

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 103/08  
5114988

BETWEEN                      MATTHEW TAYLOR  
   Applicant  
  
AND                                JUNIPER NETWORKS  
   AUSTRALIA PTY LIMITED  
   Respondent

Member of Authority:        Vicki Campbell  
  
Representatives:              Jim Roberts for Applicant  
   Michael Quigg for Respondent  
  
Investigation Meeting:        13 March 2008 at Auckland  
  
Determination:                18 March 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]        The applicant Mr Matthew Taylor was summarily dismissed on 21 December 2007 following an investigation by Juniper Networks Australia Pty Ltd (Juniper) into allegations that Mr Taylor had entered into transactions and arrangements with the intention to misrepresent the amount of product sold by the Respondent and the Respondent's parent company.

[2]        Mr Taylor has lodged personal grievances alleging unjustified disadvantage as a result of actions by the respondent leading up to his dismissal and his suspension, and unjustified dismissal. Mr Taylor also seeks a declaration as to the reasonableness of a non-solicitation clause in his employment agreement. Mr Taylor has applied for interim reinstatement until his grievances can be investigated and determined.

[3]        Mr Taylor asks the Authority to resolve his problems by orders for reinstatement, reimbursement and compensation. This determination deals with his application to be reinstated pending the Authority's substantive investigation.

[4] As required, Mr Taylor has given a formal undertaking to abide by any order made by the Authority in respect of damages that may be sustained through the granting of an order for interim reinstatement.

[5] The parties were unable to resolve the differences between them by the use of mediation. There is to be an investigation meeting of the substantive claims on 14 and 15 May 2008.

[6] I have met with the parties and considered affidavit evidence from Mr Taylor and Mr Mitchell Gaynor, a director of the Respondent. The evidence provided to the Authority at its investigation meeting of this interim application remains largely untested as several key witnesses were not present and did not provide evidence. Therefore any findings of fact are provisional only. The findings may change once the Authority has fully investigated the claims, by having those key witnesses give evidence which will be subject to examination.

[7] This determination deals only with what should happen until the full investigation of Mr Taylor's claims takes place. It is no more than that and is in no way a final determination or any influence on how his claims might eventually be determined.

### **Interim Reinstatement**

[8] Section 127 of the Employment Relations Act 2000 ("the Act") requires the Authority to apply the law relating to interim injunctions and to have regard to the objects of the Act. These objects include supporting productive employment relationships founded on good faith behaviour and mutual trust and confidence and also, recognising the importance of reinstatement as a primary remedy. The Authority acts to provide a just solution to the parties' problems in the particular circumstances of each individual case. An order for interim reinstatement may be subject to any conditions that the Authority thinks fit – empowering the Authority to craft pragmatic solutions to do justice in each particular case.

[9] The remedy of reinstatement is interim injunctive relief. An injunction is only available for the protection of a legal right or to prevent the infringement of a legal right and it is a discretionary remedy. The established tests for reinstatement are these:

- whether the applicant has an arguable case of unjustified dismissal; and
- whether the balance of convenience (including the existence of alternative remedies sometimes said to be a separate test) favours the applicant; and
- the remedy being discretionary, where the overall justice of the case lies until it can be heard (including particularly the respective strengths of the parties' cases so far as they can be ascertained at this stage).

[10] Section 125 of the Act requires the Authority allow the remedy of reinstatement where this is claimed and practicable. The primacy accorded to the remedy of reinstatement is a relevant factor in considering interim reinstatement (*Cliff v Air New Zealand Ltd* [2005] 1 ERNZ 1).

### **Concerns raised by Juniper and subsequent inquiry**

[11] Mr Taylor was the major account manager selling Juniper's products and services into the telecommunications industry in New Zealand. Two particular types of products sold by Juniper are referred to as being Infrastructure Product Group (IPG products) and Service Layer Technology (SLT products). IPG products are sold by Juniper to a reseller which then on-sells to an end-user. SLT products are generally sold by Juniper to a distributor, which on-sells to a retailer which on-sells to an end user.

[12] The application before the Authority concerns a "deal" to sell Juniper products to Datastor to on-sell to Gen-I. The end user in this transaction was Telecom New Zealand.

[13] During June and July 2007 Mr Taylor was involved in putting together the deal for Datastor within which the SLT product was bundled up as part of the overall deal. This means that while Datastor would pay for the IPG product, and on paper, the SLT product, the overall pricing strategy was such that the IPG product was discounted to the value of the SLT product. The net effect was that the SLT product was being given away. However, the accounting records for Juniper recorded the SLT and IPG product as having been "sold".

[14] In August 2007, the Datastor deal came to the attention of the US office of Juniper. An investigation ensued. The quality of the investigation including the process used by Juniper has not been properly scrutinised by the Authority at this stage. From the investigation the Authority has undertaken to date, it

appears procedural deficiencies existed up to 27 November 2007. During Juniper's inquiry Mr Taylor disclosed all the information he had including a significant number of emails.

[15] Mr Taylor was dismissed on 21 December for the following reasons:

- His involvement in a June 2007 order of products by Datastor;
- The making of an undocumented side agreement with Datastor in connection with that order; and
- Failing to disclose the details of the transactions and arrangements in Mr Taylor's certification provided in June 2007.

