

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 102
5417810

BETWEEN GRAHAM FRENCH
 Applicant

A N D SGS NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
 Matthew Beattie, Counsel for Respondent

Investigation Meeting: 27 February 2014 at Auckland

Date of Determination: 21 March 2014

SECOND DETERMINATION OF THE AUTHORITY

History

[1] The first determination in this matter issued on 12 November 2013 as [2013] NZERA Auckland 511.

[2] That first determination dealt exclusively with the question whether either or both of the personal grievances raised by Mr French had been raised within time and/or in the alternative, whether it was just for the Authority to exercise its discretion to grant leave to allow either or both of those personal grievances to proceed.

[3] In its first determination, the Authority concluded that one only of Mr French's personal grievances remained alive and that it was not just to allow the second personal grievance to proceed in terms of the "exceptional circumstances" provision of the Employment Relations Act 2000 (the Act).

[4] The live grievance is concerned with the variation to Mr French's employment agreement which was entered into by the parties approximately 12 months after the employment relationship commenced.

[5] In its first determination, the Authority accepted that Mr French had raised a legitimate personal grievance alleging he had suffered a disadvantage because of the unjustified actions of SGS New Zealand Limited (SGS) in failing to engage appropriately with him in respect of his commission arrangements.

[6] While it is no part of the Authority's present task to repeat the reasoning advanced in the first determination, it is fair to summarise the Authority's conclusion as being based on the factual matrix as the Authority discerned it, but particularly on the explicit evidence that Mr French made various, persistent attempts to get SGS to address its failure to agree a commission basis for the employment post the variation.

[7] Accordingly, the purpose of this second determination of the Authority is to address the live personal grievance raised by Mr French against SGS, which alleges that he has suffered a disadvantage as a consequence of SGS's failure to agree the terms of his commission payments post the variation, and the associated claim by Mr French for the commission that he would, on his analysis, be entitled to receive, or ought to be entitled to receive if SGS had not defaulted on its obligation to make proper provision for his post-variation commission and agree the terms of that with him.

Employment relationship problem

[8] Mr French commenced employment with SGS on 27 June 2011. That employment was governed by an independent employment agreement which, amongst other things, provided for a base salary together with an incentive payment which the Authority will loosely refer to as a commission. Mr French's evidence is that he was presented to SGS through an employment agency and that he sought a remuneration package of around \$100,000 per annum and that the package ultimately offered to him in the employment agreement by SGS reflected that aspiration. While nothing turns on this aspect, the evidence of Mr Peter Hart, the Managing Director of SGS, tends to confirm this conclusion.

[9] The employment agreement provided for a base salary of \$70,000 per annum together with a commission payment and it is common ground that in the first year of

the employment, \$30,000 in commission was paid to Mr French together with his salary entitlement.

[10] The operative provision in the employment agreement is clause 6. Subclause 6.1 provides for the annual salary payment, but it is subclause 6.2 that is most relevant for our purposes.

[11] Broadly, clause 6.2 describes an incentive package of \$30,000 payable on the achievement of certain specified targets “*in the first year of employment*”. The relevant provision concludes with clause 6.2.1 which reads:

Targets for the following 12 months will be reviewed and discussed with you, and set at a later date.

[12] Then, in April 2012, there was a restructure which, amongst other things, had the effect of disestablishing Mr French’s role. However, he was offered a new role styled Sales Manager, and a variation was signed by Mr French on 16 May 2012 reflecting the changes in Mr French’s circumstances.

[13] Of particular relevance to the present dispute are the following two paragraphs:

The employee’s current remuneration entitlements shall be maintained. On the 30th July 2012 the employee’s position, duties and remuneration shall be reviewed and may be renegotiated at this time.

All other terms and conditions of your employment remain unchanged.

[14] Looked at simplistically, the provisions just referred to in the variation to Mr French’s employment agreement are the gravamen of the dispute between these parties.

