

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Craig Linton (Applicant)

AND Auckland Labour Services Limited (First Respondent)
AND First City Group Limited (Second Respondent)
AND Future Planning International Limited (Third Respondent)

REPRESENTATIVES Suzie Tait, Counsel for Applicant
No appearance for Respondents

MEMBER OF AUTHORITY James Crichton

INVESTIGATION MEETING 9 May 2006

DATE OF DETERMINATION 10 May 2006

ORAL DETERMINATION OF THE AUTHORITY

Nature of determination

- [1] At the end of the investigation meeting, I elected to give an oral decision and I did so.
- [2] This written determination records the basis of that oral decision and of course provides the more detailed reasoning that a written determination affords.

No appearance by respondents

- [3] The applicant's statement of problem identifies three respondents, namely Auckland Labour Services Limited, First City Group Limited and Future Planning International Limited (the respondents). None of the respondent parties were represented at the investigation meeting, nor was any explanation offered as to their absence.
- [4] I deliberately deferred the start of the investigation meeting by some 10 minutes to account for any reasonable lateness by the respondent parties and then elected to proceed, taking notice amongst other things of the fact that the respondents had been duly served with notices of all appropriate documentation, including in particular a notice of the investigation meeting.
- [5] Further, the Authority's senior support officer had been able to speak at one time to an officer of one of the companies by telephone and as a consequence of that discussion, was referred to somebody else within the company.
- [6] There was no objection to the investigation meeting proceeding, nor was there any request for an adjournment from the respondents.

[7] In all the circumstances then, I was persuaded that the Authority had taken all proper steps to ensure that the respondents knew of the investigation meeting date and place and it seemed to me that the evidence suggested that a conscious decision had been made not to be involved.

Employment relationship problem

[8] The applicant (Mr Linton) alleges that he was either unjustifiably dismissed or constructively dismissed and that in either event there are wages due and owing to him.

[9] The respondents chose not to file a statement in reply despite ample opportunity to do so.

[10] Mr Linton commenced employment as a property sales consultant with the respondents in early August 2005. There is an employment agreement which provides that his employer is Auckland Labour Services Limited. However, as a matter of fact, Mr Linton reports to the management of First City Group Limited and is paid by Future Planning International Limited. The evidence discloses that all three companies have the same registered office.

[11] What Mr Linton did was participate in a sales process which generated revenue for one or other of the respondents. It is useful to describe that sales process.

[12] The respondents would organise a seminar to which upwards of 50 people would be invited. Typically, of the 50 people invited, 20 to 25 would attend. The seminar, which took about an hour and was conducted always at night, effectively promoted the ownership of real property as an investment strategy.

[13] Mr Linton did not conduct these seminars. That was a job given to Mr Linton's manager, Mr Corfield, who gave evidence at my investigation meeting.

[14] At the end of the seminar presentation, Mr Linton and his fellow sales consultants would make appointments with the members of the audience for an *in home* consultation which was supposed to happen within a week of the seminar.

[15] At this *in home* consultation, Mr Linton would establish the prospective purchaser's financial circumstances and then show that prospective purchaser how investment in real property could assist whatever investment strategy the prospect then had in place.

[16] Assuming that the prospective purchaser wished to take the matter further, another meeting was arranged in the respondent's offices at which Mr Corfield again took centre stage and endeavoured to secure a sale, the ultimate result of which would benefit one of the respondents.

[17] Mr Corfield told me that sales consultants such as Mr Linton were evaluated on their *conversion rate* from the original seminar to the final purchase decision. He pointed out that in effect, the sales consultants were being assessed on in fact two conversions, one from the original seminar to the *in home* presentation and one from the *in home* presentation to the final sale in the office.

[18] Mr Corfield said that all of the sales consultants had some slippage but that Mr Linton was the best of them.

[19] Mr Linton said that when he was appointed to the position, he indicated to his new employers that he would not be able to prejudice his commitment to his sporting interest in cricket and accordingly would not be available on Saturdays during the cricket season. That was accepted by the employer, Mr Linton says.

[20] Mr Linton described for me an ordinary day working for the respondents and he emphasised that by reason of the fact that the sales consultants were effectively engaged in seeing prospective clients in their own homes, most of their work was done at night and so there was much more limited opportunity to work during the day.

[21] He said, however, that his practice was to go into the office at 10 o'clock on most mornings to work on paperwork and/or to have sales meetings. He said that he got some appointments during the day but that typically the bulk of his work was at night and, during the cricket season, on Sundays at the weekend.

[22] Mr Linton told me that typically the seminars to attract the prospective buyers were held on Monday and Tuesday nights which left the rest of the evenings free for meeting with clients at home. Most of the other sales consultants apparently did not work Fridays, but because Mr Linton was not available on Saturdays, he tended to work on Fridays instead.

