

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 the applicant
Naomi Cervin, counsel for the respondents

MEMBER OF AUTHORITY Marija Urlich

INVESTIGATION MEETING 1 June 2005

SUBMISSIONS RECEIVED 12 July 2005
DATE OF DETERMINATION 12 July 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In late February 2002 Australian Business Telephone Company Limited (“ABTC”) set up a business in New Zealand, New Zealand Business Telephone Company Limited (“NZBTC”). Like ABTC, NZBTC was set up to sell telecommunications hardware. At start up Stephen Blakey, the national manager, was the only employee. Mr van Kampen commenced employment with the business in October 2002 as dealer channel manager/direct sales manager. He was the third employee engaged; the second was a PA/office administrator. Mr van Kampen was made redundant in February 2003. He says his redundancy came out of the blue and he was treated poorly. The respondents say the redundancy was motivated for a genuine commercial reason and that Mr van Kampen was consulted about the possible redundancy and treated fairly throughout. NZBTC ceased to trading in New Zealand in July 2004.

[2] The issues for the Authority to determine are:

- (i) the identity of the employer;
- (ii) whether the redundancy was motivated by a genuine commercial reason;
- (iii) whether the dismissal for redundancy was carried out fairly and reasonably.

Issues

(i) who was Mr van Kampen’s employer?

[3] Mr van Kampen says he was employed by ABTC and understood this to be the case from the

outset of his employment because the express terms of the employment agreement say the employer is ABTC and his wages were paid by ABTC out of its Sydney office.

[4] Mr Blakey says Mr van Kampen's employer was NZBTC. He says he used ABTC's employment agreement and policy documents to draft Mr van Kampen's documents and inadvertently omitted to remove the references to ABTC.

[5] The parties entered a written employment agreement on 10 October 2002. Attached was a document entitled "Code of Conduct". The references to "ABTC/Vircom" in the body of the document appear to relate to the Code of Conduct. The employment agreement is in the form of a letter addressed to Mr van Kampen from Mr Blakey and is written on NZBTC letter head. The first page includes:

"Dear Peter

After our various discussions it is my pleasure to offer you a role at ABTC.

...

... thus this letter is not to be seen as a full representation of all duties but is to be seen as an individual employment agreement between yourself and ABTC. It should be also noted that ABTC will be known and trade as NZBTC. (sic) (New Zealand Business Telephones) for all purposes in New Zealand."

[6] The parties put their employment agreement in writing, as required by law. The employment agreement is clear and unambiguous in its terms. I find ABTC is Mr van Kampen's employer.

(ii) redundancy

[7] The employment agreement describes the focus of Mr van Kampen's role:

"To establish and continually grow a solid and effective distribution business within New Zealand. It is anticipated that large portion of total sales will be derived from the indirect or dealer channel. Therefore a portion of the role will be to identify and train the appropriate resellers in both NZBTC products and procedures. Naturally this will then entail the normal and continual relationship management required to ensure that these resellers are kept well versed in our products and indeed even to help them on-sell these products.

It is intended that the direct sales portion of the business model will mainly be sourced through large corporate, call centres and the like, further to this you will be expected to ensure that the company is placed in the best possible light for all tenders and other provisioning or preferred supplier style agreements."

[8] Mr Blakey was required to regularly report on the progress of the business to Tony Ross, ABTC's managing director. His reporting included the development of the dealer channel. In December 2002, January and early February 2003 Mr Blakey and Mr van Kampen spoke regularly about the progress of the dealer channel and Mr van Kampen provided sales figures to Mr Blakey and information regarding potential sales which was on sent to Mr Ross. Mr van Kampen said the dealer channel was not developing at the rate he thought it would. Mr Blakey gave evidence that he was under pressure to show sales and Mr van Kampen confirmed the pressure was on from Australia.

[9] Mr Blakey said he had several discussions with Mr van Kampen about the future of his role and the possibility it could be made redundant in January and early February 2003. Mr van Kampen said no such discussion occurred.

[10] In the week beginning 11 February 2003 Mr Ross and Elizabeth McKellar, ABTC's administration manager, visited New Zealand to conduct a review. Sales were low and from ABTC's perspective the business was marginal. Mr Ross and Mr Blakey gave evidence that all three staff meet with Mr Ross and Ms McKellar on 13 February 2003 to discuss NZBTC's business. The slow progress with the development of the dealer channel was discussed and Mr Ross asked Mr

van Kampen if he thought a dealer channel manager was necessary in New Zealand. Mr van Kampen replied that unless NZBTC was prepared to make a long term commitment to establishing a dealer channel in New Zealand there would be no need for a channel manager. There was no agenda for the meeting or any minutes taken.

