IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 524
5404945

	BETWEEN	GRAEME PIPER Applicant
	A N D	SINCLAIR PRYOR MOTORS LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Stan Austin, Advocate for Applicant Gary Tayler, Advocate for Respondent
Investigation Meeting:	10 October 2013 at Gisborne
Date of Determination:	15 November 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Piper) alleges that he was unjustifiably dismissed from his employment and that the employer breached its duties of good faith toward him. The respondent (Sinclair Pryor Motors) resists both claims maintaining that Mr Piper was dismissed as a consequence of a genuine redundancy and was at all times treated in good faith by the employer.

[2] Mr Piper was employed with Sinclair Pryor Motors from 9 August 2010 in the position of Business Development Manager.

[3] There was an individual employment agreement and the remuneration was based partly on a salary and partly on commissions. The evidence is plain that the commissions effectively more than doubled the remuneration derived from the base salary.

[4] In the middle of 2012, Sinclair Pryor Motors had performance concerns about Mr Piper. There was a meeting between Mr Piper and the dealership manager for the Gisborne branch on 8 May 2012 to discuss those performance concerns and the concerns were subsequently reduced to writing by the dealership manager in two letters. The first of those letters is dated 18 July 2012 and after listing the concerns the employer had, the concluding paragraphs refer to a review in four weeks' time and indicated that shortfalls could result in either performance management or disciplinary action.

[5] That letter was followed up with another letter dated 20 August 2012 which identified some improvements in Mr Piper's performance but still had concerns about other areas. The employer required Mr Piper to report to the dealership manager on any leads that he was working on which did not result in a confirmed sale and he was also required to provide the contact details of potential clients on an ongoing basis within 12 hours of the sale falling through.

[6] Again, there was a reference to possible disciplinary action if performance did not improve.

[7] As a matter of fact, it seems common ground that there was never any follow up action taken by Sinclair Pryor Motors in respect of Mr Piper's performance. The evidence for Sinclair Pryor Motors which the Authority heard suggested that Mr Piper's performance had improved or, in the alternative, that it had improved at least to the extent that Sinclair Pryor Motors was no longer anxious about it.

[8] On Wednesday, 24 October 2012, Mr Piper received a letter from Angus Helmore, the Chief Executive Officer of Sinclair Pryor Motors. That letter set out a proposed restructuring, the effect of which was, if implemented, Mr Piper's position as Business Development Manager might disappear. Mr Piper was asked to attend a meeting to discuss matters.

[9] That meeting took place on 26 October 2012. By all accounts it was a reasonably short meeting. Mr Helmore explained that the employer was considering disestablishing Mr Piper's role and effectively replacing it with video conferencing technology. This information simply repeated the sketch provided in Mr Helmore's letter of 24 October 2012.

[10] The essence of the proposal was that instead of having a business development manager dealing face-to-face with potential clients in Gisborne, the client would sit down with a video screen and engage with an appropriate person in one of the other branches of the business, principally in the Hawke's Bay.

[11] There is some dispute about the nature of the discussion between Mr Piper and Mr Helmore. Mr Helmore's evidence is that Mr Piper was if not positive about the proposed change, at least not militantly negative about it. Moreover, Mr Helmore maintained that Mr Piper had given him some appropriate feedback about other dealerships using the same technology, although there is dispute between the two men about exactly how far that advice from Mr Piper went.

[12] In any event, the Authority is satisfied that Mr Helmore left the meeting with the belief that Mr Piper believed that the proposed new technology could be successfully implemented and would work appropriately.

[13] For his part, Mr Piper seems to have taken a fatalistic approach to the meeting and felt that anything he said of a negative nature would be ignored by Mr Helmore. Mr Piper maintained in his evidence to the Authority that he had left the meeting with the clear belief that his job had gone and that he needed to look for work and that Mr Helmore would provide him with a reference. Conversely, Mr Helmore's evidence is that no decision had been taken, that he needed to go away and think about what Mr Piper had told him, and that Mr Piper had been encouraged to go away and think about the matter as well.

