Mr Reedy, given Mr Reedy's view of himself as second in charge. Mr Gardiner said it was not decided until 11 May 2005 that Dan would remain in the caretaker role and finalise the sales.

[34] Mr Reedy continued to work after 11 May 2005. He said that he only became aware that Hayley was resigning after 11 May 2005 and that there was no discussion between him and Hayley about The Phone Guys Limited until after 17 May 2005.

[35] Mr Reedy said that during his notice period when he was still at work, he felt that he was treated differently and he did not want to engage people in conversation. Mr Reedy went to see Mr Fowler on 17 May 2005 and after discussions it was agreed that Mr Reedy's final day at Multi Media would be Tuesday 17 May 2005. The agreement was confirmed in a letter of that same day.

[36] It is unclear when Mr Reedy signed the consent to act as shareholder of the proposed company, The Phone Guys Limited. The facsimile date on the form would support that it was signed on 18 May 2005 when Mr Reedy was no longer an employee of Multi Media. The consent was registered with the Companies Office on 19 May 2005.

[37] Mr Gardiner was unhappy with the arrangements Mr Reedy had entered into with Mr Fowler, that Mr Reedy's last day of employment would be 17 May 2005.

[38] Mr Gardiner telephoned Mr Reedy and asked him to return to the workplace on 19 May 2005. Mr Reedy duly attended at the workplace and was handed another letter which provided his final day of employment with Multi Media would be 10 June 2005 at which time all due commissions and holiday pay would be paid up.

[39] It is more probable than not at the meeting on 19 May 2005 that Mr Reedy complained about the process used to implement the redundancy. Mr Reedy says that he was sworn at and told to grow up when he would not sign an exit document. Mr Gardiner does not accept that he had sworn at Mr Reedy but he did feel that Mr Reedy was being difficult.

[40] It appears from Mr Gardiner's written evidence that he may have misunderstood the agreement between Mr Fowler and Mr Reedy. That agreement was that Mr Reedy would finish work on 17 May 2005 and not that he would still be paid the balance of his notice period. Mr Reedy could simply have relied on Mr Fowler's letter that his last day of employment was 17 May 2005 but it seems that he did not appreciate that at the time.

[41] Mr Gardiner says that he felt tricked into paying two and a half weeks notice and that Mr Reedy never disclosed to him that he was intending to work for a competitor. The evidence supports that Mr Reedy was not pleased to receive the 19 May letter.

[42] Mr Reedy says that he sat at home until after 10 June 2005 and then commenced employment at The Phone Guys Limited between 10 and 17 June 2005. He does not accept that he started his employment before the end of his notice period. A letter from Hayley does support that Mr Reedy commenced his employment with The Phone Guys Limited in June 2005. Although it does not specify an actual date I place weight on the letter because it was not written for the investigation meeting but for an unrelated reason. Mr Reedy is no longer working for The Phone Guys Limited.

### **Was Mr Reedy's dismissal unjustified?**

[43] The justification of Mr Reedy's dismissal must be considered on an objective basis as to whether the decisions made by Multi Media and the way the decisions were made was what a fair and reasonable employer would have done at the time – s.103A of the Employment Relations Act 2000. The obligations in s.4 of the Employment Relations Act 2000 of good faith are required to be complied with. Under 4(1A) (c) which was inserted by the Employment Relations Amendment Act (No.2) 2004 there is an obligation on the employer proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of his or her employees to provide to the employee's affected:

- (i) *access to information, relevant to the continuation of the employees' employment, about the decision; and*
- (ii) *an opportunity to comment on the information to their employer before the decision is made.*

[44] I am satisfied that it was necessary for Multi Media, given its difficult financial position, to review staff numbers in May 2005. This was a view to disestablishing positions in order to save some positions in other departments. The other alternative which Multi Media did consider was to wind the company up. Mr Withers accepted during the Authority investigation meeting that the redundancy was genuine.

[45] The voice department was wound down over a few months after Mr Reedy and Liam's positions were disestablished with Dan remaining in a caretaker role.

Mr Reedy was one of ten other staff made redundant at that time and there is no longer a voice department at Multi Media. Mr Reedy said that there were other positions he could have been deployed into. I do not find the evidence supports that would have been possible.

[46] The redundancy was for genuine reasons and disestablishing Mr Reedy's position was what a fair and reasonable employer would do in the circumstances that faced Multi Media. In terms of the loss of Mr Reedy's position and any remedies that may flow from that the only issue is whether dismissal could have been delayed until the end of the caretaker role. It is necessary to consider the process with respect to the redundancy and whether the steps taken were what a fair and reasonable employer would have done in all the circumstances.

