New Zealand Employment Relations Authority Decisions

Andrew v DSV Air and Sea Limited (Auckland) [2017] NZERA 103; [2017] NZERA Auckland 103 (7 April 2017)

Last Updated: 13 April 2017

IN T HE E MPLOYME NT RE LAT IONS AUT HORIT Y AUCKLAND

[2017] NZERA Auckland 103

3000911

BETWEEN NICOLA ANDREW Applicant

A N D DSV AIR AND SEA LIMITED Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Received:

Date of Oral

Determination

T G Tetitaha

D Gelb, Advocate for Applicant

K Fox, Respondent representative

31 March 2017 at Auckland

31 March 2017 from both parties

31 March 2017

Date of Determination: 7 April 2017

ORAL DE T E RMINATION O F T HE AUT HORIT Y

Employment relationship problem

[1] Nicola Andrew seeks recovery of wages arrears for non-payment of a bonus under a management incentive plan.

[2] Ms Andrew was employed by UTi New Zealand Limited (UTi) on or about 15 April 2002. She signed an employment agreement that included clause 17:

17. Policies and rules

The employer shall be entitled to implement or vary, as required, policies and rules in relation to its activities and the conduct expected of its employees. The employer may amend or add to such policies from time to time. Implemented policies and rules shall be publicised by the employer and observed in good faith by the employee.

[3] On 6 September 2010 Ms Andrew was offered a new role as Manager Global Client Services. Ms Andrew duly signed and dated the letter of offer on 27 September 2010. Her terms and conditions of employment were varied to include a bonus as set out below:

Bonus: 10%

Start date: Sep 1, 2010

Target bonuses for all employees will be stated as a percentage of base salary. All bonus eligible employees will be classified into one of two bonus plans:

(1) Enterprise

(2) Local (regional, business unit, country or facility).

Each of the bonus plans will have a consistent design that applies to all employees.

Bonuses will only be paid to the extent that the company exceeds **FY** net income level.

Bonuses will be based on the individual's performance.

[4] On 31 May 2013 Ms Andrew was selected as a participant in the MIP FY14 Enterprise Management Incentive Plan (MIP). Eligibility for the MIP plan was detemfined as set out below.

Eligibility

The plan includes all full-time employees employed by the company and approved for participation under this plan by the Chief Executive Officer, the Compensation Committee, or their delegates.

[4] In 2015 a restructuring occurred due to the loss of a key client. Ms Andrew's job became superfluous to the respondent's requirements.

[5] On 20 April 2015 she received a letter from UTi referring to the loss of the key client account, its effect upon her job and proposing alternative roles for her. She was offered and accepted redeployment to a role based in Auckland servicing a New Zealand based client. If accepted she "would retain your current remuneration and related benefits".

[6] In 2016 UTi was purchased by the respondent employer, DSV Air and Sea Limited. It is accepted Ms Andrew's employment transferred to the respondent.

[7] On 17 April 2016 Ms Andrew received an email from the respondent stating it would "honour the [MIP] plan and pay any amounts earned".

[8] In May 2016 Ms Andrew became aware that she had only received a pro rata payment under

MIP. She queried this.

[9] On 23 May 2016 Kelly Fox, National Human Resources and Quality Manager, replied stating that because Ms Andrew had changed roles in April 2015 she was no longer part of the MIP programme and was paid a pro rata amount for the period of eligibility.

[11] Ms Andrew disagreed with this and raised a wage arrears claim on or about 16 August

2016. The parties were unable to resolve this matter in mediation. It is now before me for determination.

De t e r mi n a t i o n

[1] The starting point must be the employment agreement dated 15 April 2002 between the parties. Given Ms Andrew's employment transferred to the respondent in 2016, it must have been on the same terms and conditions. By virtue of clause 17 the employer policie s and rules formed part of her employment agreement.

[2] The letter of offer dated 6 September 2010 added a contractual term of a bonus based upon the performance of the Global FF team. It specified eligibility to receive the bonus was by way of one of two "bonus plans" — enterprise and local.

[3] During the material time her eligibility to receive a bonus under the MIP Plan was to be determined by the Chief Executive, Compensation Committee or their delegates.

[4] I accept Ms Fox's evidence today that the person respo nsible for determining eligibility under MIP was another employee, Tim Kelly. He determined Ms Andrew was ineligible for the MIP bonus due to the change in her role from global to local clientele. This approach is consistent with the letter of offer dated 6 September 2010 that referred to two bonus plans,

enterprise and local. Enterprise appears to have a global clientele focus. Local is as stated a local client focus. The MIP plan bonus appears to have been calculated upon teams operating within global regions e.g. Australia and America. Ms Andrews was not. She had a domestic client focus. She was therefore ineligible for a bonus under the employer's MIP plan.

[5] The application did not originally take issue with the reasonableness of Mr Kelly's determination regarding eligibility. It had sought payment to Ms Andrew due to her contractual entitlement to receive the bonus.

[17] If Ms Andrew had wished to vigorously pursue this matter, further evidence about the method of calculating eligibility under MI P should have been provided or sought. Mr Tim Kelly should have been called to give evidence. He was not. Given the delays and the evidence to date, I have determined to proceed on the evidence I have. From the evidence I have seen, there is no indication Mr Kelly's decision was unreasonable.

[6] In my view although Ms Andrew may have been contractually entitled to receive a bonus, she had been determined ineligible to receive the MIP plan bonus during the material period, other than on a pro -rata basis. The employer was entitled to determine eligibility for a bonus in accordance with its MIP Plan policy. Therefore the application is dismissed. I make no finding about Ms Andrew's eligibility to receive a bonus under the 'local plan' because that application and information is not before me.

[7] Given Ms Fox is a respondent employee and there were no external legal costs, costs are to lie where they fall. Each party shall meet their own costs of appearing today.

TGT Tetitaha

Member of the Employment Relations Authority