[15] As the Authority observed at para.[19] of the first determination:

[19] While it rather oversimplifies the arguments of the two parties, it is fair to say that while Mr French relies on the first sentence of the quoted paragraph, SGS relies on the second. Put at its simplest, Mr French says that, by virtue of the provisions in the employment agreement, which provide for commission, and the first sentence of the above quoted passage, he has a continuing entitlement to commission payments and that by failing to appropriately determine the regime in which those commission payments would be paid

during the period covered by the variation to the employment agreement, SGS disadvantaged him by unjustifiable actions.

[16] Conversely, SGS says that it is not bound to pay commission for the period 1 July 2012 down to the last day of Mr French's employment although it accepts that it was bound, and did in fact pay commission, for the period from the commencement of the employment down to 30 June 2012.

[17] In the statement in reply filed in the Authority on 17 September 2013, SGS says that while new targets for the second year were set, they "*... were never formally incorporated into a formal variation to the applicant's employment agreement*", and that in any event SGS denies that any commission "*... is in fact payable as the applicant did not meet ... required sales targets in order to qualify for the incentive payment to be made*".

[18] While not wishing to be too pedantic, the Authority notes that this argument is circular. First, it is contended that there is no obligation to pay because of the clear words in the variation, then it is said that new targets were discussed but never incorporated into the employment agreement but finally it is contended that in any event Mr French did not meet the targets allegedly discussed with him but by SGS's own admission, never incorporated into his employment arrangements, and therefore Mr French is not entitled to any commission in the second year.

[19] Even more curiously, when SGS's witnesses attended at the Authority's investigation meeting, they sought to interest the Authority in the proposition that there had been targets set for Mr French, that Mr French knew about them, but that because he did not meet the targets, no commission was payable. This evidence, aside from being inconsistent with part of the statement in reply, as the Authority sought to make clear at the hearing, is also difficult to square with two factors, the first being Mr French's adamant testimony that he had no idea what his targets were, and second SGS's evidence that the targets it says were discussed and agreed with Mr French, were never reduced to writing for Mr French's benefit, never provided to him in a formal way, and never formed part of the employment relationship documentation as a consequence.

[20] It seems common ground that from the point at which the variation was executed down to the end of the employment relationship nearly a year later on

26 April 2013, there were a number of engagements between the parties concerning Mr French's remuneration package.

[21] SGS says that Mr French met regularly with management in an effort to try to have his salary increased while Mr French's evidence is that the thrust of the discussions the parties had were around agreeing the basis on which he could earn commission. Mr French said that his salary was fixed and that the commission structure on top of the salary had never been the subject of any agreement and that he sought to complete such agreement in order that he could aspire to earn commission.

[22] It is also apparent on the evidence the Authority heard that SGS kept some sort of record of sales made by Mr French during the second year of the employment and it is that information which SGS presumably relies upon to reach its evidentiary conclusion that Mr French was not entitled to be paid commission in the second year because he had not sold sufficient services in order to meet the appropriate threshold.

[23] When the employment relationship ended through redundancy, Mr French remained unhappy with the basis on which the employment relationship had concluded, believing that he was owed commission for the second year of the employment, and he subsequently raised the proceedings which initiated this Authority investigation.

Issues

[24] The Authority must focus first on the meaning of the relevant documents and then look at the behaviour of the parties in the second year of the employment in order to discern whether Mr French has suffered a personal grievance by unjustified disadvantage and/or whether Mr French is entitled to the payment of commission.

What do the employment documents mean?

[25] There is no dispute that in the first year of the employment, Mr French was entitled to the payment of a salary of \$70,000 and to aspire to earn additional commission up to a total amount of \$30,000. It is also common ground that Mr French was paid the salary due and owing to him for the first year of the employment and, with some goodwill on both sides, was also paid all of the \$30,000 commission that was potentially available to him for the period in question.

[26] It is also apparent that in clause 6 of the executed employment agreement, there are a number of references to the commission structure set out therein being payable only in the first year of the employment, that is down to 30 June 2012. For instance, when the commission global sum is first identified in clause 6.2, it is referred to against the global target for the period in question and those clauses are then followed by this clause:

... in the first year of employment as set out below.

