

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Stuart Pryce (Applicant)
AND TelstraClear Limited (Respondent)
REPRESENTATIVES Tom Skinner, Advocate for Applicant
Carolyn Heaton, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 12 December 2005
DATE OF DETERMINATION 14 February 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] TelstraClear Limited (“TelstraClear”) employed Stuart Pryce as a sales manager – residential. It dismissed him by reason of redundancy. Mr Pryce says his dismissal was unjustified because the redundancy was not genuine, the decision to make him redundant was not made in a fair way, and his selection for redundancy was not based on proper motives.

[2] Mr Pryce also says he was employed under a fixed term employment agreement which ended early. He seeks payment in respect of the balance of the term of the agreement.

Mr Pryce’s employment and its termination

[3] In or about September 2004 TelstraClear identified a need for a sales team to operate as door to door sales representatives in the Auckland area. The team would complement the activities of independent contractors who were already selling small business and residential packages. It would sell a product named ‘Homeplan’, offering residential local-area calling services. This was a new product as TelstraClear had only recently been able to negotiate wholesale access it needed to the customer home phone lines in the Auckland area. The Northern Area Sales Manager for Small Medium Enterprises, Grant Knox, was involved in recruiting Mr Pryce as manager of the door to door sales team and Mr Pryce reported to Mr Knox.

[4] Mr Pryce’s employment began on 11 October 2004. Key terms of the parties’ written employment agreement included:

“1. The position

1.1 The Company will employ you in the position of Sales Manager, Residential for a Fixed Term for the deployment of Residential Resale in the Auckland Region.

1.2 ...

2. Agreement Duration

2.1 This Agreement is for a fixed period from 11th October 2004 to the 11th October 2005.

2.2 The Agreement is for a fixed term to recognise the fact that the Company wishes to retain your services exclusively during the contract. ...

7. Termination of Employment

7.1 Either party may terminate this Agreement by giving the other one month's notice in writing, or a lesser period by mutual agreement.

7.2 The company reserves the right to pay you in lieu of notice or alternatively require that you do not perform your duties or attend the workplace during this period. ...

8. Termination for redundancy reasons

8.1 In the event that your employment is terminated for redundancy you will be entitled to one month's notice (or pay in lieu) in accordance with clause 6.2 above and [formula for redundancy compensation]

8.2 ..."

[5] One of Mr Pryce's first tasks was to recruit the door to door salespeople. He was obliged to do so through two recruitment agencies with which TelstraClear had contracts. The plan was to have the sales team fully staffed and functioning by February 2005.

[6] Within about a month of the start of Mr Pryce's employment he had recruited some 11 salespeople, which was the number required, but none were reaching target and some required full training. There were also some resignations. Further efforts to recruit replacements were proving unsuccessful because of the acknowledged tightness of the labour market.

[7] By December 2004 sales performance was considerably less than targeted. Then TelstraClear purported to impose a stand down of sales staff from 16 December until early in January, because of the view that residential sales would be low over the Christmas holiday period. Mr Pryce himself was required to take leave from 23 December to 10 January 2005. TelstraClear also withdrew a planned promotion in suburban malls because of the cost.

[8] When Mr Pryce returned in January 2005 he sought to address the recruitment problem again, but without success. By then the number of sales representatives was down to one. Inevitably, sales were almost non-existent.

[9] On 20 January 2005 Mr Pryce was invited to a meeting to give his feedback on a proposal that his position be disestablished. By a letter of that date, he was advised that the reasons for the proposal were: the direct sales model was planned as a trial; the current Auckland labour market was proving prohibitive to that model; the model was not producing projected revenue targets; and the cost of continuing with the model was prohibitive. In other words there were too few sellers selling too little product, and it would cost TelstraClear too much to continue.

[10] There was no intention to withdraw Homeplan from the market. It remained available and has since been sold by dealerships, or through a call centre and by telemarketing. When discussing the possible disestablishment of the position, Mr Knox told Mr Pryce the product would continue to be sold by contracted door to door salespeople, reporting to directly to Mr Knox.

