

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Steve Cullen (Applicant)
AND Power Marketing Ltd (Respondent)
REPRESENTATIVES Ken Nicholson and Keshwant Kaur, Advocate for Applicant
Margaret Matthew, Counsel for Respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 6 July 2005
SUBMISSIONS RECEIVED 3 August 2005
DATE OF DETERMINATION 29 August 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Steve Cullen was employed at Power Marketing Ltd (“Power Marketing”) from December 2003 until 11 August 2004. Power Marketing provides telemarketing services to business clients. Mr Cullen’s first role with Power Marketing was as a casual telemarketer. He worked evenings and weekends, hours which suited his teachers’ college studies. Mr Cullen was an outstanding telemarketer. From 24 February 2004 he was team leader for the Ihug and Sky TV campaigns. On 5 August Mr Cullen was directed to swap his team leader responsibilities with the other team leader, Elaine Dwyer. On 9 August the swap was implemented. On 10 August Mr Cullen told the manager, Simon Foley, he was not happy with the swap. On 11 August a director of Power Marketing, Paul Ross, meet with Mr Cullen to discuss issues around the swap. The discussion deteriorated and Mr Cullen left the building. He did not return and a personal grievance for unjustified dismissal was later raised on his behalf.

[2] Mr Cullen says he was unjustifiably disadvantaged in his employment as a result of the swap and dismissed from his job with Power Marketing. He seeks lost wages and compensation for hurt and humiliation caused as a consequence of his dismissal.

[3] Power Marketing says Mr Cullen’s resignation was offered to and accepted by Mr Foley on 11 August.

[4] To determine this employment relationship problem the Authority must consider:

- (i) whether the swap disadvantaged Mr Cullen?; and
- (ii) whether he resigned or was dismissed?

Background

[5] Mr Ross decided to swap Mr Cullen and Ms Dwyer's team leader duties. He thought Mr Cullen's style would better suit the World Exchange campaign and the soon to be launched Sky Sports campaign. To compensate Mr Cullen for any drop in pay until the Sky Sports campaign started Mr Cullen's commissions would be topped up until a new Sky Sports campaign began in early September 2004.

[6] Mr Ross and Mr Foley meet with Mr Cullen and Ms Dwyer on 5 August and advised of the swap and the commission proposal. Mr Ross told Mr Cullen he thought he "put the fear of God" into his team and that the new team would suit his style better. There is some dispute as to whether Mr Cullen agreed to the swap. Mr Cullen says he did not agree and said nothing because he wanted to think about it. The other witnesses present at the meeting say he and Ms Dwyer agreed to the swap. There is no dispute that the swap was not put to Mr Cullen and Ms Dwyer as a proposal on which their comment was invited for consideration.

[7] On 9 August the swap was announced to the respective teams and Mr Cullen worked on the World Exchange campaign. Mr Cullen said he did not perform any team leader duties because Mr Foley sat at the front of the room and he assumed the team leader role. Mr Cullen did not raise this with Mr Foley at the time. Mr Foley said he was moving between the two buildings and expected Mr Cullen to act up into his role when he was not present. There was no evidence Mr Foley told Mr Cullen this was his expectation.

[8] On his way to work on 10 August Mr Cullen bumped into a co-worker who commented "I hear you've been demoted." Mr Cullen was upset by this comment. He understood the co-worker to be referring to the swap with Ms Dwyer. Mr Cullen started his shift but found he was too upset to work. He asked Mr Foley if he could go home because he felt he had been demoted and all the staff knew this. Mr Foley told Mr Cullen he had not been demoted. Mr Cullen then said he did not trust Ms Dwyer and that he knew she had been after his job. Mr Foley said he let Mr Cullen go home because he was upset and had expressed animosity towards Ms Dwyer.

Issues

(i) Did the swap disadvantage Mr Cullen?

[9] Clause 3.1 of Mr Cullen's employment agreement provides that he is engaged as a team leader. Annexed to the employment agreement is a position description which includes the title "Thug/Sky Team Leader" and describes the purpose of the position as leading a campaign for a specific client.

[10] Power Marketing says it was able to swap Mr Cullen's team leader duties without his agreement because clause 3.2 of the employment agreement provides:

"Nothing in paragraph 3.1 of this agreement will prevent you from working in any operational area as required provided that Power Marketing considers you are competent and/or qualified to perform that type of work."

[11] Mr Cullen was advised on 5 August that the specific Sky campaign duties were to be removed and replaced with the World Exchange campaign. He was told his commissions would be made up. There was no evidence Mr Cullen suffered a financial disadvantage as a consequence of the swap. Mr Cullen said he felt he had been demoted because Mr Foley had performed the supervisor's function on 9 August and he had worked as a telemarketer that shift. Mr Cullen said the World Exchange campaign was very difficult and commissions were hard to earn. He said he thought Power Marketing wanted him to work as a telemarketer on the World Exchange campaign to lift the

sales. There is no evidence that he raised these concerns with Mr Foley or Mr Ross.

[12] Mr Ross said Mr Cullen was the best telemarketer he had ever seen, he said it was true that he wanted his skills on the World Exchange campaign but that supervisors still performed telemarketing. There was no evidence Mr Cullen was told he would not supervise the World Exchange team or that he was told he would only be telemarketing on that campaign. When Mr Cullen told Mr Foley he thought he had been demoted on 10 August Mr Foley assured him he was not.

