

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 415/09
5119243

BETWEEN

JOHN MCMAHON
Applicant

AND

IMARDA NEW ZEALAND
LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: E Butcher, counsel for applicant
D Watson, counsel for respondent

Investigation Meeting: 22, 23 and 24 June 2009

Determination: 23 November 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] John McMahan says his former employer, Imarda New Zealand Limited (“Imarda”):

- a. breached express terms of the parties’ employment agreement regarding the provision of 10% of the ‘equity value’ of Imarda’s North American business;
- b. breached its obligation to act in good faith during Mr McMahan’s employment;
- c. affected Mr McMahan’s employment to his disadvantage by unjustifiable action in demoting him and warning of the possibility of dismissal; and
- d. constructively dismissed him.

[2] Penalties for unspecified breaches of the employment agreement were also sought.

[3] Imarda says Mr McMahon was not dismissed but rather he resigned. It denies breaching the employment agreement or engaging in any unjustified and disadvantageous action.

Whether there was agreement to provide an equity share

1. Relevant corporate identities

[4] Imarda operates in the global telematics market. It was formed in 2007 when it purchased the assets of Prolificx Limited (“Prolificx”) and another company.

[5] At the commencement of the relevant period, being early 2004, Prolificx, Endace Limited (“Endace”) and a third company were managed by an executive team who were themselves employed by a related company named Sellutions Limited (“Sellutions”). Endace and Prolificx respectively had invented electronic network security and telematics products. In 2004 Prolificx was still in its start up phase but a global business model was being developed and expansion funding was being sought.

2. Mr McMahon is introduced to Prolificx in May 2004

[6] Also in early 2004 Mr McMahon’s daughter was employed as the personal assistant to Selwyn Pellett, who is the founder of the group and holds directorships and shareholdings in various companies comprising it. He is the CEO of and a director and shareholder in Imarda. At relevant times he was also a member of the executive team employed by Sellutions, as well as being the company’s director and having an interest in the shareholding.

[7] Mr McMahon, who is a US resident, was in employment in the US but sought a new role. Conversations with his daughter led him to arrange for his daughter to forward his CV to Mr Pellett in April 2004, as Mr McMahon was interested in working for Prolificx in the USA. The CV was referred in the first instance to Kevin Johnson, the business development and sales manager.

[8] In May 2004 Mr McMahon visited New Zealand. On 17 May 2004 he attended at Prolificx' offices and met first as arranged with Mr Johnson, who was positive about involving him in the organisation.

[9] Mr McMahon was then introduced to Mr Pellett. He sat in on a meeting during which Mr Pellett gave a power point presentation of the proposed global business model for Prolificx. The presentation showed in particular the proposed inter-relationship between Prolificx, Endace, Sellutions and other companies, involving operating and investment structures intended to have global application. The next day Mr McMahon accompanied Mr Pellett on a visit to the Endace offices in Hamilton. On 19 and 20 May he attended at the Prolificx offices again, but there was no further meeting with Mr Pellett.

[10] During this time Messrs Pellett and McMahon discussed the organisation, what Mr McMahon could bring to it and the remuneration and other benefits Mr McMahon would seek in return. Mr Pellett accepted in evidence that he probably passed comment on Mr McMahon's salary expectations. He also accepted that it would be consistent for him to include discussion about share options in a discussion about remuneration, and to discuss figures in the context of what might be an appropriate balance between remuneration level and shareholding as Mr McMahon said he did. Finally Mr Pellett accepted in evidence that he was willing to explore taking Mr McMahon on in the future.

[11] However while Mr Pellett saw the May meetings as amounting to Mr McMahon 'pitching for a position', Mr McMahon saw them as extremely positive and resulting in an offer of employment to him. Mr McMahon said he told Mr Pellett before his return to the US that he would need to know if the company was serious about employing him, to which Mr Pellett replied he should 'put a deal down on paper that would work for me.' Mr McMahon took that as a 'yes'. He said he wrote his proposal down, and gave it to Mr Pellett on 21 May. Mr Pellett replied by expressing reservations about the level of salary and the amount of the equity share proposed, and told Mr McMahon he would work on a counter proposal.

[12] This was the essence of the evidence in support of Mr McMahon's statement that the May visit ended with a commitment to an employment agreement whereby:

he would resign from his employment and commence employment on 1 June 2004 as VP of Prolificx' American operation; he would work from a home office; and a salary/equity split as well as commission would be agreed over the next few weeks.

[13] Mr McMahon considered the deal was done on the handshake that followed.