[16] At the substantive investigation meeting Juniper's actions in dismissing Mr Taylor will be assessed according to whether its actions were those a fair and reasonable employer would have taken in all the circumstances.

### **An arguable case**

[17] I find for Mr Taylor, that there is a strongly arguable case with regard to the inquiry undertaken by Juniper. Particularly the extent to which Juniper investigated Mr Taylor's explanations including the copies of all correspondence he provided and the discussions he reported he had held with the head of Finance, Mr Lung, based in Hong Kong, and his Australian Manager, Mr Alex Krawchuk, who is based in Australia.

[18] I have formed a preliminary view that there were a number of very senior managers involved in putting the Datastor deal together, including the initiation of it by Mr Taylor's manager, Mr Krawchuk.

[19] With regard to the reliance Juniper placed on Mr Taylor's completion of certification requirements, the evidence currently before the Authority shows that the deal with Datastor was well known to Mr Lung and Mr Krawchuk as they were all party to the communications and were providing detailed information to Mr Taylor including setting the pricing structures.

[20] The certification report completed by Mr Taylor in June 2007 was completed prior to the deal with Datastor taking shape, and was exception based. Mr Taylor was only required to disclose a side agreement, if his Manager or the head of Finance were not aware of it. Mr Lung and Mr Krawchuk were both actively engaged in the detail of the Datastor deal.

**Balance of convenience**

[21] In the exercise of the Authority's discretion I weigh up the inconvenience to Juniper of having to bear the burden of interim relief before the substantive case is dealt with, against the inconvenience to Mr Taylor, who may have a just case, of having to bear the detriment of unjustified action until the problem has been investigated and determined.

[22] It is relevant too that I have arranged an investigation meeting with the parties on 14 and 15 May which is 8 weeks hence.

[23] Mr Taylor was a very senior employee in a specialist role and he earned significant income from his employment. Similar roles with the level of remuneration and the seniority of the position Mr Taylor held at Juniper are not commonly available in New Zealand.

[24] Mr Taylor gave evidence that he has been unable to find alternative employment as a result of a non-solicitation clause in his employment agreement (the reasonableness of which he has challenged) and he has had to realise some assets and has borrowed against others in order to meet his ongoing financial commitments.

[25] Mr Taylor says his reputation is being damaged the longer he is not in paid employment. Presuming that is the case, an order for interim reinstatement will not restore any loss in that regard. Interim reinstatement is a holding pattern until the dismissal can be fully investigated with the possibility that the Authority may yet confirm the dismissal as being justified. Another possibility is that Mr Taylor is found to have been substantially at fault in what he did that led to an unjustified dismissal. Loss of reputation in those circumstances will be a natural and predictable outcome.

[26] On the other hand, Juniper says an adequate alternative remedy to reinstatement is the payment of damages. Further, Juniper claims Mr Taylor's return to the workplace would result in a loss of reputation for the company, although there was no evidence to support this submission. However, if the submission is correct, these concerns can be accommodated by an order that Mr Taylor be reinstated on the condition that he does not attend work.

[27] In these circumstances, I conclude it would bear more harshly on Mr Taylor to have to bear the burden of interim relief. Accordingly, I find that the balance of convenience favours Mr Taylor.

### **Overall Justice**

[28] Standing back from the detail of the other tests, I now decide whether it will be in the interests of justice to grant interim reinstatement. I consider too, in the exercise of the Authority's equity and good conscience jurisdiction and in determining whether to grant a discretionary remedy, what options other than those advanced by the parties, the justice of the case requires.

[29] There is no dispute that the deal with Datastor provided large discounts and gave the false impression that over US\$750,000 worth of SLT product had been sold. There is also no dispute that the "sale" of the SLT products were included in Juniper's reporting. Whether Mr Taylor was responsible for the decision's made with respect to the deal, or the inclusion in the reporting will only become apparent after a full investigation has been completed.

[30] I conclude that the overall justice of the matter favours Mr Taylor. Mr Taylor received clear instructions from Mr Krawchuk to bundle as much SLT product into the Gen-I order as possible. He had no control over what prices would be quoted or how the deal would be structured. Mr Taylor has also produced evidence to show that no deal was pursued until such time as it was approved. Approvals were made by the office based in Hong Kong.

[31] In reliance on Mr Taylor's undertaking as to damages, I order Juniper Networks Australia Pty Ltd to reinstate Mr Taylor to his former position pending the determination of his personal grievance. This order is subject to the following conditions:

- Juniper Networks Australia Pty Ltd may elect to place Mr Taylor on paid garden leave;
- Mr Taylor is to be paid on the basis of his average monthly remuneration calculated for the 12 month period ending 21 November 2007. For the avoidance of doubt Mr Taylor's remuneration means his base salary and commission);
- This order takes effect on Monday 24 March 2008;

**Costs**

[32] Costs are reserved. Mr Taylor is entitled to an order for costs but I would prefer to deal with the detail of these after the personal grievance has been concluded.

Vicki Campbell  
Member of Employment Relations Authority