[27] What is set out below are a series of fractional amounts of the global commission sum against fractional amounts of the global target sum together with the dates that that incentive must be achieved by. In broad terms, there are two commission payments each of \$5,000 set against a revenue target followed by another two \$10,000 incentive payments set against different revenue targets, with each target being set for a particular span of months. The period for the incentive payment specifically concludes on 30 June 2012.

[28] Then, and finally on this point, clause 6.2.1 reads as follows:

Targets for the following 12 months will be reviewed and discussed with you, and set at a later date.

[29] The Authority has concluded that the only proper way in which those provisions can be read is as a self-contained code the broad effect of which is to provide for a commission of \$30,000 to be payable in the year to 30 June 2012 on certain terms and conditions and with the clear and explicit provision that targets for the ensuing year will be “*reviewed*”, “*discussed with you*”, and “*set at a later date*”.

[30] In the Authority’s judgment then, the employment agreement provides for commission of \$30,000 for the first year of the employment down to 30 June 2012 but does not make any specific provision for either the quantum of the commission or the target for such commission in the ensuing year. However, it is absolutely plain from the words used in the employment agreement at clause 6.2.1 that the parties intend that commission be payable in ensuing years. While it is true that there is no agreement about just what that commission will be, or indeed what the targets are, it is nonetheless apparent from the words used that there is an intention that there will be a commission structure in ensuing years. Were that not the case, clause 6.2.1 would be absolutely meaningless and that cannot be the intention of the parties or indeed of the author of the employment agreement, SGS, whose document it is.

[31] The Authority notes in passing that if the interpretation of the provision were in any way difficult to discern, the *contra proferentem* rule would entitle the Authority to interpret the agreement against its author; but reliance on that legal rule seems unnecessary in the present case because the Authority is satisfied that the words have a plain meaning and that the proper course is to give effect to that meaning.

[32] Turning then to the variation, it is appropriate to note that the variation is not artfully worded. As the Authority has already noted, Mr French relies on the simple sentence which says "*the employee's current remuneration entitlements shall be maintained*". He says the effect of that provision is to require SGS to pay him his existing salary (about which there is no dispute) and the commission which he would have been entitled to in the first year of the employment, that is \$30,000. But that cannot be right because, as we have just seen, the employment agreement is absolutely specific that the \$30,000 figure applies in the first year of the employment and does not apply subsequently.

[33] It is perfectly possible that the parties might have agreed a greater figure in a subsequent year or years. Worse than that, the \$30,000 payable in the first year of employment was payable against targets that had been set and agreed between the parties. Here there are no such targets agreed so there is no basis whatever on which Mr French could be paid the commission that he seeks, unless and until there is an understanding between the parties incorporated into the employment arrangement, which identifies the basis on which Mr French is to earn commission and at what rate. Had there been such a concluded understanding between the parties, those new arrangements would have been absolutely consistent with the terms of clause 6.2.1 which, it will be remembered, referred to targets for the following 12 months being reviewed, discussed and set at a later date.

[34] Of course, there is a difference between the parties as to whether those new arrangements for the ensuing year were set or not. Mr French is adamant that they were not although he acknowledges that there were some general discussions about the matter and one discussion in particular in a café where he says the matter was discussed and the employer says the matter was concluded.

[35] But even SGS acknowledges that the arrangements it says were concluded in the café meeting were never reduced to writing, never provided to Mr French and never formed part of the written variation of the employment in a way that the parties

could properly rely upon. They rely on an oral agreement which they say represents the bargain between the parties, despite the obvious difficulties with that view. First, Mr French denies any such arrangement existed, and second, the employment agreement, at Clause 23, specifically requires what it calls amendments to the agreement, to be in writing. Such a requirement is of course, absolutely consistent with practice from the previous year when a variation was executed to reflect a change.

[36] Looking now at the interpretation that SGS puts on the executed variation, and ignoring for a moment the apparent change in its position from the view expressed in the statement in reply to the evidence given to the Authority at the investigation meeting, SGS maintains that the variation provides that on 30 July 2012 there shall be a review with Mr French which may result in a renegotiation of the terms of his remuneration. That of course is also consistent with clause 6.2.1 of the employment agreement which contemplates a later discussion between the parties to set the new parameters.