[11] Mr van Kampen has no recollection of any exchange regarding the viability of the channel manager role at the meeting on 13 February 2003. He said the meeting time was taken up with an exchange between Mr Ross and Mr Blakey regarding freight costs. He said there was no time to discuss other aspects of the business before they had to leave to attend a client meeting. Mr van Kampen said he did not discuss his performance or any aspect of his future employment with Mr Ross at any point during his visit. At the investigation meeting Mr van Kampen said he told Mr Ross the development of the dealer channel required an 18 month to two year commitment from ABTC. Mr van Kampen said the only leadership Mr Ross demonstrated was to encourage direct selling headsets and suggested they cold call in Queen St. Mr Blakey and Mr van Kampen said they were not interested in that kind of direct selling.

[12] At the conclusion of his visit Mr Blakey was left with no doubt decisions had to be made about the future direction of NZBTC. Mr Ross told Mr Blakey his view was that NZBTC should focus on direct selling and he should give away the idea of developing a distribution channel.

[13] Mr Blakey said he had discussions with Mr van Kampen about the future direction of NZBTC on Friday, 14 February 2003 and the following Monday. Mr Blakey said on the Monday he told Mr van Kampen that if he decided to focus NZBTC's business along the Australian model, ie, direct selling headsets, then his position as dealer channel manager would be redundant. He said Mr van Kampen said he understood this was the reality of the situation. Mr van Kampen denied any such discussion took place.

[14] On Friday, 21 February Mr Blakey told Mr van Kampen he was to have a teleconference with Mr Ross over the weekend about the future of NZBTC and that following that discussion he would make a decision as to whether to continue to develop the dealer channel and if not that Mr van Kampen's position would be made redundant. This teleconference took place on Saturday, 22 February. Mr Blakey said the discussion was around the change in strategy for NZBTC to direct sales and corporate sales. Following this discussion Mr Blakey said he made the decision to make Mr van Kampen's position redundant. The reasons were NZBTC were running at a loss, pressure was on him from Australia to make sales and cut down costs and Mr Ross had given a clear indication as to how he thought that could happen.

[15] Mr van Kampen's recollection of the 21 February discussion with Mr Blakey was that he was advised his sales target had been revised from \$100,000 to \$120,000. Mr van Kampen told Mr Blakey this was an unrealistic target and Mr Blakey replied that he was to discuss the future of NZBTC with Mr Ross over the weekend and the outcomes were that either Mr Blakey would resign or he would be back on Monday to advise Mr van Kampen he was dismissed. Mr van Kampen said the reason for the dismissal would be his failure to commit to the sales target of \$120,000.

[16] On Sunday, 23 February Mr van Kampen requested a reconciliation of his car allowance payments and details of his final pay.

[17] On Monday, 24 February Mr Blakey advised Mr van Kampen his position was redundant and that he was dismissed. Mr Blakey said this advice came as no surprise to Mr van Kampen. Mr van Kampen said the advice came out of the blue and was a shock.

(iii) genuine commercial reason

[18] Mr van Kampen says his dismissal was not motivated for genuine commercial reason. He says he was dismissed because he would not accept a revised sales target of \$120,000 per annum and his position was later filled.

[19] I do not accept Mr Blakey told Mr van Kampen he would be dismissed due to a failure to accept a revised sales target. There is no reason ABTC would require Mr van Kampen to agree to a revised sales target when, as the employer, it was its prerogative to revise and set sales targets.

[20] In support of his claim that his position had been filled by another employee, Mr van Kampen says a colleague of his telephoned NZBTC and was told by a new employee, Jeff Doyle, that he had taken over Mr van Kampen's position in early May. Mr Blakey says Mr Doyle's position is titled corporate sales manager and is 100% focussed on corporate and mass merchandising sales. He says Mr Doyle was employed four months after Mr van Kampen's redundancy as a result of a new product being introduced to New Zealand.

[21] Mr Blakey's evidence that the position filled by Mr Doyle was established four months after Mr van Kampen's dismissal as a result of a new product being introduced was not challenged. Mr van Kampen accepted the role of corporate sales manager was not identical to that of direct sales manager. Even if the roles were similar the four month gap severs the link to Mr van Kampen's role. The evidence received is insufficient to support a finding Mr Doyle was employed in a position identical or significantly similar to that held by Mr van Kampen.

[22] The parties do not dispute the dealer channel was not developing as quickly had been expected. Mr van Kampen's evidence was he told Mr Ross on 13 February the dealer channel would require a commitment from ABTC of another 18 months to two years to get the dealer channel up and running. ABTC was not prepared to make that commitment. The development of the dealer channel was the main focus of Mr van Kampen's role and he told the Authority he increased this focus following Mr Ross' visit to New Zealand. The development in the dealer channel did not occur and it was ABTC's prerogative to refocus its business away from this area. I am satisfied on the evidence received that a genuine commercial reason existed to disestablish Mr van Kampen's position.