[14] It is common ground that Mr Piper did not request a further meeting and that Mr Helmore did not offer one. However, Mr Helmore told the Authority that if Mr Piper had asked for another meeting, he would have readily agreed to one. He told the Authority he was not in any particular hurry to implement the new proposal.

[15] Despite that evidence, it is apparent that Mr Helmore wrote a letter dated 30 October 2012 (that is four days after the meeting between Mr Helmore and Mr Piper), and that letter effectively notified Mr Piper that his position had been disestablished for redundancy.

[16] The parties agree that Mr Piper did not receive the letter on the day it was written and it was not provided to him until 2 November 2012. Mr Piper and Mr Helmore had a telephone discussion around 9am on 2 November 2012, the thrust

of which was Mr Helmore confirming to Mr Piper that his position had been disestablished and that written confirmation would follow. Mr Piper then received the 30 October 2012 letter from Mr Helmore.

[17] At Mr Helmore's suggestion, Mr Piper was paid in lieu of notice and left the workplace immediately.

[18] The parties agree that the video conferencing proposal was never actually implemented. Mr Helmore told the Authority that within two weeks or so of Mr Piper's departure from the business, he (Mr Helmore) had satisfied himself that the proposed video conferencing proposal ought not to proceed.

[19] Mr Helmore's evidence was that a significant reason for that decision being taken was his conviction that a staff member in the Gisborne branch responsible essentially for administration was grossly overworked and needed additional support. Mr Helmore confirmed in answer to a question from the Authority that he had been unaware of the deficits in relation to administration in the Gisborne branch at the point at which Mr Piper was dismissed for redundancy.

[20] Acting on the intelligence that there was an administrative shortfall in the Gisborne branch and also reflecting some growing unease about the utility of the proposed video conferencing technology, Mr Helmore decided to scope a new position and that position was duly advertised on 21 November 2012 (19 days after Mr Piper left the business).

[21] Mr Piper saw the advertisement, saw that it appeared to include all of his former role (as well as other duties that he had not been responsible for), and whether because of the advertising of this role or not, a personal grievance was raised five days after the advertisement appeared for the new job.

[22] Mr Helmore did not consult with Mr Piper concerning this new advertising, notwithstanding the fact that the job content of the new role included all of Mr Piper's former duties. Mr Helmore gave the Authority to understand that he felt comfortable about Mr Piper's redundancy. Mr Helmore also opined that a comparison of the new position with the former role previously occupied by Mr Piper disclosed that there was 60% common duties and 40% different duties. When pressed, Mr Helmore indicated that that was not a scientific percentage, just his considered view.

[23] Once Mr Piper raised his personal grievance and sought proper advice, Sinclair Pryor Motors understandably made an offer for Mr Piper to allow himself to be considered for the new role. Mr Piper refused on the footing that he had lost trust and confidence in his former employer. This was so notwithstanding that one of the claims that he made in his raising of a personal grievance was a claim for reinstatement.

[24] In the result, Sinclair Pryor Motors made an appointment to the new role.

Issues

[25] The Authority will need to consider and answer the following questions:

(a) Was the redundancy a genuine one; and

(b) Was the consultation appropriate; and

(c) What about the new position?

Was the redundancy a genuine one?

[26] In order for a redundancy to be genuine it must be effected for genuine business reasons and not be activated by base or improper motives. In this particular case, one of the arguments advanced on behalf of Mr Piper is that the employer at best had mixed motives in progressing the restructure, mixed because the employer continued to harbour doubts about Mr Piper's performance of his duties.

[27] The thrust of this allegation relies on the performance concerns that Sinclair Pryor Motors evidentially had about Mr Piper. As the Authority has already noted, there was a meeting between the parties on 8 May 2012 to discuss those performance issues and the employer's concerns were subsequently reduced to writing on two occasions, the first being a letter dated 18 July 2012 and the second a letter dated 20 August 2012.