[37] However, the variation is unhelpful in that the words just referred to do not deal explicitly with the commission position but refer in very broad terms to “*the employee’s position, duties and remuneration ...*”. Nowhere in the variation is there any suggestion that the parties need to engage with each other to fix the terms of the incentive package.

[38] It follows that in the Authority’s judgment, both parties had an obligation to engage with each other to “*review, discuss and set*” targets for the ensuing year. Insofar as SGS seeks to maintain that it has no obligation to do that (as the statement in reply appears to suggest), it is or was mistaken.

[39] The question whether targets were set or not is the subject of the next section of this determination.

What was agreed between the parties?

[40] The parties have quite different perceptions of what was arranged in respect of targets for Mr French to work to in order to derive the commission which his employment agreement contemplated. As the Authority has already noted, while the issue was dealt with and settled for the first year of the employment, the position was otherwise in relation to the second year.

[41] The need to set new targets arose because first the employment agreement set targets for the first year but only contemplated the process for setting targets for the ensuing years, and second because the executed variation did not deal with the matter either, but, as the Authority has already observed, in rather unsatisfactory language, contemplated further engagement with the parties at a future date.

[42] Mr French's position is very straightforward. He says simply that there was never an agreement between himself and SGS on any of the elements of the commission structure for the second year. He accepts there were discussions between the parties, including a discussion in a café that SGS relies upon, but he denies there was ever a settled agreement for him to work to.

[43] That view of matters is supported by a number of factors which the Authority now refers to. First Mr French's evidence throughout two investigation meetings and in all of the documentation that he prepared both prior to the end of the employment and in anticipation of the Authority's investigation, is all absolutely consistent with the view that he advanced, namely that there was never a settled agreement.

[44] Second, that view of matters is supported by the evidence of SGS which frankly acknowledges that whatever else is true, the arrangement which it claims was in place, was never incorporated into the terms of Mr French's employment by any formal process. It was not, for instance, included in a variation document, not included in a letter, not even retained in any electronic form which evidences that Mr French ever saw it.

[45] There is a document before the Authority which is an email from SGS's Managing Director to a subordinate referring to an incentive agreement for Mr French but there is no evidence from either party that Mr French ever saw that email.

[46] Third, what evidence there is from SGS of a documentary nature tends to support Mr French's view that there were numerous meetings but never any conclusion. In that regard, the Authority refers particularly to the evidence of Tanya Matthews, a senior human resources adviser for SGS.

[47] While that evidence from Ms Matthews primarily concerns her recollection of a series of meetings with Mr French (most undocumented) where she says that he sought a review of his salary (a suggestion supported by the evidence of Mr Currie, a senior divisional manager with SGS), there is one set of notes for a meeting held

between Ms Matthews and Mr French on 5 December 2012. Those notes plainly confirm by a straightforward recording of the position by Ms Matthews, that the parties were “*still to sit down and confirm objectives*”. Ms Matthews confirmed to the Authority that that reference was to the need for Mr French and SGS to agree objectives in respect of his commission earnings.

[48] While Mr French represents his various meetings with SGS management as an attempt to get it to resolve the incentive payment structure for the second year of the employment, and SGS represents those same meetings as Mr French attempting to get a salary increase, it is difficult for the Authority to not see those two aspects as two sides of the same coin.

[49] Looked at from Mr French’s perspective, he might very well have been completely frustrated by the failure of SGS to address the commission structure for the second year and so regularly raised the prospect of a salary increase as an alternative way of getting his income back to the level that he desired (by common consent around \$100,000 per annum).

[50] What is more, Ms Matthews’ notes of the 5 December 2012 meeting seem to suggest that looked at exclusively as a salary, Mr French’s remuneration was on the low side of the Auckland average. Ms Matthews’ evidence to the Authority supported precisely that conclusion.

[51] Moreover, while there are no other notes of meetings available to the Authority, Ms Matthews’ evidence at the investigation meeting was very straightforward and credible in her recollection that she had had several meetings with Mr French between December 2012 and February 2013 and that in those meetings he (Mr French) had advised her about his discussions with his manager in the second year, Mr Currie, concerning the commission structure for the second year.