(iv) consultation

[23] In a redundancy setting an employer is obliged to consult with an effected employee prior to any decision being made to make the employee's position redundant and prior to any decision being made to terminate that employee as a consequence of their position being made redundant (section 4(4) Employment Relations Act 2004).

[24] There is no dispute the development of the dealer channel was the primary focus of Mr Blakey's role. This is clearly outlined in the employment agreement and there was no evidence the parties had agreed to change that emphasis.

[25] Mr Blakey and Mr Ross maintained regular and close reporting on the progress on the development of the dealer channel throughout the period of Mr van Kampen's employment. The NZBTC office was very small and Mr Blakey and Mr van Kampen's desks were close together. Mr Blakey and Mr van Kampen worked in a collaborative manner and their work overlapped. They had known each other for many years and both have had extensive experience in telecommunication sales. Mr Blakey said all issues were discussed openly and frequently. Mr van Kampen was aware of the difficulties in the development of the dealer channel and also aware of the pressure on Mr

Blakey from Australia to show results.

[26] Following Mr Ross' visit to Auckland I am satisfied on the evidence received Mr van Kampen was aware his position with ABTC was perilous. Mr van Kampen told Mr Ross the development of the dealer channel required an 18 month to 2 year commitment from ABTC and no such commitment was forthcoming. However, I find it is more likely than not that the first time Mr van Kampen was told expressly his position could be made redundant was 21 February. The issue was crystallised for Mr Blakey following Mr Ross' review of the New Zealand operation, his expressed view as to how the business should be focussed and his direction to Mr Blakey to come back to him with decisions as to the direction of the business.

[27] Mr Vlatkovich submits Mr van Kampen's dismissal was procedurally flawed. He submits Mr van Kampen was not given an opportunity to seek advice prior to the meeting or to bring a representative with him to the meeting, that there was no discussion regarding redeployment or any consultation regarding the possible reconfiguration of the role to better fit with ABTC's aims for the business in New Zealand, Mr van Kampen was not provided with any information to support the redundancy proposal or given a fair opportunity to comment on that proposal and he did not receive notice of his redundancy in writing.

[28] Ms Cervin submits Mr van Kampen is an experienced and articulate person well able to assert his rights in a redundancy setting. She submits that the respondent's process should not be subject to pedantic scrutiny given the size and resources of the business, that Mr van Kampen was well aware of the possibility of redundancy, that discussions had been ongoing since January as to the possibility of redundancy and the specifics of the redundancy proposal and redeployment options were well canvassed with Mr van Kampen and dismissed before 24 February.

[29] I accept discussions as to the lack of development of the dealer channel were held with Mr van Kampen before 21 February but I do not accept that the possibility of redundancy was put to Mr van Kampen prior to 21 February. My reasons for this finding are set out above at paragraph 26 above.

[30] Mr van Kampen's dismissal was implemented without due regard for procedural fairness; Mr van Kampen was not given an opportunity to seek advice or representation and was not given a fair opportunity to comment on the redundancy proposal before the decision was made. While I accept the writing may have been on the wall for some time with regard to Mr van Kampen's future role with ABTC and he had made it clear that he was not interested in the type of direct selling Mr Ross had in mind, he had a reasonable expectation his employer would treat him fairly and reasonably in a redundancy process and engage in a transparent process around his redundancy. This did not occur and for these reasons I find Mr van Kampen's dismissal for redundancy was unjustified.

Remedies

[31] Mr van Kampen seeks remedies of lost wages and compensation for hurt and humiliation caused as a consequence of his dismissal. I have found his redundancy was motivated for genuine commercial reasons. In such circumstances there is no basis upon which to award lost wages because the challenge to the reason for dismissal has not been successful. Mr van Kampen's dismissal was unjustified on the grounds of serious flaws in the process used by ABTC.

[32] Mr van Kampen gave evidence of the emotional and financial difficulty caused to him and his family as a consequence of the dismissal. He says ABTC's failure to consult denied him and his family the opportunity to prepare for the consequence of his being without work.

[33] ABTC is ordered to pay Mr van Kampen the sum of \$3000.00 pursuant to section 123(c)(i) of the Act.

Costs

[34] The issue of costs is reserved. I invite the parties to attempt to resolve this issue themselves. If they are unable to do so they may apply to the Authority to determine costs.

Marija Urlich
Member of Employment Relations Authority