

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Peter Henricus van Kampen (Applicant)

AND New Zealand Business Telephone Company Limited (First Respondent)
AND Australian Business Telephone Company Limited (Second Respondent)

REPRESENTATIVES Anthony Vlatkovich, Counsel for Applicant
Anthony Drake, Counsel for the Respondents

MEMBER OF AUTHORITY Marija Urlich

SUBMISSIONS RECEIVED 10, 23 and 30 September 2003

INVESTIGATION MEETING 9 June 2004

DATE OF DETERMINATION 16 June 2004

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Peter Henricus van Kampen, has applied for leave to bring his personal grievance out of time. In so doing Mr van Kampen does not concede that his personal grievance was filed out of time. The respondents ("NZBTC") do not consent to Mr van Kampen's application.

[2] The central issue to be determined is when did Mr van Kampen's employment end with NZBTC. By consent this matter was to have been considered and determined on the papers and submissions were filed accordingly. During this consideration it became apparent to the Authority that it was necessary to convene an investigation meeting.

Background

[3] Mr van Kampen was employed by NZBTC in the position of Dealer Channel Manager in October 2002. His terms and conditions of employment were set out in a letter of appointment and attachment dated 10 October 2002. In regard to notice of termination the agreement provides:

"Either party in the event of termination of services would require One month's notice."

[4] I note that Mr van Kampen's employment agreement does not contain a plain language explanation of the services available for the resolution of an employment relationship problem as required by section 65(2)(vi) of the Act.

[5] On Monday, 24 February 2003 Mr van Kampen was advised by Stephen Blakey, NZBTC's New Zealand National Manager that his position was redundant and that he was giving him notice in accordance with the terms of the employment agreement. This was the last of several discussions between the parties regarding Mr van Kampen's position being made redundant. Mr van Kampen said he offered to work out his notice period and that Mr Blakey told him he "could go". Mr Blakey said he told Mr van Kampen he could have the remainder of the week off and this is confirmed in a letter under his name addressed to Mr van Kampen dated 26 February. Mr van Kampen asked for a letter with the reasons for his termination, which he says he never received. Mr van Kampen left his NZBTC laptop with Mr Blakey. He says he returned the laptop because it was inadequate for work purposes. Mr van Kampen retained and continued to use his NZBTC cell-phone, at no cost to himself, until May 2003 when he returned it to Mr Blakey at Mr Blakey's request. Mr Blakey says he personally meet the costs of Mr van Kampen's use of his NZBTC cell-phone during this period. Mr van Kampen said he did not know that and assumed NZBTC continued to meet the cost of the cell-phone as it had done throughout his employment. There was no evidence of an agreement between Mr van Kampen and Mr Blakey that Mr Blakey would meet the cost of the use of the cell-phone.

[6] Mr van Kampen did not return to the offices of NZBTC after 24 February other than to meet someone called "Geoff" in March. Mr Blakey said the access codes to the NZBTC offices were changed but could not recall when.

[7] In opposing Mr van Kampen's application NZBTC seeks to rely on a letter dated 26 February 2003. It says this was notice to Mr van Kampen of his dismissal by way of redundancy. Mr van Kampen says he never received this letter. He says the first time he saw the letter was in June 2003 as a result of filing these proceedings in the Authority. He says all his correspondence with the respondent was electronic and that he has checked his email server and found no record of this email being transmitted. The Authority requested confirmation that this letter had been emailed to Mr van Kampen and received a document confirming when the letter was created, which was 26 February 2003. At the investigation meeting Mr Blakey confirmed this document was evidence of the date the document was created. Mr Blakey said the letter would have been emailed or posted to Mr van Kampen but was unable to provide any evidence to support this contention. In the absence of any compelling evidence that the letter was sent the Authority finds the letter of 26 February was not sent to or received by Mr van Kampen.

[8] On 26 February Mr van Kampen emailed the respondent, including:

"I will be in Hamilton myself tomorrow and then going across to Tauranga with the kids. So I will catchup with you next week."

[9] NZBTC says Mr van Kampen's last working day was 28 February and that he was sent away on this date. There was no evidence that 28 February was Mr van Kampen's last working day or that he was sent away on that day. Mr van Kampen said he was in Tauranga on 28 February and relies on his email of 26 February.

