

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 160
5346870

BETWEEN SONYA CULLING
 Applicant

AND TURNERS AUCTIONS
 LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Alan Millar, Advocate for Applicant
 Jane Latimer, Counsel for Respondent

Investigation Meeting: 30 August 2011

Determination: 21 October 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Sonya Culling, says she has been unjustifiably disadvantaged by the respondent, Turners Auctions Limited (“Turners” or “the company”).

[2] Ms Culling was appointed to the position of Finance and In House Consultant on 9 August 2010.

[3] Her individual employment agreement (“IEA”) provided, in the clause headed “Remuneration”, that her base salary was to be \$35,000 per annum. Under the heading “Benefits” there is provision for the company to operate an incentive scheme. Ms Culling was also provided with a commission scheme structure outline dated August 2010.

[4] Ms Culling was responsible for selling finance, warranty and insurance products.

[5] Mr Scott Bennett, the Branch Manager in Palmerston North, took up his position in September 2010. He observed that Ms Culling spent much of her time in her office rather than on the floor selling.

[6] After Christmas Ms Culling was still not achieving her targets. At that stage a Performance Improvement Plan (“PIP”) was considered.

[7] At a meeting on 24 March a PIP was proposed and Ms Culling was given the document. Ms Culling was of the view that this was a preliminary disciplinary procedure. Mr Bennett said it in itself was not, although it could lead to a disciplinary procedure.

[8] Ms Culling thought the targets set in the PIP were unachievable. They were to have eight full finance contracts by 2 April; and by 10 May nine full contracts completed for April.

[9] Ms Culling deposed that she was aware the expectation was eight to nine finance deals per month but had never agreed to what she regarded as an unachievable goal. Ms Mandy Brooker, the National Sales Manager, said the PIP targets formalised the expectations which had been relayed to Ms Culling when she accepted the role.

[10] Ms Culling said she believed the intent was to set her up to be pressured into resigning or being dismissed. The respondent says that Whangarei, which is a smaller branch, closes around twelve deals per month.

[11] Ms Culling claims that the PIP was a variation to the method of payment provided by her IEA to force on her a unilateral variation to her salary clause.

[12] On 28 March Ms Culling told Mr Bennett she was not prepared to sign the PIP at that stage but was prepared to have further discussion about it.

[13] Mr Bennett and Ms Culling met on 29 March. Ms Culling said Mr Bennett told her if she did not sign the PIP she should consider leaving Turners. Mr Bennett denies this. He says they had a frank discussion regarding her performance and the PIP. He explained that the PIP was designed to help her and that she could get back out of it what she was prepared to put in. He told her the last thing they wanted was for her to leave and that Turners preferred that she work through the process.

[14] They met again on 31 March and Mr Bennett said she had not provided any solutions or suggestions for variation but was giving him reasons why she could not achieve the goals. They had a discussion about the possibility of Ms Culling finding other employment and Mr Bennett said he had some connections if that was what Ms Culling wanted.

[15] On 8 April Mr Millar emailed Ms Sarah Harding of Human Resources saying he was commencing a personal grievance on the basis of disadvantage as the company's action in attempting to impose non agreed terms was an unjustified action. The remedy sought was that the action cease and that Mr Culling be paid compensation.

[16] On 19 April a meeting was held. Ms Brooker and Mr Alan Kurtovich for Turners were also present. Mr Millar represented Ms Culling. Mr Bennett said Mr Millar cut off Ms Brooker's introductions and said the meeting was over and a personal grievance would be lodged. Mr Millar said they would not be participating in the PIP as it was an alteration to Ms Culling's terms and conditions. Ms Brooker said the meeting lasted three minutes.

[17] Ms Culling said Mr Millar told Turners that she wanted to deal informally with the grievance but that until it was resolved it was inappropriate to proceed. Mediation was proposed.

[18] Mr Millar said that as a personal grievance had been lodged what would be said might be used in evidence and that issues in dispute should be dealt with in the confidential forum of mediation.

Decision

[19] Ms Culling does not have a personal grievance.

[20] The PIP was not an attempt to vary the method of payment or to force a unilateral variation to Ms Culling's IEA. The PIP was an attempt to improve Ms Culling's performance. It was not disciplinary. Her salary remained the same.

Costs

[21] If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King

Member of the Employment Relations Authority