

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Douglas Melville (Applicant)
AND MarketSMART International (NZ) Ltd (Respondent)
REPRESENTATIVES Dean Organ, for the applicant
Anna Fitzgibbon, for the respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 26 May 2005
FURTHER INFORMATION 22 July 2005
AND SUBMISSIONS
RECEIVED
DATE OF DETERMINATION 21 July 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Douglas Melville was employed by MarketSMART International (NZ) Ltd (“MarketSMART”) in a new business and account management role in May 2000. In the early stages of his employment Mr Melville secured a number of significant clients for MarketSMART, the maintenance and management of which became the major focus of his role. MarketSMART is a wholly owned subsidiary of an Australian company, DCS Technologies (“DCS”). In late August 2004 discussions were initiated with Mr Melville regarding his role and shifting to a sales focus. These discussions continued through September and into mid-October concluding in the termination of Mr Melville’s employment on 18 October 2004.

[2] Mr Melville says his dismissal was unjustifiable on the following grounds; it was predetermined, prior to 18 October he had not received any advice his position could be made redundant or that he could be dismissed and he was not given an opportunity to prepare for the 18 October dismissal meeting. Mr Melville seeks reinstatement to his position with MarketSMART, reimbursement of lost wages and commission and compensation for hurt and humiliation consequent to his dismissal.

[3] MarketSMART says Mr Melville was dismissed for redundancy following an extensive consultation process and his refusal to accept its offer of redeployment. It says the dismissal and redundancy process were conducted fairly and reasonably in all the circumstances.

[4] The issues the Authority must determine are:

- (i) the nature of Mr Melville’s dismissal – redundancy or otherwise;

- (ii) whether that dismissal was justified;
- (ii) whether Mr Melville's employment agreement provides for ad infinitum commission payments.

Background

[5] In mid-2004 DCS had stabilised after a period of significant financial difficulties and was looking to grow revenue. MarketSMART is DCS's main business asset and in late August 2004 the Board resolved to build that asset. Part of this resolution involved restructuring Mr Melville's role. Wes Ferguson, a director of DCS came to New Zealand on 31 August to implement that resolution. He met with Mr Melville in MarketSMART's Auckland offices that day and told Mr Melville his job no longer existed and they wanted to develop a sales role in discussion with him. He asked Mr Melville to prepare a sales plan for the next 12 months and Mr Melville agreed to provide one by 9 September. They were then joined by Paul Harper, general manager, MarketSMART and Peter Abotomey, another director of DCS and the detail of the meeting was reviewed.

[6] Mr Melville said Mr Ferguson spoke to him about a restructure and that the client servicing part of his job would be removed so he could focus on growing new business. Mr Melville recalled that Mr Ferguson told him the changes were going to happen "with or without him" and that they would advise him what he would be paid.

[7] On 1 September Mr Ferguson emailed Mr Melville a summary of their discussion on 31 August. In particular it records Mr Melville's agreement to "again pick[ing] up the role of direct sales person" and to provide a sales plan by 9 September. The email sets out what should be in the sales plan and detail of how Mr Melville could develop and implement the plan.

[8] On 8 September Mr Melville emailed Mr Ferguson providing a summary of his current role and the role he would prefer. This email includes:

"My role at MarketSMART to date:

...

As a result of very poor service provided by the MarketSMART IT Department, from mid/late 2002 to mid 2004 90% of my time has been spent working to retain the 9 clients I acquired...

The role I would prefer:

Focus on and play an integral part in creating a lot of new business, quickly (while retaining existing clients/revenue).

..."

[9] Mr Ferguson responded by email the same day acknowledging Mr Melville's past efforts and referring to the "new and exciting growth path". The email closes "I look forward to receiving the plan".

[10] Mr Melville prepared the sales plan and provided it to Mr Ferguson by 9 September. Mr Melville was advised the sales plan would be discussed with the Board and their agreement sought.

[11] The Board approved the sales plan and Mr Melville was advised of this sometime during the third week of September. Mr Harper, on instruction from Mr Ferguson, began work on a remuneration package for the new sales role. Mr Harper says he discussed the package with Mr Melville and relayed his concerns about the commission structure and in particular that he was not happy losing commissions from existing clients to Mr Ferguson. Mr Melville says no such consultation took place. I find Mr Harper did discuss the draft remuneration package with Mr Melville; Mr Melville's concerns are expressly referred to Mr Ferguson in the covering letter to the letter of appointment.

[12] On Friday 1 October Mr Ferguson convened a telephone hook up with Mr Melville and Mr Harper to discuss whether Mr Melville agreed to take on the new position. Mr Melville raised his concerns that his salary would not be the same and that he would not be paid any commission until sales were made. Mr Ferguson told Mr Melville the hand over of existing clients would have to occur that day and Mr Melville complied with that instruction. There was no dispute the new position was implemented from Monday 4 October. Mr Ferguson said that at the conclusion of the 1 October telephone call he understood the parties were in agreement. Mr Melville said he agreed to nothing.

[13] After experiencing technical difficulties on 4 October Mr Ferguson emailed Mr Melville a letter of appointment on 5 October setting out a description of the new role, MarketSMART (NZ) Sales position, detailing the handover and the remuneration package and concludes that Mr Melville indicate his agreement by giving Mr Harper a signed copy of the agreement by Monday 11 October. The covering letter acknowledges Mr Melville's concerns about the commission structure and states this has been addressed with "salary smoothing during the change period".