[10] Mr van Kampen received his final pay on 14 March 2003. Mr Blakey said this was likely to be because the pay cycle was monthly and that employees were paid on the 14th of each month, two weeks in arrears and two weeks in advance. NZBTC's final pay calculations for Mr van Kampen show his notice period was calculated from 1 March 2003. There was no evidence the date of final payment was discussed or agreed between the parties.

[11] Mr van Kampen received the final lease payment for his car from NZBTC in May 2003. This

payment was made following some discussion between the parties on this issue.

[12] Mr van Kampen says he continued to perform work for NZBTC during his notice period. He provided an email exchange between himself and Mr Blakey dated 12, 13 and 19 March 2003 regarding a meeting in March with a Rotorua trucking company. Mr Blakey said this meeting had nothing to do with NZBTC and that it was in relation to a business he intended to set up in his personal capacity. Mr van Kampen said the work was for NZBTC because NZBTC held the New Zealand distribution rights for the product which was the proposed subject of the meeting. While Mr van Kampen and Mr Blakey's evidence points to tentative steps in March to maintain their relationship with a view to future business opportunities it is difficult to distinguish the steps to set up the Rotorua meeting from work for NZBTC. Mr Blakey did not dispute NZBTC held the New Zealand distribution rights for the product in question and the emails show he was aware of and intended to be involved with the meeting. Mr Blakey provided no adequate explanation as to how this meeting could have nothing to do with NZBTC when the emails indicate he was to be involved in the meeting, he was the National Manager and NZBTC held the New Zealand distribution rights for the product.

[13] Mr van Kampen raised his personal grievance with NZBTC by way of letter dated 11 June 2003. NZBTC received this letter on 16 June and acknowledged receipt by facsimile dated 17 June.

Determination

[14] Section 114(1) of the Employment Relations Act 2000 requires an employee to raise his or her grievance within 90 days of the date on which the action complained of occurred or came to the employee's attention. Mr van Kampen says he was unjustifiably dismissed, that his dismissal was effective on his final day of employment and that that day was the last day he was paid until, 27 March 2003. Mr van Kampen says the 90 day time period began to run on 27 March, the final day of his notice period. He says this was the date his employment ceased and relies on the Court of Appeal's judgment in *GFW Agri-Products Ltd v Gibson* [1995] 2 ERNZ 322.

[15] NZBTC says 28 February is the date from which the 90 day statutory time limit should run. It says all payments were made to Mr van Kampen by this date and he performed no more work after this date. It says *Gibson* can be distinguished from Mr van Kampen's circumstances because Mr van Kampen left the respondent's employ on 28 February, it says he was "sent away" on this date.

[16] Mr van Kampen was told his position was redundant on 24 February but there is no clear evidence he was told this was his final day of employment. Mr Blakey told Mr van Kampen he could go in response to his offer to work out his notice period but Mr Blakey also says he told Mr van Kampen he could have the rest of the week off. There is no evidence that Mr van Kampen received the letter dated 26 February confirming his dismissal for redundancy and payment in lieu of notice. Mr van Kampen emailed the respondents' representative Stephen Blakey on 26 February advising he would "...catchup with [him] next week". There is no evidence to support NZBTC's contention that Mr van Kampen was sent away on 28 February. Mr van Kampen was not at work that day and there is no record of any notice from NZBTC that 28 February was his final day of employment. While it is clear Mr van Kampen was not actively involved in NZBTC after 24 February it is also clear he had not severed all ties. He continued to freely use company property (the cell-phone), NZBTC paid the lease on his car until May, he did not receive his final pay until mid-March and he worked with Mr Blakey, albeit in a limited way, to set up a meeting with a potential client for a product for which NZBTC held the New Zealand distribution rights. In these circumstances it is understandable and reasonable that Mr van Kampen relied on the final day of his notice period, 27 March, to compute the 90 day period because this was the effective date of dismissal.

[17] For these reasons I find Mr van Kampen's employment ceased at the end of his notice period, 27 March 2003. The final day for raising his personal grievance was therefore 25 June. NZBTC acknowledged receipt of his letter raising his personal grievance on 17 June, well within expiry of the 90 day period. Accordingly, Mr van Kampen's application for leave is granted.

Mediation

[18] Having determined this issue in favour of Mr van Kampen the parties are directed to attend mediation within 28 days of the date of this determination pursuant to section 114(5) of the Act.

Costs

[19] The issue of costs is reserved. The parties may be able to resolve this issue themselves, and they are invited to do so. However, if they cannot they may seek a determination on this issue from the Authority.

Marija Urlich
Member of Employment Relations Authority