

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 36
5360412

BETWEEN

BEVAN DUFFY
Applicant

A N D

THE RADIO NETWORK
LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Piers Hunt for Applicant
Blair Scotland for Respondent

Investigation Meeting: 9 February 2012 at Napier

Submissions Received: 9 February 2012

Date of Determination: 5 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Duffy, claims for bonuses that he considers he should have earned when he believes he was transferred from the Hawkes Bay/Poverty Bay region to the Manawatu region of the respondent, the Radio Network.

[2] The Radio Network claims that Mr Duffy was never transferred to the Manawatu region except on a temporary basis, and that his entitlement to bonuses remained limited to the Hawke's Bay/Poverty Bay region during that period, but they were never achieved. It also claims that no bonuses were ever payable for the Manawatu region, which was in any event part of a wider region of the Radio Network, where bonus targets were similarly not met.

Factual discussion

[3] There are very few, if any, disputes over what occurred in this case. Mr Duffy was employed by the Radio Network which, as its name implies, is one of the major radio networks in New Zealand, between September 2009 and mid 2011. When he commenced he was the General Sales Manager, Eastern Region. At that time the Eastern region was based around Napier, Gisborne and Taupo. Taupo was later removed from the area.

[4] Mr Duffy was employed pursuant to a written individual employment agreement, together with a terms of engagement letter. The terms of engagement letter provided for a set level of salary, plus *monthly bonus of \$1,000 per month based on achieving local revenue budget (Napier, Gisborne and Taupo) and quarterly bonus of \$4,000 per quarter based on achieving local revenue budget for the quarter (Napier, Gisborne and Taupo).*

[5] Mr Duffy's individual employment agreement contained the following relevant clauses:

1.2 *In the event that it is necessary for The Radio Network to transfer or relocate you within The Radio Network to meet operational or business needs, The Radio Network reserves the right to transfer you to another location and/or subsidiary or division of The Radio Network, on terms no less favourable to you. Should the transfer or relocation require you to move outside the city within which you are currently employed, any transfer will be undertaken with your agreement and on reasonable notice to you in accordance with The Radio Network's Employment Policy.*

[6] Clause 21 deals with reviewing the agreement. Clause 21.2 states:

Subject to the Company Policy clause, any changes agreed to in the terms of this Agreement must be recorded in writing in the Terms of Engagement letter. All such changes will form part of this Agreement and will supersede any previous provisions affected by the change to the terms...

[7] Clause 22.1 provides:

This Agreement replaces all previous written or oral agreements and understandings and represents a full record of the agreement entered into by the parties.

[8] The Radio Network employment policy is a comprehensive document. It deals with travel expenses at clause 14 and transfers at clause 15. The travel expenses clause sets out the basic requirements for company travel away from the employer's work location and includes provisions for (amongst other things) transport payments when away on business, accommodation expenses, and meal expenses.

[9] The transfer clause provides (amongst other things):

Where employees are required to transfer to another location, the company will cover a number of costs associated with the transfer.

[10] Costs associated with a transfer cover may include travel allowances, one pre-transfer visit, paid leave to transfer, meal expenses for the employee and their family, accommodation during the transfer, household removal costs and property purchase and sale costs.

[11] In December 2010 the Radio Network needed to make arrangements to cover the absence of the Regional Sales Manger for the Western region on six months parental leave. Initial arrangements fell through and in mid December Mr Stefan Goodburn, the then General Manager of Regions, contacted Mr Duffy's boss to see whether Mr Duffy would be interested in covering the Manawatu area during the period of parental leave. While the person taking parental leave was based in Palmerston North, she was the Regional Sales Manager for the whole of the Western region which included Taranaki, Wanganui and Masterton. However, it was decided that Mr Duffy would be asked to provide cover just for the Manawatu area.

[12] Mr Duffy's boss spoke to him about this opportunity, which was sold to him as a good development opportunity, because the Regional Manager was based in New Plymouth and therefore Mr Duffy would be dealing with a wider range of issues than just the normal ones, such as promotions, sponsorships and client concerns, that he did not encounter, being based in Napier where his Regional General Manager was also based.