[11] By letter dated 28 January 2005 the disestablishment of Mr Pryce's position was confirmed. The letter advised Mr Pryce there were no alternative roles to which he could be reassigned, redundancy was an option, and he could raise any other ideas he had regarding further options for addressing the disestablishment. The possibility of Mr Pryce accepting a dealership was raised, but this was not attractive to Mr Pryce and he considered redundancy was the only option.

[12] By letter dated 3 February 2005 Mr Pryce's redundancy was confirmed. He was given one month's pay in lieu of notice in accordance with clause 8 of the employment agreement. He did not qualify for redundancy compensation in terms of the clause.

The justification for the redundancy

1. Genuineness of the redundancy

[13] Mr Pryce believes the redundancy was not genuine. However aside from the shock of having the position disestablished so soon, most of his concerns about genuineness boil down to disagreement with the timing of the decision, a feeling that the door to door sales programme would have been successful if it had been given longer, a feeling that the recruitment problems could have been addressed, and a feeling that he was somehow being blamed or penalised for the failure of the programme (which was not the case). Concerns of that kind amount to disagreement with the management decision, but do not in themselves bear on its genuineness.

[14] I accept the redundancy was genuine in that the continuing operation of an in-house door to door sales team was not financially viable. While the immediacy with which recruitment and retention problems arose calls into question the adequacy of the human resource planning underpinning the introduction of that method of selling, the quality of the decision to introduce it (and the quality of the recruitment process) do not affect the genuineness of the redundancy.

[15] The second aspect of Mr Pryce's concern about the genuineness of the redundancy was his view that since Homeplan is still available, there must be a position available to manage its sale. I do not accept that logic. Homeplan is being sold by a method not involving the employment in-house of a dedicated door to door sales team, and accordingly there is no corresponding dedicated manager's position. The evidence Mr Pryce produced to the contrary did not prove what he thought it did – in particular a media release, dated April 2005 and referring to TelstraClear salespeople, actually concerned the activities of a dealership. Secondly, in December 2005 he had a relative contact TelstraClear to inquire about Homeplan. That is not a good way of obtaining evidence, and while the response may have confirmed Homeplan is still available it did not shed light on the sales model being used.

[16] Mr Pryce also says an unfair procedure was used in implementing the redundancy. I do not accept that was so. He was consulted about the decision to disestablish his position, and his response focussed on the recruitment difficulties he acknowledged were being experienced. When the decision to disestablish the position was confirmed, he was consulted again about the alternatives available to him. His response was that redundancy was the only option. He also confirmed he had received legal advice.

[17] Mr Pryce has since sought to argue that there were vacancies available, and for which he might have been suited. In support, however, he merely provided a series of lists of vacancies downloaded from TelstraClear's intranet. A majority of the vacancies were for technical positions, although there were some business development manager's positions. Mr Pryce did not seek to argue he was suited to any of these positions. Nor did he access them and indicate an interest in any of them at the time of his redundancy. Finally, he had declined the offer of a dealership. I do not accept TelstraClear failed to properly consider alternative positions for Mr Pryce.

[18] Again, the real concern about unfairness lay in the short time given to the attempt to establish the in-house door-to-door sales team. As I have indicated, arguments bearing on the quality of a management decision are not included in the tests of justification for a redundancy. TelstraClear has met the tests of fairness it was obliged to meet here.

[19] Finally there was no evidence of any improper motive in selecting Mr Pryce for redundancy.

[20] For these reasons I conclude the termination of Mr Pryce's employment on the ground of redundancy was justified.

Termination of fixed term agreement

[21] Mr Pryce seeks a payment for the balance of the term of his fixed term agreement.

[22] An impediment to that claim is that there was provision in the employment agreement for its early termination in the form of the redundancy clause. Mr Pryce was made redundant in reliance on that clause.

[23] Secondly there was no evidence, and nor was it argued, that the agreement was really a minimum term agreement of the kind discussed in **McAulay v Sonoco New Zealand Limited** [1998] 2 ERNZ 225.

[24] Accordingly I find no breach of the employment agreement arising out of the early termination of Mr Pryce's employment. He is not entitled to payment for the balance of the term of the agreement.

Costs

[25] Costs are reserved. The parties are invited to agree on the matter themselves, but if they are unable to do so they shall have 28 days from the date of this determination in which to file and serve memoranda on the matter.

R A Monaghan
Member, Employment Relations Authority