[13] I am not satisfied on the evidence received Mr Cullen suffered any disadvantage as a consequence of his swap with Ms Dwyer. Clause 3.1 of the employment agreement reserved the right of the employer to shift Mr Cullen to any operational area within the business. Mr Cullen had an opportunity to discuss the swap with his employer prior to implementation, he did not. He did not raise any concern about the swap until after his co-worker commented he had been demoted. However, such a comment does not amount to a disadvantage. There was no evidence that any duty owed to Mr Cullen was breached; his broad duties and responsibilities did not change (other than the specific campaign, which the parties had agreed in the employment agreement Power Marketing could change) and his pay did not change.

(ii) Was Mr Cullen dismissed or did he resign?

[14] On 11 August Mr Ross arranged to meet with Mr Cullen to discuss the start of the Sky Sports campaign. At the meeting Mr Ross told Mr Cullen the campaign was his to run but that he wanted him to “tone down” his management style. Mr Cullen told Mr Ross he had no right to question the way he ran his team. Mr Foley said he was able to hear the robust exchange between Mr Cullen and Mr Ross which ensued in the adjoining office partition. Mr Ross asserted his right to manage the business and Mr Cullen responded that no one had problem with his style except Mr Ross. Mr Ross left the room.

[15] Shortly after Mr Cullen spoke with Mr Foley. Mr Foley says Mr Cullen told him he was giving a week’s notice because he was unhappy with the way Mr Ross had spoken to him, Mr Foley accepted his notice and told him he did not need to work out his notice period. Mr Ross returned to the office and a further exchange occurred between Mr Ross and Mr Cullen which Mr Foley interrupted by advising Mr Ross Mr Cullen had handed in his resignation and he had told him he did not need to work out his notice. Mr Ross told Mr Cullen he could leave the building then and there.

[16] Mr Cullen says he went into Mr Foley’s office after the exchange with Mr Ross and said he was thinking of giving a weeks notice and that Mr Foley told him to work out the week and think about it. Mr Cullen says Mr Ross then entered Mr Foley’s office and was verbally abusive, telling him that he “just didn’t get it”, that he was “dumb” and told him to go. Mr Ross denies telling Mr Cullen he was dumb.

[17] On his way out of the building Mr Cullen was intercepted by a co-worker. Mr Cullen pushed the co-worker out of his way, who fell to the floor. Mr Cullen then left the building.

[18] Mr Foley then left a message on Mr Cullen’s mobile telephone asking him to return the work keys. Mr Cullen left a message saying he would return the keys at 7.30pm that evening.

[19] At about 7.15pm Mr Cullen telephoned Mr Foley, apologised for pushing the co-worker and asked if he was dismissed. Mr Foley said his resignation had been accepted and Mr Cullen replied that as it was not in writing it wasn’t binding. Mr Cullen said there had been no consultation or

warning of the swap and asked Mr Foley if he thought Mr Ross had treated him fairly. Mr Foley asked when the keys would be returned and Mr Cullen did not reply. The conversation ended. Mr Foley then telephoned the property manager to get advice on the securing of the building.

[20] At 8.30pm Mr Cullen telephoned Mr Foley again and told him he was not prepared to return the keys yet, that he was in the process of getting advice and would then make a decision. Mr Foley again asked Mr Cullen to return the keys. Mr Ross had already told Mr Cullen by telephone that evening that he would call the police if the keys were not returned. Later that evening Mr Foley spoke with Mr Cullen's representative who gave an assurance the keys would be returned.

[21] Mr Cullen has not returned the keys to Power Marketing. He told me he gave the keys to a former employee of Power Marketing to return but that the keys have been lost.

Determination

[22] Mr Cullen says either he was constructively dismissed from his job with Power Marketing or he was dismissed.

[23] I find Mr Cullen resigned from his position; he told Mr Foley he was giving a weeks notice, Mr Foley accepted his resignation and told him he didn't need to work out his notice period. Mr Cullen confirmed that he had resigned later that evening when he told Mr Foley the verbal resignation would not stand up. Mr Cullen did not seek to withdraw his resignation. He attempted to nullify his resignation by seeking to rely on an inaccurate technicality. That this was Mr Cullen's approach is supported by the equally inaccurate claim that he had a right to retain Power Marketing's keys until he got advice.

[24] Does Mr Cullen's resignation amount to a constructive dismissal? I accept Mr Cullen was upset by the perception of his co-workers that the swap to World Exchange was a demotion. However, such a perception does not amount to a personal grievance for unjustified action causing disadvantage.

[25] I also accept that Mr Cullen was upset that Mr Ross criticised his style of managing his team. However, an employer is entitled to raise performance issues with an employee in a fair and reasonable manner. Mr Ross did not raise the issue of "style" with Mr Cullen in a disciplinary setting. He raised the issue with him in a meeting to confirm a new campaign for Mr Cullen to lead. Mr Cullen did not react well to this criticism. Mr Cullen challenged his employer's authority to manage his business and Mr Ross reacted in an attempt to assert his authority. Following this exchange Mr Cullen left the meeting and gave Mr Foley his notice. While his resignation was tendered immediately subsequent to the robust exchange with Mr Ross the evidence establishes Mr Cullen was an equal participant in the exchange and Mr Ross had not threatened his employment. For these reasons I find Mr Cullen was not constructively dismissed.

Costs

[26] Costs are reserved. I invite the parties to resolve the issue of costs themselves. If they are unable to do so then they should apply to the Authority to determine the costs.

Marija Urlich
Member of Employment Relations Authority