[28] The 8 May 2012 meeting and the two letters on 18 July 2012 and 20 August 2012 respectively concern themselves with what was effectively a claim that Mr Piper was under-performing. Both the letters contain a reference to possible disciplinary action if matters did not improve and there was reference to the matter being followed up.

[29] In fact, as the Authority has already noted, there was no follow up at all. So the last contact on that matter must be said to have been the second letter of 20 August 2012 just over two months before the proposed restructuring was announced.

[30] Mr Piper's allegation is essentially that, while Sinclair Pryor Motors may have been minded to take cost out of the business, they must also have thought that they could as it were *kill two birds with one stone* and deal with the poor performance issues as far as Mr Piper was concerned, by disestablishing his position.

[31] While there is a kind of rough symmetry to the contention that this was a redundancy activated by mixed motives, the Authority is not persuaded that the evidence supports the contention. There is only the juxtaposition of the dates. Nothing in the exchanges between the principal protagonists Mr Angus Helmore the Managing Director of Sinclair Pryor Motors and Mr Piper himself, suggests that the performance issues were in play during the exchanges the two men had around the restructuring. Indeed, Mr Helmore's evidence was that the performance issues had nothing whatever to do with the restructuring. For the record, the Authority believed his evidence on that point.

[32] Mr Helmore described becoming increasingly concerned about the overhead structure the business was carrying in Gisborne relating to the sale of finance packages for vehicle purchases (essentially the costs of Mr Piper's employment) and the sustainability of those costs looking on into the future. In essence, the Authority was told that one important aspect of Mr Piper's role was to sell finance packages to purchasers of motor vehicles such that, in addition to Sinclair Pryor Motors selling a vehicle to a customer, they also sold the finance which enabled the customer to complete the purchase and so were able to enhance their profitability not just by the retail sale of the vehicle but also by the on-sale of the finance product.

[33] What Mr Helmore was saying in his evidence to the Authority was that because there were not enough finance sales being effected by Mr Piper, the overhead structure of maintaining Mr Piper in the employment was becoming increasingly less attractive.

[34] Mr Helmore had come up with the notion of selling these finance packages via a SKYPE video conferencing arrangement whereby the Gisborne customer would engage with a staff member of Sinclair Pryor Motors based not in Gisborne but in one

of the larger branches in the Hawkes Bay and that engagement would be facilitated by the video conferencing link. If such an arrangement were able to be effected satisfactorily, the need to have the position Mr Piper occupied in branch at Gisborne fell away, at least in respect to that aspect of his work.

[35] The Authority is not satisfied there are any mixed motives in this present factual matrix. The Authority accepts at face value Mr Helmore's evidence that he was simply interested in the bottom line and that, having come up with a slightly novel way of removing the necessity for part of the role which Mr Piper fulfilled, he saw the option of taking cost out of the business without effecting the bottom line. In truth, while the facts may be slightly novel, this is an absolutely standard kind of redundancy process where the purpose is to enhance the businesses performance by removing unnecessary costs.

[36] Mr Piper contends that the provisional decision of the employer to explore the video conferencing idea was so under researched as to suggest that the real motive was something else. Again, the Authority has reflected on this contention but dismisses it. Mr Helmore's evidence was as plain as could be that his company was what he described as an entrepreneurial business and as such it tended to make instinctive business decisions quickly and without a great deal of assessment or analysis. It may well be that that description is characteristic of the motor industry or perhaps more generally of industries reliant on volume sales in order to survive.

[37] Whatever the position elsewhere, the Authority is persuaded that Mr Helmore's description of his own enterprise was an accurate one and that it reflected the kind of way that he would approach any task, including this one. It follows that in the Authority's opinion the fact that this particular proposal was plainly under analysed and under researched and proved to be completely unsuccessful even before it was attempted, does not of itself suggest an improper motive. The Authority is still satisfied that the motive for the restructuring was the common business desire to take out cost without reducing service, and therefore improve the bottom line.