[14] On his return to the US, by email message dated 22 May 2004 Mr McMahon provided Mr Pellett with what he described as a 'soft copy of the proposed deal'. He also advised he would contact a person in the US about Mr Pellett's giving a presentation about Endace, and expressed the view that he was 'extremely lucky to be joining the team'.

[15] The 'proposed deal' set out in the 22 May message included:

- . base pay at the rate of \$1,000/month from June – October, then \$5,000/month for the rest of the year with a review to occur at the start of the next financial year;
- . expenses;
- . commission payable on the basis that there would be 'a fair deal. Selwyn to define'.
- . equity available at: '20% of franchisor's portion of Prolificx Americas (ie 20% of the 51%)' in return for growing the Prolificx Americas franchisee organisation and the business required to meet the overall Prolificx Group plan';
- . the position would be CEO Prolificx Americas.

[16] The references to a franchise in the fourth bullet point reflect the business model that had been covered in Mr Pellett's power point presentation. Under the model Sellutions would provide an executive team in return for 51% of the company to which services were provided. Accordingly to the extent that the possibility of a shareholding was discussed, the relevant shareholding would be in Sellutions. Although Mr Pellett supported it strongly at the time, the associated business model was never implemented because the necessary capital was not raised.

[17] I accept that the items set out in the first four bullet points in the document arose out of conversations during the May visit. However the document and any

discussion that preceded it amounted to Mr McMahon's proposals, not to a record of an agreement or even heads of agreement already reached. In particular Mr McMahon said elsewhere in evidence that any salary/equity split was to be discussed after the visit to New Zealand, as well as acknowledging that Mr Pellett indicated an intention to work on a counter proposal.

[18] Further, Mr McMahon commented in the 22 May email message that the last bullet point of the deal was not discussed but was important to him. The last bullet point detailed Mr McMahon's role. It specified that he would be CEO Prolificx Americas, responsible for the entire franchisee organisation in the Americas and having some role in the group management team. That was something Mr McMahon sought, not something already agreed.

[19] Finally, the proposed deal document did not mention a start date. I do not accept that any readiness to start immediately which Mr McMahon expressed to Mr Pellett in May amounted to an agreement to commence employment on 1 June.

[20] Nevertheless Mr McMahon acted on his indication that he would pursue a contact regarding a presentation by Mr Pellett, copying Mr Pellett in on the relevant email communication dated 25 May 2004. The communication ended with the comment 'I'm still using my old email address as I just joined Selwyn's company last week.'

[21] It is not clear what Mr McMahon meant by the comment. However it is not itself evidence that an employment relationship had been entered into. On the evidence available to me I would probably find no such relationship had been entered into at the time, let alone on terms that were agreed. It can be difficult to draw the line between discussions involving the parties to a possible employment relationship exploring what might be if a relationship was entered into – in the process testing whether agreement could be reached and whether a relationship could be entered into – and discussing the terms of a relationship that has been entered into. The former is the more likely here.

[22] Further, I consider it unlikely that the failure at the time to place Mr McMahon on the payroll was an oversight.

[23] Even if I am wrong on whether an employment relationship had been entered into, clearly there was no agreement on the terms of any salary/equity split. At most that matter had been discussed in the context of a range of possibilities being explored. In the absence of agreement on such critical terms it was very unwise of Mr McMahon to proceed as he did.

[24] Mr Pellett noted the comment in Mr McMahon's 25 May email, but replied simply by saying:

“John lets get those (i)s and (t)s crossed. Please work with Kevin to get a draft agreement in place for me to review.”

[25] The reply is consistent with a view that arrangements between the parties were not finalised. Mr Pellett said his intention was to indicate to Mr McMahon that he should slow down.

[26] Meanwhile by email message dated 1 June 2004 Mr McMahon announced his resignation to the staff employed by his existing employer, having earlier offered his oral resignation. In the message he said ‘they hired me to run Prolificx Americas.’ That was not accurate as - aside from what was meant by the phrase ‘they hired me’ - on Mr McMahon's evidence his position had not been discussed at the time.

3. The visit to New Zealand in July 2004

[27] Mr McMahon visited New Zealand in July 2004, saying in evidence the visit was to discuss his first month's work and confirm the terms of his employment. Mr Pellett regarded a meeting Mr McMahon said occurred on 6 July as a further meeting about Mr McMahon's prospective employment.

[28] Mr Pellett's evidence was that Mr McMahon ‘pitched’ the ‘proposed deal’ document at that meeting. He said there was agreement on the payment of a retainer of USD1000 per month for the first 5 months, and that Mr McMahon's expenses would be paid. He was prepared to entertain commission payments, although the details were left open for future discussion. I consider it likely that the ‘proposed deal’ document was the one discussed because there was nothing to suggest the

document had been discussed or been the subject of any counter-proposal in the meantime. It was responded to in the July meeting.