[13] Mr Duffy was keen to take up the opportunity and agreed with Mr Goodburn that it would take place for four months.

[14] Mr Duffy's boss was concerned that the arrangements for the limited term cover be finalised. She therefore wrote to Mr Goodburn on 23 December reminding him of this. She also stated:

You will also need to advise him of the bonus component he will be entitled to regarding budget achievement in Manawatu as he will be responsible for this and should be rewarded for that.

I would assume that a variation of terms letter should be drafted for him detailing this.

Can you please have a conversation with him so that we are all clear on the demarcation of roles and who is responsible for what, where and when.

We want to avoid any confusion for staff (here and in Manawatu) and each of us need to know where we stand.

Could you please advise asap.

[15] Mr Duffy went to base himself in the Manawatu for the first four months of 2011. On average he worked there three days a week, and maintained his presence in Hawkes Bay for the other two days of the week. The Western Regional Manager oversaw the sales responsibilities for the regions other than Manawatu during this period.

[16] As might be expected, the Western Regional Sales Manger bonus system was not dissimilar to Mr Duffy's, being based on the whole of the region. However, as noted above, it had been suggested to Mr Goodburn that bonus arrangements for the Manawatu alone should be organised for Mr Duffy. Unfortunately, neither Mr Duffy nor his boss were ever advised of any changed arrangements. It therefore followed that no changed arrangements were agreed between the parties.

[17] During Mr Duffy's time in the Manawatu he was paid in accordance with clause 14 of the policy (namely travel expenses such as transport, accommodation and meal costs). None of the separate additional expenses that may have been covered under the transfer clause such as household removal costs, paid leave to transfer, were applied to him, however.

[18] Mr Duffy remains concerned that while, during the period he was in the Manawatu, it met all its financial targets and therefore had there been a bonus arrangement negotiated for the Manawatu he would have achieved bonus for each of those four months, and for the January to March quarter. Unfortunately, during the same period the financial performance of sales in the Eastern region was not sufficient so as to allow Mr Duffy to be paid bonuses at all.

[19] On his return from the Manawatu, Mr Duffy sought bonuses for achievements in the Manawatu, but has been consistently denied them. The employment relationship problem has remained unresolved and it therefore falls to the Authority to make a determination.

Determination

[20] Mr Duffy's claim is in essence that he was transferred to the Manawatu, and that in order to make his transfer conditions no less advantageous to him it was necessary for the Radio Network to provide him with bonus opportunities based on his work in the Manawatu.

[21] Even if Mr Duffy could be said to have been transferred for four months, the evidence does not disclose that his conditions of employment were on terms no less favourable to him by way of bonus arrangements. The parties could not have known at that time whether sales in the Manawatu, or the Western region, or the Eastern region, would or would not meet the terms of the bonus arrangement. While I accept that the prospect of the Eastern region meeting budget was probably less in the light of his absence for 60% of the time, others were covering for him.

[22] Mr Duffy was simply left on the same terms of employment. He remained eligible for his bonus if the Eastern region met budget. On this basis alone the claim must fail.

[23] In any event, Mr Duffy's time in Manawatu was treated more as an extended period of travel (while he covered for his colleague on parental leave) than a transfer.

[24] Furthermore, even if he had have had discussions over new bonus terms, there was no certainty as to whether these would apply to the Manawatu (as suggested at the time by his boss, and now by Mr Duffy) or to the whole of the Western region, or to some other combination that may have even involved the Eastern region, given that Mr Duffy was still working there every week. In other words, there was no certainty that a term such as that suggested by Mr Duffy would have been negotiated. It certainly was not, even although Mr Duffy's boss suggested such an arrangement. Mr Duffy can not rely on what his boss suggested, albeit that it does make business sense and the Radio Network's management of this arrangement by Mr Goodburn was, at best, unclear and disorganised.

[25] The Authority can not imply terms simply because it is of the view that such a term would make better business sense than the written terms already covering the parties, particularly when such an implied term would have to be certain and consistent with the express terms of the agreement. I therefore dismiss Mr Duffy's claims.

Costs

[26] Costs are reserved.

G J Wood
Member of the Employment Relations Authority