[38] Mr Piper relies on the dictum in *Rillstone v. Product Sourcing International 2000 Limited* ERA Auckland AA167/07 as authority for the view that the burden of proof in cases such as this rest not on the claimant employee but on the employer. But with respect, that misunderstands the authority. It is the case that the burden rests

on the employer if the Authority is satisfied that there are mixed motives for the restructure but only then. Here, the Authority is quite clear that, notwithstanding the claims made by Mr Piper, the motive for the restructure is an uncomplicated business motive and nothing more than that.

[39] It follows from that conclusion that the Authority is satisfied that this was a genuine restructure which resulted in a genuine redundancy.

[40] One further point needs to be made under this head. The Authority is persuaded that the law requires it to judge the position *at the time the dismissal …occurred*: s.103A(2) Employment Relations Act 2000 (the Act). What that means in practical terms in a redundancy such as this is that the employer's actions need to be assessed at the time that the dismissal took place. It follows from that conclusion that the fact that it rapidly became clear to Mr Helmore that his proposed video conferencing arrangement simply would not work is neither here nor there and cannot be brought to bear, as Mr Piper encourages the Authority to do, on the question whether the redundancy was a genuine one or not. Essentially, Mr Piper's thesis is because the employer's proposal seemed so undeveloped and there were no details about how it would operate, no evidence of any planning about the new arrangements, no evidence of the technology having been tested, or anything of that kind, the whole restructure was a sham and that all that was effectively proved when the employer ditched the proposal within a week or so of Mr Piper's redundancy.

[41] While the Authority accepts that the proposal was not well thought out the fact that the proposal was dumped immediately after the redundancy was effected does not in the Authority's opinion confirm that the proposal was a sham and that the real reason was to get rid of Mr Piper because of the performance concerns. All that the dumping of the proposal confirmed in the Authority's mind is that the employer had concluded that the proposal was not workable.

[42] While no doubt it is true that if the proposal had been properly researched in the first place Sinclair Pryor Motors might have reached the conclusion before making Mr Piper redundant that their proposal had no merit, the authority is not persuaded that that fact of itself proves that the real reason for the redundancy was something sinister.

Was the consultation appropriate?

[43] The Authority has no hesitation in concluding that the consultation undertaken by Sinclair Pryor Motors did not meet the employer's obligations under the law. In the well known passage in *Simpson Farms Limited v. Aberhardt* [2006] ERNZ 825 Chief Judge Colgan said:

> *Consultation is to be a reality, not a charade. The parties to be consulted must be told what is proposed, must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done.*

[44] Nothing about this process of consultation seems to the Authority to fall within the ambit of those words of the Chief Judge. What seems to have happened here is that Mr Helmore wrote a very sketchy letter to Mr Piper in which he set out the barest details of what was in prospect, summoned Mr Piper to a meeting and essentially seems to have proceeded on the footing that because Mr Piper thought the proposal workable, and even offered some helpful suggestions about it, it was safe to proceed. Mr Helmore told the Authority in his evidence that *by and large he (Mr Piper) agreed with the proposal.*

[45] But that is not the evidence of Mr Piper who says that he raised concerns about the proposal and in particular how customers would respond to it, pointed out that Broadband was slow in Gisborne and that if the employer was intent upon using the technology, there was better technology than SKYPE available.

[46] Critically, Mr Piper is very clear that he asked Mr Helmore what the timeframe was and was told *oh about a week* and that he then said *I better start looking for a job* and Mr Helmore confirmed that was the position.

[47] This initial meeting was the only meeting between the parties. It seems by common consent to have taken about three quarters of an hour but whereas Mr Helmore's impression of the meeting was that he had been effectively given cart blanche to implement the new proposal with the blessing of the affected staff member, Mr Piper was left with the impression that he had been presented with a *fait accompli* which meant he was out of a job.