[29] Regarding the equity share, Mr Pellett was not prepared to offer an equity share to someone unknown and without a proven record of performance with the company. I accept that he told Mr McMahon as much. That does not mean no equity share would ever be available, only that Mr McMahon would have to prove himself first. Claire Mitchell, who at the time was employed by Sellutions to provide services as chief financial officer for Endace and Prolificx, gave evidence that she recalled a retainer of USD1000 was discussed. She also recalled the request for an equity share, the reply that no such offer would be made, and that any arrangement would be results-driven before Mr Pellett would consider it.

[30] Mr McMahon's evidence was that during the meeting there was agreement to a salary of USD7000 per month with a 10% equity share of the American business. His salary would be paid at USD3000 per month with the remainder deferred and accruing until the company could afford to pay it.

[31] While I accept Mr Pellett's and Ms Mitchell's evidence about what was discussed at the 6 July meeting, whether the discussion went as far as Mr McMahon agreeing to the retainer and commission arrangement under discussion was less clear. However I do not accept there was an agreement in the terms Mr McMahon asserts. At most, the amount of his retainer and commission remained unresolved. There was no agreement to an equity share.

[32] Unfortunately nothing was placed in writing at the time. Further, there was still no action taken to place Mr McMahon on the payroll. That matter was not addressed until April 2005.

4. The remainder of 2004

[33] In early August 2004 Mr McMahon had an emailed exchange with Tim Rattray, then the general manager of Prolificx, about expense claims he had submitted. Mr Rattray enquired about the agreed retainer, and raised the need to finalise the employment agreement. This terminology is consistent with the view of

the parties' association Mr Pellett expressed in evidence. Mr McMahon replied that he recalled the retainer agreed in July was USD7000, part of which was deferred and accruing for payment, although he also acknowledged he could be wrong.

[34] For his part Mr Pellett's evidence, which I accept, was that Mr McMahon's recollection was wrong and he would have corrected the matter if it had been referred to him at the time. Matters were not helped in that Mr McMahon proceeded as if he were employed on the terms he asserted, rather than engaged on a retainer, and other company managers appear to have taken him at his word.

[35] By email dated 1 September 2004 Mr McMahon sent to Mr Rattray his 'feedback on the compensation plan we discussed on 9 July.' This apparently comprised a commission table which 'reflects our discussions but with a bit more detail'. Mr McMahon also provided a document headed 'proposed compensation plan'.

[36] Despite the title 'proposed compensation plan', Mr McMahon said in evidence the document was a record of the terms agreed in July. I do not accept the document recorded the terms of an agreement reached in July. I found unconvincing Mr McMahon's explanation of why he used the title he did on the document.

[37] The 'proposed compensation plan' provided for a salary of USD7000 and commission payments, and contained a proposal for an equity share worded as:

“ . 10% of the equity value of all Prolificx-owned North American business (ie 10% of the 51% of the franchisees' businesses owned by Prolificx at the time of roll-up, plus 10% of the value of any direct or other non-franchisee North American business).
....”

[38] Mr Rattray replied to Mr McMahon saying: 'Looks good, just checking the equity stake with Selwyn.'

[39] Mr Pellett did not recall whether the check was made. Since he was copied in on an email message from Mr Rattray to Mr McMahon dated 3 November 2004, I find there probably was some follow up with him. The message attached a 'cut down version of your compensation discussed today.' Mr Rattray said he would 'get an agreement

drawn up today'. The document attached to the message was an edited version of Mr McMahon's 'proposed compensation plan,' with the equity share provisions deleted.

[40] Mr Pellett said that by the end of 2004 not only had no formal contract been entered into, but having had an opportunity to observe Mr McMahon he was not impressed. During a business trip to the US in November 2004 he expressed to Mr McMahon an adverse view of his performance. His concern centred on Mr McMahon's manner of presenting himself and the company to customers.

[41] By then Mr McMahon had seen the 'cut down' version of his compensation arrangement. He said in evidence he was planning to raise the omission of the equity share with Mr Pellett, but did not do so because Mr Pellett was indicating he was on the verge of being fired. Mr McMahon is a senior manager with many years' experience in business. That is a poor explanation for his failure to address the exclusion of the equity share from a document setting out the terms of an agreement as the company saw it. The provision was omitted because Mr Pellett did not agree to it, and it is likely Mr McMahon knew that. He chose not to press the matter further.