[23] The respondents' senior managers were all based in Auckland and as part of the investigation meeting, I was shown an email exchange directed at Mr Corfield which suggested, in reasonably trenchant and unparliamentary terms, that senior management was unhappy with the sales performance presided over by Mr Corfield.

[24] The remuneration of all the sales consultants was by way partially of retainer and partially of commission. Because the commission was capable of being increased by one's own efforts, the sales consultant had an enthusiasm for endeavouring to maximise their income by making sales.

[25] Notwithstanding that, as I mentioned above, those efforts do not seem to have impressed senior management in Auckland greatly.

[26] On Saturday, 10 December 2005, Mr Linton received a message to the effect that there was to be a special sales meeting the following day, Sunday, 11 December 2005.

[27] There were various alarms and excursions about exactly when that meeting would take place and it became clear at the investigation meeting that some of the changes to the suggested time of the meeting were a function of Mr Corfield's efforts to find a time of the day when Mr Linton could in fact attend.

[28] Mr Linton was playing cricket on the Sunday because on the previous day there had been a One Day International cricket match in Christchurch which the various local cricket players had of course wanted to attend as spectators so the normal competition games were postponed to the Sunday.

[29] Mr Linton explained this to Mr Corfield and in the result Mr Linton was not present when the meeting actually took place at 5pm on Sunday, 11 December 2005.

[30] That meeting was presided over by a Mr Tuk Wakelin. [We need to check this man's surname. He is referred to in the documents as both Wakelin and Wakefield.] Mr Wakelin told the gathered staff (which as I mentioned excluded Mr Linton) that he (Mr Wakelin) had been instructed by Auckland management to either close the Christchurch office immediately, terminating all staff, or sack two employees immediately and carry on with a reduced sales force.

[31] Mr Wakelin then told the meeting that as Mr Linton had not attended the meeting, he was sacked with immediate effect and he reiterated that point again towards the end of the meeting, despite the protests of Mr Corfield who said that the approach being taken by the respondents was illegal. Mr Corfield asked Mr Wakelin who was to sack Mr Linton. Mr Wakelin said that was Mr Corfield's job.

[32] There was a meeting between Mr Corfield, Mr Wakelin and Mr Linton on Tuesday, 13 December 2005 which Mr Wakelin took charge of. Mr Corfield's evidence, which I accept, was that Mr Wakelin said to Mr Linton that they wanted Mr Linton to go and that *he could either fall on his sword or make it hard*.

[33] Mr Wakelin also said in this meeting that if Mr Linton left voluntarily, he would get his commissions but if he took legal advice he would be the last to be paid.

[34] On 15 December 2005, Mr Linton wrote to the respondents a letter of resignation specifically referring to the choices that Mr Wakelin had given him in the 13 December meeting.

[35] Mr Linton has been paid some of the retainer salary that he is owed but not all of it and he has been paid no commissions at all despite evidence (which I accept) that he is entitled to receipt of commissions from completed sales.

Issues

[36] I need to decide the following matters:

- (a) Is Mr Linton an employee or a real estate agent?
- (b) Was Mr Linton unjustifiably dismissed?
- (c) What remedies (if any) should obtain.

Is Mr Linton an employee?

[37] I am satisfied that Mr Linton is not a real estate agent within the meaning of the definition in s.3 of the Real Estate Agents Act 1976. I indicated at the investigation meeting that this was an issue which I needed to consider, but having heard the evidence, I am absolutely satisfied that Mr Linton's activities did not constitute the activities of a real estate agent within the meaning of the Real Estate Agents Act 1976.

[38] For instance, Mr Linton was not selling a property in any sense. What he was doing was selling an investment concept and at the level at which he was operating, there was no identification of a particular property or properties.

[39] Mr Linton was looking at the particular circumstances of the prospective buyer and then encouraging them to take the next step of meeting with Mr Corfield who, in my opinion, may well have been close to the role defined in s.3 of the Real Estate Agents Act in that he was showing prospective clients the options that might be available to them in respect of the possible purchase of one or perhaps two subject properties.

[40] As I think that all Mr Linton was doing was selling the sizzle and not the steak, I have decided that Mr Linton is in fact an employee and accordingly it is available to him to bring these proceedings.

Who was Mr Linton's employer?

[41] This question is one of no little difficulty. As I mentioned earlier, Mr Linton says that he works for the First City Group Limited in the sense that he reports to the management of that entity, but his employment agreement is expressed to be with Auckland Labour Services Limited and he is paid by Future Planning International Limited.