[48] It is difficult to see how the consultation requirements of the law can be fulfilled with a single meeting particularly where the employee is left with the impression that the decision has already been taken at the end of that single meeting. Mr Helmore told the Authority that if Mr Piper had sought a further meeting he would readily have arranged one but that is not good enough. He has an obligation as an employer to ensure that a fair process is followed. The law around redundancy processes is redolent with judicial dicta about ensuring the power imbalance between employer and employee is redressed as far as that is possible and one way in which that can ensured is by making it plain that employers must, in following a consultation process, make active provision for employees to have input into matters rather than wait for them to ask for that opportunity. Redundancy, by its very nature is a process driven by the employer's business imperatives and it is incumbent upon the employer to ensure that the employee has all the opportunities he or she needs to engage in and consult around the process.

[49] Despite telling the Authority that there was no real urgency for the implementation of the proposal, Mr Helmore proceeded to write a letter just four days after the only consultation meeting in which he confirmed to Mr Piper that his job had gone. That very constricted timeline between a meeting to consult on Friday 26 October 2010 and a letter written on Tuesday 30 October 2010 strongly suggests that Mr Helmore had closed his mind to any alternative scenario but the dis-establishment of Mr Piper's role. Further, the very proximity of the writing of that letter to the only consultation meeting suggests that Mr Piper was quite right to leave the consultation meeting believing that his job had gone and that the decision was as good as made already.

[50] The Authority does not accept the claim made for Mr Piper that he ought to have been provided with further and better particulars about the nature of the proposed change in order that he could comment on it. In the normal course, that is an accurate statement of the law but the Authority is persuaded in the particular circumstances of this case and for reasons already canvassed, the nature of the proposal was truly and unformed one and the information provided in the initial letter of 24 October 2012 and subsequently at the meeting on 26 October 2012 was in fact all the information the employer had because they had not researched the matter thoroughly.

[51] While the matter is not free from doubt, the Authority is persuaded that it is more likely than not that Mr Piper was told at the consultation meeting that his job was gone. All of his behaviour after that meeting tends to suggest that that was what he was told.

[52] When the Authority asked Mr Helmore about that particular aspect, he said he *totally refuted the claim that the job was gone from the consultation meeting.* Mr Helmore continued *I was asked by Graeme (Mr Piper) what would happen if the job was gone and I said he would need to look for work and that I would give him a reference. At the end of the meeting I said I would think about things and I asked him to do likewise.*

[53] But against that, it is clear that Mr Piper immediately after the meeting spoke to his wife and colleagues and certainly conveyed the impression that his job had gone.

[54] Further evidence of the unsatisfactorily short nature of the proceeding is the fact that while Mr Helmore acknowledged that Mr Piper made certain technical suggestions about the proposal which required further investigation, Mr Helmore did not bother to feed back his research on those points to Mr Piper, as he should have done given his obligation to engage appropriately and fully and frankly in the consultation environment.

[55] It follows from the foregoing analysis that while the Authority is satisfied that the redundancy proposal was a genuine one, the consultation undertaken by Sinclair Pryor Motors with the affected staff member Mr Piper was grossly inadequate and did not comply with the obligations of the law. The fact that Sinclair Pryor Motors appears to have derived comfort from their analysis that Mr Piper agreed with their proposal, even if that were true, does not obviate their obligation to fully consult with him in respect to the totality of the proposal and its pros and cons. There is no doubt in the Authority's mind that the truncated timeframe adopted by Sinclair Pryor Motors militated against their legal obligation to adopt a measured and reflective approach.

What about the new position?

[56] The evidence is that within a matter of a few weeks of Mr Piper's dismissal for redundancy, Mr Helmore had had a change of heart and decided not to persevere with the video conferencing technology proposal. The Authority accepts Mr Helmore's

evidence that the principal reason for this change of heart was his discovery that the administration in his Gisborne branch was under significant pressure. As a consequence, he decided to create a fresh position to, amongst other things, provide additional administrative support in the Gisborne branch.

[57] The new position was advertised on the Web and Mr Helmore's evidence is that 60% of the new position's tasks were common to Mr Piper's former role. In effect then, what the new role did was to amalgamate Mr Piper's old job in its totality with a parcel of administrative tasks designed to support the administrative work in the Gisborne branch.