[42] Also in or about November 2004 Prolificx appointed a CEO, Lena Lim, to take over the management of existing staff from Mr Pellett. Mr McMahon continued to work for Prolificx, reporting to Ms Lim rather than to Mr Pellett.

5. The written employment agreement

[43] Ms Lim and Mr McMahon finally signed a letter of employment containing an agreement dated 12 December 2005, with the employment relationship expressed to commence on 1 June 2004. The employer was Prolificx New Zealand Limited, and Mr McMahon's position was Vice President Business Development Americas. The agreement provided for salary and commission and other benefits, but not for an equity share.

[44] The agreement also provided:

"10. General provisions

a. ...

...

d. This agreement is the entire agreement entered into between you and the Company with respect to your employment by the Company, and supersedes all previous oral or written agreements, commitments or understandings.”

[45] Mr McMahon said he and Ms Lim did not discuss the equity share at the time, although he also said he had raised the matter with Ms Lim previously and she told him to resolve it with Mr Pellett.

[46] He said elsewhere in evidence he did not pay attention to the omission of the equity share when he received the document because he had already recorded the agreement on that matter. The agreement could not be changed without further agreement. I am afraid I found that to be an unconvincing attempt to explain the absence of a critical provision in the employment agreement. I repeat that Mr McMahon knew the equity share proposals required Mr Pellett’s agreement, and the agreement had not been given.

[47] Further the ‘proposed compensation plan’ document did not record an agreement between the parties, and Mr McMahon’s assertions that it did were not credible. The lack of credibility was reinforced by his failure to refer to the ‘cut down’ agreement provided to him in November 2004, leaving Imarda to identify and produce the relevant information. If the failure was no more than an oversight, the fact remains that the information was highly relevant and material to the assertions regarding the terms of the agreement. Such an oversight reflects badly on the accuracy of Mr McMahon’s recollection.

[48] Not only that, in an email message to a Mark McLauchlan, dated 2 January 2006, Mr McMahon said he was ‘not gonna sign this agreement until the equity issue gets resolved, which Lena has promised to take up with the board. Otherwise if I sign this agreement I’m waiving Prolificx’ obligation committed to by Selwyn in July 04 when he was CEO.’

[49] No such obligation was committed to in ‘July 04’. There was a preliminary discussion during the visit to New Zealand in May 2004, which never proceeded to agreement. Most of all, Mr McMahon understood the implications of signing the agreement and did so anyway.

[50] In what I understood was intended as evidence of Mr Pellett's acknowledgement of the obligation contended, Mr McMahon said he met with Mr Pellett and Ms Lim in February 2006 to discuss his equity share. Mr Pellett told Mr McMahon that the arrangement reached in July 2004 was not binding, but he felt honour bound to offer something. Accordingly he offered a 2.5% share rather than 10%. Mr McMahon did not agree to the reduction.

[51] Mr Pellett denied that exchange, although he said Ms Lim approached him during a company conference in February 2006 and raised Mr McMahon's wish for an equity share. He viewed the approach as a heads up to the effect that Mr McMahon was still pushing for a shareholding.

[52] I consider it likely that Mr McMahon's recollection on the point reconstructs a series of conversations occurring at about that time. For example, work was being done on preparing a formal written employee share scheme, and Ms Lim referred to the scheme in an email message to Mr Pellett dated 13 February 2006.¹ It is conceivable that there were discussions with Mr McMahon about his rights under such a scheme. It is also conceivable that, if the matter was raised with him, Mr Pellett would comment on the binding nature of the proposal documents Mr McMahon had presented. Whether or not this is correct, for Mr Pellett to have had the conversation attributed to him would be so inconsistent with areas of Imarda's evidence I have accepted, that I consider it unlikely the exchange occurred as Mr McMahon described it.

6. Conclusion

[53] On the facts as set out, I find there was no oral term or condition of Mr McMahon's employment entitling him to an equity share.

[54] The May and July 2004 discussions occurred some five years before the investigation meeting in the Authority. Inevitably neither Mr Pellett nor Mr McMahon had a detailed or accurate direct recollection of the relevant conversations. Mr Pellett admitted to this while Mr McMahon did not. However there were so many

¹ The scheme was finalised and offered to staff after Mr McMahon's employment ended.

inconsistencies in Mr McMahon's evidence that, while he might now believe his account of events was accurate, I do not accept that it was.