[14] Mr Melville was not happy with the offer and discussed a counter-offer with Mr Harper. Most of the details of this discussion are disputed but there is agreement Mr Harper offered Mr Melville advice on how the counter-offer could be structured. On 8 October Mr Melville sent Mr Ferguson an email setting out his concerns about the offer and proposing another remuneration package which included his current commission structure.

[15] Mr Harper met with Mr Melville to clarify his counter-offer. This information was relayed to Mr Ferguson who emailed Mr Harper on 13 October including:

"...

My view is very clear. The job that Douglas had at MarketSMART no longer exists, we have now created a new sales position which has certain conditions and performance metrics, we have offered that job to Douglas and provided he can demonstrate a willing eagerness to grasp the new challenge we would be happy for him to assume the role. If the role is unsuited to him for any reason (his or ours) and we have no other job to offer, he is redundant to our needs and should be let go on that basis.

..."

[16] On 15 October Mr Ferguson emailed Mr Melville:

"Douglas,

Your reply has been considered, Paul will talk to you about this matter on Monday when he is back in New Zealand."

[17] On 18 October Mr Harper asked Mr Melville into the meeting room. Another employee was present as a witness for MarketSMART. Mr Harper then advised Mr Melville he was dismissed because his position had been made redundant and he had not accepted the new position offered. Mr Harper then handed Mr Melville a dismissal letter and his final pay, which included one month in lieu of notice and a pay slip and explained how the final pay had been calculated. Mr Melville asked if he was expected to leave now and was told he could work out the rest of the day. He said he may as well go now and was given the option to clear his desk now or come back later. Mr Melville then left the MarketSMART offices returning a day or two later to pick up his personal items.

Issues

(i) the nature of Mr Melville's dismissal

[18] Mr Melville was employed in a new business account management role. There was no

dispute no new sales had been made for a number of years and Mr Melville's evidence was he was obliged to spend 90% of his time on account management. The DCS Board resolved to push sales in MarketSMART. Mr Melville was the only employee in a sales role in MarketSMART. To implement the Board's resolution the decision was made to restructure Mr Melville's sales position to focus on sales and the account management function reallocated to other employees - half the on paper role and 90% of the in practise role was gone. Mr Melville's position was superfluous to the needs of MarketSMART and there is no compelling evidence to suggest otherwise.

[19] Mr Melville was on notice from 31 August his position was redundant and entered discussions with MarketSMART to develop a new role focussed on sales. Mr Melville expressed his eagerness to shift focus to new business. Mr Melville submitted a sales plan which was accepted by the Board. He discussed with Mr Harper the remuneration package proposal and his concerns were acknowledged in the written offer of 5 October. There is no dispute Mr Melville handed over his client management role to other employees on 1 October and the new structure was implemented from 4 October. MarketSMART's remuneration offer for the new position was not acceptable to Mr Melville and he was dismissed on 18 October.

[20] For the above reasons I find Mr Melville was dismissed for redundancy.

(ii) was Mr Melville's dismissal justified?

[21] Mr Melville says his dismissal was unjustified because there was no genuine motive for his redundancy.

[22] There is no dispute Mr Melville was aware his account management functions had been reallocated to other MarketSMART employees; he conducted the hand over of these jobs. By Mr Melville's own assessment this had the effect of removing 90% of his job. Mr Melville's position had become superfluous to the needs of the business. I find Mr Melville's dismissal was motivated for genuine reasons.

[23] Running parallel with the restructuring process was the development of a new position entirely focussed on sales. The new role was discussed with Mr Melville and he agreed to write a sales plan for it. Mr Melville says there was no discussion with him regarding the change in remuneration. This claim is not supported by the evidence; Mr Melville said he was told repeatedly he would be advised of the remuneration package for the new role, Mr Harper discussed the draft remuneration package with Mr Melville and Mr Ferguson's offer referred to these concerns and his attempts to address them.

[24] Mr Melville says also that his dismissal was unjustified on the grounds of procedural fairness.

[25] I have found the decision to make Mr Melville's position redundant was advised to him on 31 August. The restructuring was not put to Mr Melville as a proposal; he was told by Mr Ferguson it was going to happen "with or without [him]". MarketSMART failed to consult with Mr Melville prior to any decision being made to restructure his position and this is a significant flaw in the process.

[26] Mr Melville says he received no notice prior to 18 October of redundancy or the possibility of dismissal and seeks to rely on the fact none of the documents refer to redundancy or the possibility of dismissal. Mr Melville was told at the meeting of 31 August about the restructuring of his position to focus on sales and that this was going to happen "with or without [him]". Mr Melville was on notice of the possibility of dismissal from the outset of the process. Having engaged in lengthy and detailed discussions regarding the remuneration package for the new position an offer

reinstatement to that role.

[35] Mr Melville seeks compensation for hurt and humiliation caused as a consequence of his dismissal. He gave evidence that he was depressed and embarrassed by his dismissal and suffered insomnia and that these factors had a negative impact on his family life. This evidence was confirmed by his partner. I have found Mr Melville's dismissal was unjustified on procedural grounds and any award of compensatory damages must be confined to the effect of those process flaws.

[36] MarketSMART is ordered to pay Mr Melville the sum of \$5000.00 pursuant to section 123(c)(i) of the Act.

Costs

[37] The issue of costs is reserved. The parties are invited to attempt to agree costs themselves. If they are unable to do so they may apply to the Authority to determine costs.

Marija Urlich
Member of Employment Relations Authority