[58] Mr Piper saw the advertisement, saw the common elements from his old job, and not unnaturally felt aggrieved.

[59] Given that the Authority has already accepted that the redundancy was a genuine one effected for proper business reasons, the fact that the employer had to re-think its strategy and eventually dump the original plan altogether has no effect on the outcome because the only appropriate time for the Authority to consider if a redundancy was genuine or not is at the time that the dismissal took place. The Authority is satisfied it is not available to it to re-think its original conclusions made at the time of dismissal, in the light of what happened subsequently.

[60] Even if that conclusion is wrong in principle, the behaviour of the employer is relevant to the case. As soon as it became evident to Sinclair Pryor Motors that Mr Piper was aggrieved about the decision to advertise the new role, Sinclair Pryor Motors quite correctly offered Mr Piper the opportunity of applying for the new role.

[61] Of course, the correct thing to have done in the particular circumstances of the case would have been to give Mr Piper that opportunity as soon as or contemporaneously with the decision to advertise the role. That sort of proactive approach would have potentially avoided some of the unpleasantness which developed subsequently.

[62] However, the decision taken by Sinclair Pryor Motors to offer Mr Piper the opportunity of being considered for the role was the next best thing. Mr Piper of course chose not to be considered for the role, as he was entitled to do, but he cannot now be heard to protest about the unfairness of the matter as he was given an opportunity to be considered for the new position and chose not to engage.

[63] In summary then, the Authority is not persuaded that Sinclair Pryor Motors' decision to dump the video conferencing proposal and to create a new position incorporating Mr Piper's old position is an unjustifiable action causing Mr Piper's disadvantage because the Authority is satisfied it is within the remit of the employer to do what it has done, given its decision to drop the original video conferencing plan.

[64] Even if that logic is rejected, it is still apparent that any default by Sinclair Pryor Motors in creating this new role has been addressed as between itself and Mr Piper by inviting Mr Piper to be considered for the role.

Determination

[65] The Authority is satisfied that this was a genuine redundancy activated by proper motives and with a particular outcome in mind at the time the decision to dismiss for redundancy was made. Subsequently, that plan was reviewed and dumped and a new role was created which incorporated the role that Mr Piper had previously occupied. In creating that new role, Mr Piper having left the employ, the Authority is not persuaded that Sinclair Pryor Motors have breached any obligations they may have had to Mr Piper and if they have those breaches were remedied by their offer to Mr Piper to be considered for the new role, an offer which he declined.

[66] However, the Authority is satisfied that the consultation undertaken by Sinclair Pryor Motors in the run-up to the declaration of Mr Piper's redundancy was manifestly inadequate. It follows that as a matter of law Mr Piper has a personal grievance based not on an unjustified dismissal which would have been the case if he had been the victim of a redundancy that was not genuine, but based on a disadvantage to him created by the unjustified actions of Sinclair Pryor Motors in failing to consult appropriately with him in accordance with the law.

[67] The Authority has considered Mr Piper has not contributed in any way to the circumstances giving rise to his grievance and has reached the conclusion that nothing Mr Piper did had any impact on the personal grievance: s.124 of the Act applied.

[68] To remedy Mr Piper's personal grievance exclusively in respect to the unjustified disadvantage that he has suffered, the Authority directs that Sinclair Pryor Motors Limited to pay to Mr Piper the sum of $3,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

[69] That sum represents the Authority's assessment of the compensation to which Mr Piper is entitled as a consequence of the wrong done to him in failing to adequately consult with him in respect to the redundancy proposal. Mr Piper is not entitled to the larger sums that he has claimed because those sums are only accessible where redundancy is found to not be genuine and thus the personal grievance can be for unjustified dismissal rather than simply for disadvantage.

[70] Further, because the only grievance found proved by the Authority is a disadvantage grievance, and not an unjustified dismissal grievance, there can be no wages claim because wages are only able to be claimed where there has been an unjustified dismissal.

Costs

[71] Costs are reserved.

James Crichton
Member of the Employment Relations Authority