[55] On the information available I do not accept that the May meetings went as far as Mr McMahon believed they did. There was no offer of employment, and no agreement of the kind Mr McMahon alleged was reached. The discussions were exploratory in nature and the outcome from Mr Pellett's point of view was an understanding that he was open to an association between the parties, with discussions to continue. Mr McMahon saw the handshake as 'sealing the deal.' To Mr Pellett it was something less than that.

[56] Meanwhile any relationship proceeded at the time on the basis that Mr McMahon was engaged on a retainer plus commission.

[57] For the reasons indicated, I do not accept that any agreement on an equity share was reached during the meeting in July 2004.

[58] Further, for reasons also indicated, I find neither the 'proposed deal' nor the 'proposed compensation plan' document amounts to a written record of any oral agreement reached on the matter. The documents record entitlements Mr McMahon sought to negotiate.

[59] There was no written term or condition of employment in the December 2005 agreement entitling Mr McMahon to an equity share.

[60] As to the effect of clause 10:

- (i) there was no previous oral or written agreement capable of being superseded by the December 2005 agreement;
- (ii) there was no relevant commitment, in that the May 2004 conversations were exploratory and by July 2004 Mr Pellett had made clear his view of any shareholding that might be available and
- (iii) there was no mutual understanding regarding a shareholding on the terms Mr McMahon contended.

Whether there was unjustified action causing disadvantage

1. Background

[61] Ms Lim resigned in May 2006.

[62] In October 2006 Mr Pellett sent an email message to a number of individuals, including Messrs Johnson and McMahon, concerning the importance of accurate sales forecasting. In a passage directed at these two men and some others, he said: “Kevin ... and John own the ‘when will we close a sale and at what level. The very future of Prolificx now hangs on getting these two predictions correct. Predict exactly what you will sell for Oct Nov Dec knowing if you get it wrong its millions of dollars we don’t have to pay wages.”

[63] There was a financial risk to the company in that in general it did not warehouse products. It built particular products in anticipation of particular orders being received, so that the products were available for dispatch on receipt of the order. Accordingly it committed capital to the purchase of component parts in reliance on forecast orders, in circumstances where it could be left with capital tied up in unsold inventory if the orders were not confirmed.

[64] Sales forecasts dated 16 November 2006, and forwarded to Mr Pellett on 23 November, recorded that Mr McMahon predicted a 75% probability of a series of sales of a particular product over January, February and March 2007. Because the probability was 75% materials were purchased so the product would be built and ready when the order was placed. A significant sum of money was raised for the purpose, at a time when Prolificx’ overall future was in jeopardy. Had the probability been less than 75%, the product would not have been built.

[65] Sales forecasts dated 18 December 2006 showed Mr McMahon had amended his predictions so that the probabilities dropped from 75% to 40 – 60% variously, and expected sales would occur between May and September 2007.

2. The December 2006 email chain

[66] When Mr Pellett received this information he was extremely angry. He sent Mr McMahon an email message dated 20 December 2006, in which he said this was

the third time in 6 months that Mr McMahon had waited until he was pressed on the legitimacy of his forecasts before pushing them out or cancelling them. He commented adversely on Mr McMahon's approach to forecasting and said he had not seen the quality thinking, processes and pipeline management he expected from someone at Mr McMahon's level. He went on to say:

"This email is to give you the opportunity to address these issues prior to John [Walley, the chairman of the Prolificx board] and I taking a position on your future employment.

As we don't have a CEO John and I will have to make this decision and will do so before the Christmas break.

Please come back with your thoughts on the observations above. This has been expressed to you many times before so there is nothing new in this communication except the period of grace that has already been extended has now run out."

[67] Mr McMahon read the message as an indication that he was about to be fired. He understood the company's circumstances and the implications of forecasting orders which were then either delayed or did not proceed, but believed he had made the best forecasts he could. At the same time Mr Pellett's point appeared to be that the best forecasts Mr McMahon could make were not good enough, and he needed to address his method of forecasting.

[68] Mr McMahon replied in a message dated 21 December, expressing surprise and disappointment and explaining the changes in his forecasts. His explanation centred on changes in information received from customers, saying in respect of a particular example that he did not think the matter was one of bad forecasting but rather the result of his failure to drive his customer for hard data. It is difficult to see how the failure to obtain hard data is not an aspect of bad forecasting.

[69] The 21 December message also said: "... not having worked with you I am unsure of what you expect from me and sales at this stage. If you can provide some guidelines of how you would like me to operate, your expectations and something to measure my performance against, I would be happy to work to that end ..."