[42] In all the circumstances, on the evidence available to me, I am completely unable to make any sense of who Mr Linton was actually employed by, and as these companies are all inter-connected and all have the same registered office, I have decided that it is sufficient for the purposes of Mr Linton's claim to continue to refer to these three companies together as the respondents.

[43] One of these companies is Mr Linton's employer, and any orders that I may make will be against all three companies.

Was Mr Linton unjustifiably dismissed?

[44] I am very clear that Mr Linton was either unjustifiably dismissed as a consequence of the meeting on Sunday, 11 December 2005 or, in the alternative, was constructively dismissed as a consequence of the disciplinary meeting on Tuesday, 13 December 2005.

[45] At the meeting on Sunday, 11 December 2005, Mr Wakelin advised all present (excluding Mr Linton who was not present), that Mr Linton was sacked with immediate effect.

[46] Later in the same meeting, Mr Wakelin said words to the effect: *Craig [Mr Linton] was sacked and that was the end of Craig. Tuk [Mr Wakelin] felt it was a shame but he had no choice as Craig had not attended the sales meeting.*

[47] I am satisfied on the evidence that these observations were made by Mr Wakelin. Mr Corfield gave evidence before me and I found him to be a truthful and straightforward witness. He says that he and one other staff member took the minutes of the special sales meeting on 11 December from which these observations are taken. He stands by the accuracy of the minutes.

[48] Because Mr Linton was not present at the special sales meeting on 11 December, it certainly could not be said that he was dismissed on that day. However, I think it possible to argue that the dismissal was effected when the results of that meeting were communicated to Mr Linton on Monday, 12 December 2005. Mr Corfield, who struck me as an honourable and decent man, tried to mitigate the effect of the meeting by simply telling Mr Linton that he had been told to dismiss him but had refused and that he was simply going to give Mr Linton a warning.

[49] However, other staff made it clear that Mr Wakelin had said that Mr Linton was in fact dismissed and so I think it is available to conclude that Mr Linton could properly have regarded himself as having lost his job on Monday, 12 December 2005 as a consequence of remarks made by a senior manager at a meeting the day before.

[50] In the alternative, it is plain that the effect of Mr Wakelin's behaviour at the meeting on Tuesday, 13 December is such that there can be little doubt that a constructive dismissal has been effected. At that disciplinary meeting, Mr Wakelin talked of Mr Linton either falling on his sword or *making it hard*.

[51] Later in the same meeting, Mr Wakelin went on to say that if Mr Linton did the right thing and resigned, then he would get his commissions but that if he took legal advice he would be the last to be paid.

[52] Mr Linton clearly acted on what he was told at that meeting because two days later he wrote to the employer on 15 December 2005, referred to Mr Wakelin's two options and tendered his resignation.

[53] In my judgement, it would be difficult to find a clearer example of the first kind of constructive dismissal, the group of cases where the employer effectively gives the employee the

opportunity of either tendering a resignation or being dismissed (or in this case, being so penalised by continuing as to make dismissal seem a preferable strategy).

Remedies

[54] I order that the respondents are to pay Mr Linton the sum of \$6,500 as compensation under s.123(c)(i) of the Employment Relations Act 2000. The evidence of the hurt, humiliation and injury to feelings presented at the investigation meeting was graphic. Mr Linton has been sorely troubled by the behaviour of his former employer. He took some significant time to get alternative employment and has now left the industry in which he previously worked. He had to borrow money in order to survive over the holiday and Christmas period and that dramatically affected his self-esteem.

[55] I am satisfied that Mr Linton has lost wages as a consequence of the unjustified dismissal and I direct that the respondents are to pay to him the sum of \$17,700 in commissions due on settled sales together with a further amount of \$4,257.87 being unpaid wages still due and owing from the employment relationship.

[56] I also direct that the respondents are to account to Mr Linton for the possible settlement of the Atwood sale and on the basis that that sale has indeed settled, I direct that the respondents are to pay Mr Linton a further \$1,500 by way of overdue commission.

[57] I direct that interest is to run at the rate of 6% per annum on the unpaid sums from 20 December 2005, being the last date it seems reasonable to expect that the respondents would have accounted to Mr Linton for the moneys owing to him.

Costs

[58] It is not normally the practice of the Authority to award costs to fully reimburse a party, but I am disposed to take that step in this case. Mr Linton has incurred costs of \$2000.

[59] The respondents have treated Mr Linton in an off-hand and improper fashion, have put him to trouble and expense and failed to engage with him in any meaningful way in the resolution of his employment relationship problem.

[60] In all the circumstances then, I direct that the respondents are to pay Mr Linton \$2,000 in respect of his costs.

James Crichton
Member of Employment Relations Authority