[52] Ms Matthews does go on to then claim that she understood from Mr French’s discussion with her that he knew what the targets were for his commission payment for the second year, a view Mr French does not agree with. That, however, is about the only thing he does not agree with in relation to Ms Matthews’ evidence; it was clear to the Authority from the investigation meeting that Mr French and Ms Matthews had a good working relationship and continued to think well of each other.

[53] That positive relationship was further evidenced by Ms Matthews taking up the matter of Mr French's bonus arrangements with Mr Currie (Mr French's manager) and with the Group Human Resources Manager.

[54] The particular thrust of those discussions seems to have been around Mr French's entitlement to be credited with all of the sales that he thought he was entitled to be credited with.

[55] Even if Mr French had been aware of the dollar target for his commission selling (which Mr French denies), given the evidence just described from Ms Matthews, the Authority must conclude that the arrangements for the second year were so unformed as to not constitute a proper sales incentive structure in the manner contemplated by the employment agreement between the parties.

[56] After all, that agreement set out in detail the arrangements for the incentive package for the first year, such that there does not seem to have been any confusion between the parties as to what applied, and then goes on to make clear that targets for the second 12 months of the employment would be set at a later date. The words used do not contemplate the sort of "... agreement to agree..." situation but contemplate an engagement between the parties and a fixing of the new arrangement.

[57] It is difficult for the Authority to accept that the arrangements carefully set out for the first year in the employment agreement are followed in the second year by an informal hotchpotch arrangement which is not documented (by common consent) and which even on SGS's evidence, seems to be still subject to argument and disputation about what matters earn commission and what matters do not.

[58] On balance then, and for the avoidance of doubt, the Authority prefers the evidence of Mr French that there was no concluded agreement or understanding about the commission structure for the second year of the employment. The Authority is satisfied that there was never a concluded bargain between the parties about the commission structure in the second year. Even on SGS's evidence, there is nothing in writing as between the employer and employee and even if the Authority were to accept SGS's position that there was an informal arrangement which had been agreed by Mr French, that arrangement is so radically different from the arrangement clearly postulated for the first year in the employment agreement as well as being so uncertain as to its terms (reference here the dispute between Mr Currie and Mr French

about what earned commission and what did not), that it is really difficult to accept any concluded bargain. Last, but by no means least, such an informal arrangement would not be consistent with the requirements of the employment agreement requiring amendments to be in writing.

Determination

[59] The Authority is satisfied that the employment agreement and the variation of that agreement between these parties contemplated a commission component to Mr French's earnings in the second year of the employment and that the commission structure for the second year of the employment was never formalised between the parties.

[60] It follows from that conclusion that the evidence advanced by SGS to the effect that Mr French did not have an entitlement to commission in the second year because he did not meet targets is misplaced because there were no targets agreed. The Authority agrees with SGS that the commission structure for the first year of the employment cannot be superimposed on the second year of the employment but where SGS then carries on to argue that there were no targets formalised for the second year, it is otiose to then add that in any event Mr French did not meet the targets that had not been set.

[61] Mr French claims to have suffered a personal grievance by reason of being disadvantaged by the unjustifiable actions of SGS and for reasons that the Authority has advanced in this determination, the Authority is satisfied that Mr French has suffered a breach of s123 (1) (c) (ii) of the Employment Relations Act 2000. That subsection deals with the right to be paid compensation for the loss of a benefit including a monetary one. Mr French is entitled to have the Authority consider compensation for the wrong done to him.

[62] The Authority has concluded that SGS has breached the employment agreement between the parties, that that is not the action of a fair and reasonable employer, and that the consequence of that breach is that Mr French has suffered the loss of a monetary benefit, namely the commission payment to which he might otherwise have aspired to.

[63] By virtue of the employer's breach, Mr French suffered damage and he is entitled to be compensated for that damage, so far as the quantification of that can be ascertained from the evidence before the Authority.