[70] Mr Pellett replied by email message dated 22 December, requiring certain information about participants in the telematics industry in North America. He

assumed Mr McMahon was already in possession of most of the information and his requirement amounted to a requirement that it be recorded in a systematic way. He gave Mr McMahon 30 days in which to produce the report and ended the message with: "John when I have this done I will have a view on whether you understand you have a handle on selling or not. You now have 30 days."

[71] In a further message dated 28 December Mr Pellett sought and obtained Mr McMahon's confirmation that he had received the 22 December message. He was annoyed because he had expected a response amounting to affirmation that Mr McMahon did 'have a handle on selling'. For his part Mr McMahon saw no need to reply. This small matter illustrates the wider lack of understanding between the two men.

[72] Unfortunately a few hours later, also on 28 December, Mr Pellett sent another email message to Mr McMahon requiring a weekly call planner and specifying the information to be contained in the planner. Mr McMahon had reason to find the message insulting, as such a requirement would usually be imposed on a junior salesperson. The message ended with:

"John you have not acted as a VP and should be dismissed purely on the lack of information about competitors, lack of pipeline, lack of management of your US team and after nearly three years in this role you have fallen well below any reasonable expectation.

...

The clock is now ticking and you need to step up to the standard required of any sales VP."

[73] Mr McMahon considered exchanges of this kind to be part of a string of humiliating emails he received at the time.

[74] In a message dated 1 January 2007 Mr McMahon set out what he described as 'testimony for the defence', detailing his view of his performance as well as difficulties he had experienced. He ended by saying he was suffering from a medical condition and needed to avoid stress, although the medical condition was not invoked in respect of the performance concerns. He asked that the email chain stop because it caused him stress.

[75] Mr Pellett found the response unsatisfactory. He replied by email of the same date in a manner Mr McMahon said he found devastating. Mr Pellett did not accept Mr McMahon's explanation of his performance and went on to say:

“John if you can not perform your job due to this or any other health issue you must say so. I can not second guess your health from here. If you are saying you are just a salesman ... then I can take a slightly less aggressive position but you are currently holding the title VP which you are clearly not doing. I will assume that you have already given this role up from the correspondence you have sent ... and will now focus my demands solely on those of a sales person.”

[76] Mr McMahon said he had expected Mr Pellett to back off because of his health condition, but on receipt of this message he concluded the employment relationship was destroyed and he had no future at Prolificx.

[77] John Walley was being copied in on the email exchanges. He contacted Mr McMahon by message dated 5 January, to which Mr McMahon replied by suggesting a dialogue to reconcile what was 'a rather irrational situation.' Mr Walley simply asked to him to provide the information Mr Pellett had sought, and to make the clear the position with his health.

[78] Meanwhile Mr McMahon worked on the requirements Mr Pellett had set out in the 22 December email. He sought the assistance of a colleague in an email message dated 18 January 2007, commenting: "I don't want to do this just to satisfy this lunatic in Auckland. Let's instead make it a document that will be useful to the two of us." There was no indication that Mr McMahon and Mr Pellett discussed the matter again, and no further action was taken at the end of the 30 day period referred to in Mr Pellett's 22 December message. For his part Mr McMahon asserted in his letter of resignation that he had met Mr Pellett's requirements.

[79] The resulting allegations of unjustified and disadvantageous action on Imarda's part concern:

- a. the threats to dismiss contained in the December 2006 email chain; and
- b. the unjustified demotion contained in the email message of 1 January 2007.

3. Conclusion regarding the threats to dismiss

[80] In principle Mr Pellett was entitled to be concerned about the amendments in December to Mr McMahon's forecast sales, against a background of a similar approach in the past, and to require an explanation. In principle he was also entitled to contemplate the possibility of disciplinary action.

[81] He said his intention was to 'put a rocket' under Mr McMahon. Even so, he should not have sent the 20 December email message in anger and continued with emailed exchanges in the way he did, rather than taking the time to put his concerns to Mr McMahon in a more considered way and adopting a structured approach to addressing them.

[82] For example because of the extent of the generalisations involved, the comments on Mr McMahon's thinking, processes and pipeline management could have been omitted, and the communication should have been more factually objective about the issues to be addressed. The very limited time given for a response exacerbated the difficulty. Mr McMahon provided a response nevertheless. Mr Pellett found it unsatisfactory, but Mr McMahon had some reason to be uncertain of what was expected from him. While Mr Pellett's overall dissatisfaction was clear, other than in his reaction to the amended forecast he had not adequately identified 'the issues' to be addressed.

[83] One of Mr Pellett's broader concerns about Mr McMahon was his view that Mr McMahon tended to make excuses rather than addressing and resolving issues in the pro-active way he expected of a senior manager. That view was reflected in the 22 December message. It was also the view Mr Pellett took of Mr McMahon's 'testimony for the defence' in January 2007.