[47] Mr McGinn submitted in terms of consultation that it was a crisis situation and Multi Media did not have the luxury of time to go through a lengthy consultation process.

[48] I accept that there was urgency about the situation facing Multi Media. In order for Mr Reedy to properly comment before a decision was made about the continuation of his employment, he had to know what Multi Media was proposing to do.

[49] Mr Reedy knew that the company was in real financial difficulty but I found that he was not in a reasonable position to provide any comment about his own role because he did not have sufficient information or time to do so before the decision was made.

[50] Importantly Mr Reedy was not provided with information about how an employee would be selected for the caretaker role in a way that would enable him to comment. It was not clear to Mr Reedy why Dan had been selected to remain in this role in the voice department. Mr Reedy was the longest serving employee in the department when Hayley resigned. Dan did not take part in the first meeting with Liam and Mr Reedy with Mr Gardiner and this could indicate some predetermination that the decision had already been made that Dan would be staying on.

[51] The obligation to provide the information in terms of s.4(1A)(c) of the Act does not depend on it being asked for by the employee. It is to be provided by Multi Media so that an employee can properly comment on what is being proposed. I would

accept that in the circumstances the time limit to comment on the information may well be quite tight but there was no real opportunity for Mr Reedy do so at all in this case.

[52] The consultation with Mr Reedy was inadequate in terms of s.4 of the Employment Relations Act 2000 because the information provided about the business decisions regarding the voice department was insufficient to enable Mr Reedy to properly comment on it. Further there was no information about how an employee was to be selected for the caretaker role in the voice department.

[53] The process adopted by Multi Media was not what a fair and reasonable employer would have done under the circumstances and Mr Reedy's dismissal was therefore unjustified.

[54] Mr Reedy has a personal grievance that he was unjustifiably dismissed and he is entitled to remedies.

### **Remedies**

[55] Mr Reedy did not contribute towards his personal grievances in circumstances where he was dismissed for the reason his position was redundant.

[56] I am not satisfied by the evidence that Mr Reedy realistically lost the chance to be selected for the caretaker role. I accept that Mr Gardiner was genuine in his view that Dan had more sales experience than Mr Reedy and was able to work unsupervised. It was unlikely that even if there had been proper consultation about the selection for the caretaker role that Mr Reedy would have been selected. Mr Reedy's remedies are therefore confined to the hurt and humiliation caused by the unfair process and the way the redundancy was handled, rather than the loss of the job itself.

[57] Mr Gardiner said in his evidence that Mr Reedy has not pursued his grievances with any vigour and he felt that it was raised and then pursued for ulterior motives.

[58] I found Mr Reedy was quite credible when giving evidence about his belief that the redundancy process was unfair. He was particularly aggrieved about Dan being retained in the caretaker role because he believed that he was second in charge

to Hayley. Mr McGinn submits that if there is any compensation awarded it should be at the lower end.

[59] The sum claimed on behalf of Mr Reedy for compensation of \$5,000 is not excessive. I do take into account that Mr Reedy was given one months notice which was appropriate in the circumstances of this case and that he was not required to work for about 2.5 weeks in that period.

[60] In all the circumstances I am of the view that a suitable award under s.123(1)(c)(i) of the Employment Relations Act 2000 is the sum of \$4,000.

[61] I award Multi Media Communications Limited to pay to Cory Andrew Reedy the sum of \$4,000 without deduction being compensation for humiliation and loss of dignity under s.123(1)(c)(i) of the Employment Relations Act 2000.

### **Counterclaim**

#### ***Did Mr Reedy breach duties of good faith and fidelity owed to Multi Media?***

[62] The duty of good faith and fidelity carries with it a duty not to undermine the relationship of trust and confidence – *Tisco Ltd v. Communication and Energy Workers Union* [1993] 2 ERNZ 279.

[63] An employee has to act with good faith toward his or her employer. The duty of fidelity co-exists with the term of the employment agreement but does not outlive it – *Schilling v. Kidd Garrett Ltd* [1977] 1 NZLR 243.

[64] The question of whether or not there has been breach is to be decided on the facts of each case.

[65] Multi Media allege firstly that Mr Reedy was involved in the preparation for setting up of The Phone Guys Limited at the same time as he was advised that redundancies would be considered. This appears to be on the basis of the date of incorporation of The Phone Guys Limited and the signing of the consent by Mr Reedy of a shareholding in the proposed company. The dates, Mr McGinn submits, indicate that there must have been some earlier activity in terms of preparation.