[64] On the balance of probabilities, it seems more likely than not that a good and fair employer would negotiate in good faith with their employee to meet the obligations in the employment agreement, and that between them those parties would craft a result which met the employer's sales needs and also met Mr French's income aspirations while being achievable, having regard to all the circumstances.

[65] SGS's evidence is that Mr French achieved sales revenue of a little over \$1.0m in the second period of the employment against what they say was a target of \$1.4m. Given the breach by the employer in its failure, as a good and fair employer, to finalise a commission structure with Mr French, the revenue generation accepted by SGS can form the basis for the Authority to compensate Mr French for the wrong done to him.

[66] Mr French seeks the commission that he has been deprived of and lost wages. Mr French told the Authority that he has still not obtained further employment since the dismissal by SGS for redundancy and accordingly it is understandable that he would seek to have wages reimbursed. However, the Authority has no power to award wages in circumstances where the nature of the personal grievance found proved has not actually caused the wages loss.

[67] This is just such a situation. The termination of the employment for a legitimate redundancy not challenged by Mr French (and properly so), was the reason that Mr French ceased to earn wages or salary, not the failure of SGS to engage and commit to an incentive programme for the second year of the employment. It follows that the Authority cannot award wages lost to Mr French.

[68] While the Authority cannot impose a commission structure on these parties, it can compensate Mr French for the loss he has suffered given the evidence before the Authority about what Mr French's work has generated by way of new business. In doing that, the Authority acknowledges it has made a finding that the grievance found is different to the one pleaded: s122 of the Act applied.

[69] That leaves only the question of fixing the level of compensation for the personal grievance and reimbursement of the Authority's filing fee of \$71.56.

[70] Before fixing on the compensatory sum, the Authority confirms it has turned its attention, as it is required to do by s.124 of the Act, to the question whether Mr French has contributed in any way to the circumstances giving rise to the grievance. The Authority's considered view is that Mr French has done everything in his power to try to address matters with the employer by regularly raising the issue of his remuneration so the Authority concludes that there is no compensatory fault.

[71] In terms of s.123(1)(c)(ii) of the Act, the Authority must fix compensation to balance the loss of the benefit which Mr French might have expected to receive, were it not for the personal grievance. It seems more likely than not that the parties would have agreed on a commission structure which was at least as generous as that which applied in the previous year, because that is what parties informed by the good faith principle would do. It follows that the Authority's starting point should be \$30,000.

[72] That figure must be reduced by two separate amounts. First, SGS seek recovery of overpaid salary in the sum of \$2176.16. Mr French acknowledges receipt of the overpayment and it is common ground that matter has not been attended to. Second, it seems appropriate to deduct from the total compensation sum an amount to take account of the claim made by SGS that Mr French did not achieve the target they say was their aspiration. That shortfall amounts to around 21%. If the logic is that achievement of the target would have resulted in a payment to Mr French of \$30,000 in commission then it must follow that falling short of the target ought to result in a reduction. However, that deduction must be balanced against Mr French's evidence that the aspiration of SGS as to the target in the second year, was simply unrealistic.

[73] The final observation the Authority desires to make in relation to the fixing of compensation is that the parties have already adopted a pro rata approach in respect to the calculation of commission in the first year of the employment and on that basis it seems sensible to adopt it here, where, on the evidence, there appears to have been some shortfall, although perhaps not the shortfall that SGS claim.

[74] Taking all those factors into account then, the Authority fixes compensation at the figure of \$24,000 and directs that that sum, together with the sum of \$71.56 being the Authority filing fee, should be paid to Mr French to remedy his personal grievance.

Costs

[75] There may be no issue as to costs given that Mr French was substantially successful and acted for himself. However, if either party wishes costs to be addressed, they should first make approaches to the other party to see if matters can be resolved by agreement and failing that, the Authority will fix costs on the application of one party or the other.

[76] If an application for costs to be fixed by the Authority is made, that application must be filed in the Authority and served on the other party and the other party has 14 days from the date of receipt of the initiating party's submissions to file and serve its own submissions.

[77] The Authority will then deal with the costs issue on usual principles.

James Crichton
Member of the Employment Relations Authority