[84] The 22 December message went on to set out a series of requirements Mr Pellett apparently intended to use to satisfy himself of Mr McMahon's general competence as a senior sales manager. However they amount to a method of addressing a performance problem which would usually follow a detailed discussion, including explanations of specific matters sought and provided, of a kind that had not

occurred here. In the absence of such a discussion the requirements did not have a context, and it is not surprising that Mr McMahon reacted adversely.

[85] If the exchanges were not intended to amount to disciplinary action, their wording indicated otherwise. I accept that the company was on a financial precipice, and that continuing urgent and concerted action was required to ensure it did not fall over the precipice. Up to a point, it was appropriate for Mr Pellett to convey that urgency and he was entitled to expect a senior manager to respond accordingly.

[86] However the email exchanges of December 2006 and January 2007 went too far. They did not meet the basic requirements of a fair disciplinary process. To the extent that no disciplinary action was intended - despite the underlying suggestion about the prospects of continuing employment - the exchanges were bullying.

[87] This is so both because of the implied and actual references to ending Mr McMahon's employment, and because of the belittling tone of the messages. In particular, while there might have been some point in requiring a report of the kind sought in Mr Pellett's 22 December email, the 28 December email was demeaning.

[88] As for the 1 January message, Mr Pellett was entitled to require Mr McMahon to advise of his health status and the implications of that for the performance of his duties. Further he was not necessarily obliged to adhere without more to Mr McMahon's request that he cease raising his valid concerns, although it was necessary to reconsider his approach. Again, he went too far in continuing by indicating that if Mr McMahon wished conduct himself as a less senior manager he would be treated like one.

[89] For all of the above reasons I find the December email chain amounted to a seriously flawed attempt to address performance concerns. If what amounted to threats of dismissal were not meant, they should not have been made. If they were meant, then the approach was unfair. In that respect Mr Pellett's actions were unjustified.

[90] There was a disadvantage to Mr McMahon in the creation of uncertainty about his future. He has a personal grievance as a result.

4. Conclusion regarding unjustified demotion

[91] Despite the statement in the 1 January 2007 email to the effect that Mr Pellett assumed Mr McMahon had given up the role of VP, there was no evidence anything changed. In particular there was no change to Mr McMahon's terms and conditions of employment, no announcement or any confirmation that his position title had changed, and no indicator that his duties changed in any respect.

[92] As I have said, Mr Pellett was indicating that if Mr McMahon wished to conduct himself as a less senior manager then Mr Pellett would treat him as one. The communication was unnecessarily sarcastic, but there was no demotion.

[93] I therefore conclude that Mr McMahon's employment was not affected to his disadvantage in that respect.

Whether there was a dismissal

1. The advice of resignation

[94] Mr McMahon's claim of unjustified constructive dismissal relies on the events of December 2006 in particular.

[95] However he did not forward his resignation until almost four months later. In late March 2007 he contacted the newly-appointed CEO of Prolificx to advise of the content of the resignation he eventually sent to Mr Walley on 27 April 2007. Mr McMahon referred in the resignation to the email chain of the previous December and advised that he felt he had no choice but to leave. He said:

“... Selwyn has made it abundantly clear to me at various stages of my employment that he has no confidence in my abilities and is simply waiting for an appropriate opportunity to terminate my employment. It is totally unrealistic to expect me to keep working loyally for the company on an indefinite basis in those circumstances. I have wanted to get the FedEx Freight contract sealed, and now that is complete, I believe I have no choice but to leave. The necessary element of trust in any ongoing employment relationship has been destroyed by Selwyn's treatment of me.”

[96] The FedEx Freight contract was very significant for the company. The ‘contract’ which was ‘sealed’ in 2007 was the proof of concept document signed in February 2007, with the principal contract document being signed in 2009. As mentioned in the resignation, a reason for delaying the resignation was that Mr McMahon wanted to remain until the completion of the proof of concept stage. However his motivation lay equally in his wish to preserve the value of the company, and the shares to which he considered himself entitled.

2. Conclusion regarding whether the resignation was a constructive dismissal

[97] A termination of employment which on its face is effected at the initiative of an employee can amount to a constructive dismissal if it falls within one or more of the following categories:

- (a) the employee is told to resign or be dismissed; or
- (b) the employer follows a course of conduct with the deliberate and dominant purpose of coercing the employee to resign; or
- (c) a breach of duty on the part of the employer caused the resignation, and the breach was sufficiently serious to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing.²

[98] Mr McMahon’s claim is based on (c) above. The parameters of (c) can be approached as follows:

“It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.”³

² See: **Auckland Shop Employees IUOW v Woolworths (NZ) Limited** [1985] 2 NZLR 372 and **Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW** [1994] 2 NZLR 415, [1994] 1 ERNZ 168.