[66] Mr Reedy does not accept that this was the situation. I am not satisfied there was evidence prior to 17 May 2005 to support that Mr Reedy was preparing for the

setting up of The Phone Guys Limited and/or had accepted the position of employment with the proposed company in a way that it could be found his conduct was undermining Multi Media. To the extent that Mr Reedy may have spoken to Hayley about a possible employment opportunity with the proposed company it is not a breach of the duty of fidelity to discuss a possible change of employment with a potential employer while an original contract of employment is still running – *Northern Amalgamated Workers Union Inc v. Gardner* (Unrep) WEC69/96.

[67] Between 17 and 19 May 2005 Mr Reedy was not an employee of Multi Media. Mr McGinn submits that Mr Reedy should have disclosed his interest with The Phone Guys Limited to Mr Fowler and Mr Gardiner and that the fact that he was to be employed by the company. Further Mr McGinn submits that Mr Reedy should not have accepted payment in lieu of notice until 10 July 2005.

[68] There are two issues that arise. The first is whether Mr Reedy had an obligation to advise his employer that he was intending to work for The Phone Guys Limited or had an interest in that company. The second is whether Mr Reedy did in fact work for The Phone Guys Limited during his notice period.

[69] In terms of the first issue as to whether Mr Reedy had an obligation to advise Mr Gardiner about The Phone Guys Limited, Mr McGinn referred to an Authority determination *New Zealand Grazing Company Limited v. Fraser-Jones* (unreported AA441/05) 16 November 2005. This determination suggests that the employee has a positive obligation to advise his employer if he was intending to enter into competition with the employer after he left irrespective of what had occurred during the terms of employment. In that case though there had been a representation made during employment that the employer relied on which resulted in the employer keeping the telephone number of his employer.

[70] There were no such representations made by Mr Reedy during his employment as to his future intentions. In the High Court case of *Marsden Providors (1988) Limited v. Cotterill & Anor* (1989) 2 NZERC 97, 095 where two employees had left their employment and set up a competing business, Wylie J observed at page 17 of the judgment:

*The first defendant may perhaps be criticised for failing to tell his employer of the knowledge he had acquired as to the second defendant's intentions, and later of his own intentions, but I think that may be a*

*matter of moral judgment rather than a breach of the legal duty ... . It seems unrealistic to think that his duty of good faith and fidelity requires him at the same time to tell his employer of an opportunity which arises for him, but which would clearly not be available to the employer, and of the move he makes to take advantage of that opportunity and thus invite the thwarting of his own plans.*

[71] I note there is no evidence that Mr Reedy approached any of Multi Media's clients prior to or during his notice period and there is no evidence of any other undermining behaviour.

[72] In conclusion I do not find there to be a breach of the duty of good faith and fidelity owed to Multi Media because Mr Reedy did not disclose his interest in The Phone Guys Limited to Mr Fowler or Mr Gardiner.

[73] It is certainly a different matter if Mr Reedy worked during his notice period and yet still accepted payment in lieu of notice from Multi Media. There is however no evidence to support that Mr Reedy did work for The Phone Guys Limited during his notice period. The evidence supports that it is more likely that Mr Reedy did have plans to work for The Phone Guys Limited after 17 May 2005 but changed his plans after 19 May 2005 and delayed the commencement of his employment with The Phone Guys Limited until after 10 June 2005.

[74] I do not find on the balance of probabilities that Mr Reedy worked for The Phone Guys Limited during his notice period.

[75] In conclusion therefore, I do not find that Mr Reedy breached his obligations of good faith and fidelity to Multi Media and on that basis Multi Media's counterclaim is dismissed.

### **Costs**

[76] I reserve the issue of costs.

### **Calculation of commission**

[77] Mr Gardiner indicated that he would endeavour to obtain some information as to whether there were any commissions payable to Mr Reedy although there was no claim as such for unpaid commission.

## Summary

- I have found that Mr Reedy was unjustifiably dismissed.
- I have not found any issue of contribution arising in this case.
- I have ordered Multi Media Communications Limited to pay to Mr Reedy the sum of \$4,000 without deduction under s.123(1)(c)(i) of the Employment Relations Act 2000.
- I have not found that Mr Reedy breached his obligations of good faith and fidelity to Multi Media.
- I have reserved the issue of costs.

Helen Doyle  
Member of the Employment Relations Authority