³ **Wellington, etc, Clerical etc IUOW v VV Greenwich and CF Greenwich** [1983] ACJ 965, 975 (1983) Sel Cas 95, 104.

[99] The relevant breaches of duty on which Mr McMahon relies arise out of the email chain of December 2006. They were said to be breaches of the duty to: deal with Mr McMahon in good faith; be active and constructive in establishing and maintaining a productive employment relationship (not destructive as the emails were); provide Mr McMahon with access to information about the decision to terminate his employment; and provide an opportunity to comment on it.

[100] I have found that Mr Pellett went too far in the way he expressed himself in the email chain, and his conduct amounted to bullying. I have reflected that in finding Mr McMahon had a personal grievance on that ground. However Mr Pellett's explosion was not entirely gratuitous in that he had reason to be angry about Mr McMahon's changed forecasts and the further jeopardy in which those actions placed the company. He also had reason for concern about the approach to forecasting. I would further accept that, at that level of management, blunt talking and prompt reaction could be required to ensure the failure of a company was avoided.

[101] For these reasons I find Mr Pellett's conduct was inconsiderate and caused Mr McMahon both unhappiness and resentment, but it was not dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[102] In addition, there is an inconsistency in Mr McMahon's view in December 2006 that he could not continue his employment because of Mr Pellett's conduct towards him, yet find himself able to stay on for several months to preserve what he viewed as ultimately a benefit to him in the completion of the proof of concept stage of the FedEx contract. The explanation that he was helped in doing so because of the geographical and reporting distance, and because he was now reporting to someone he liked and respected, does not assist. If anything the positive way in which Mr McMahon described the person to whom he was now reporting suggests it was an overstatement to say the employment relationship had been destroyed. Mr McMahon had also spoken positively of Ms Lim, so that both in the past and for the foreseeable future he could expect to report to someone other than Mr Pellett and for whom he had respect.

[103] By December 2006 Messrs Pellett and McMahon probably had little respect for each other, and Mr McMahon expressed his dislike of Mr Pellett when giving evidence. He also indicated dislike and disrespect in the message to his colleague in January 2007, and other email messages that were similar in tone.

[104] For his part, Mr Pellett was not satisfied with Mr McMahon's approach to carrying out his duties, but it was an overstatement for Mr McMahon to say in his letter of resignation that Mr Pellett was waiting for an appropriate opportunity to terminate his employment. Arguably an opportunity had presented itself in December 2006, but Mr Pellett did not take it. Otherwise the only time the possibility of termination had been raised before was in November 2004. Again the possibility was not acted on. Moreover, Mr McMahon asserted in evidence that Mr Pellett had spoken positively to him in 2005 about his performance.

[105] Overall I do not accept that Mr Pellett's conduct in the form of the December email chain was such that it was reasonably foreseeable Mr McMahon would decide he could not continue to work in those circumstances.

[106] For these reasons I conclude Mr McMahon was not constructively dismissed.

Remedies

[107] I have found Mr McMahon has a personal grievance on the ground that the email chain of December 2006 and January 2007 amounted to unjustified action causing disadvantage to Mr McMahon in his employment.

[108] Mr McMahon did not lose any remuneration as a result of the grievance, but did suffer injury to his feelings. He is entitled to compensation for that injury.

[109] To the extent that the injury arose out of uncertainty about Mr Pellett's intentions regarding his future, the injury was relatively short lived since there was no reason for uncertainty beyond the end of January 2007 at the latest. Moreover, Mr McMahon's comment to his colleague in the 18 January email message indicates resentment but not uncertainty about his future. To the extent that there was injury in that Mr Pellett did not view the advice of Mr McMahon's medical condition as a

reason to stop voicing his concerns, then Mr McMahon was not entitled to require Mr Pellett to do so although he was entitled to a more appropriate response than he received.

[110] Finally, I take into account that Mr Pellett had reason to express some anger.

[111] Balancing these factors, I order Imarda to pay \$5,000 to Mr McMahon as compensation for injury to his feelings caused by his personal grievance.

Costs

[112] Costs are reserved.

[113] The parties are invited to resolve the matter. Any party seeking an order from the Authority shall have 28 days from the date of this determination in which to file a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority