

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number: WA 153/07
File Number: 5090005

BETWEEN SHARON HINDE
Applicant

AND LENOVO (AUSTRALIA & NEW
ZEALAND) PTY LIMITED
Respondent

Member of Authority: G J Wood
Representatives: Nikki Flint for Applicant
Mac Raymond for Respondent
Investigation Meeting: 31 October 2007 at Wellington
Submissions received: By 19 November 2007
Determination: 21 November 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is a claim by Ms Sharon Hinde against her employer Lenovo (Australia & New Zealand) Pty Limited for payment of a retention award under her individual employment agreement.

[2] Ms Hinde had previously been employed by IBM for a number of years. IBM's business interests in New Zealand were bought out by Lenovo in May 2005. Ms Hinde continued her employment as a District Account Manager with Lenovo, selling to large wholesalers or distributors of IBM products, under an individual employment agreement with it. As part of her terms and conditions of employment Ms Hinde accepted the offer of a retention award made to her by Lenovo's General Manager, Mr Alan Munro.

[3] The letter of offer stated:

“In recognition of your skills and continuing contributions toward the Lenovo business in Australia & New Zealand and in recognition of the critical role that you play in ensuring we build a successful new enterprise over the next few years, I have authorised the following special action:

Retention Awards

You will receive a special \$6,000 pre-promised award (pre tax), which will be paid to you provided you are an active full-time employee as at 1st January 2006 and continue to remain employed at the time of payment. The amount of \$6,000 will be paid during the month of January, 2006.

In addition you will receive a separate special \$12,000 pre-promised award (pre tax), which will be paid to you provided you are an active full-time employee as at 1 January 2007 and continue to remain employed at the time of payment. The amount of \$12,000 will be paid during the month of January, 2007.

In both cases these awards are contingent upon your acceptance of the terms and conditions of this memo.

The awards will be taxed as ordinary income in the year in which it is paid and will not be considered for purposes of any benefit program.

For the entire period during which the retention award is being earned, you must maintain satisfactory performance and continue to actively contribute to the business (both of which shall be determined in the reasonable discretion by me). In addition, you must continue to adhere to and comply with Business Conduct Guidelines.

Since this award is not being offered to all employees, your participation and any award under it must remain confidential. It is most important that you do not discuss this with anyone other than me or your manager.

Please indicate your acceptance and agreement to these terms by signing this memo and returning it to me within one week. I look forward to your continued support and contributions. I know that your efforts will have a significant, positive impact toward achieving building a successful business with Lenovo in Australia & New Zealand.

*Signed:
Alan Munro
General Manager
24 June, 2005*

*Signed:
Sharon Hinde”*

[4] This offer was made and accepted by all other ex-IBM sales staff in Australia and New Zealand.

[5] Lenovo carries out regular appraisals of employees' performance. The performance appraisal system (known as P3) categorises people's performance as either: 1. outstanding; 2. strong; or 3. needs improvement. Ms Hinde's performance in the past had never been rated as needing improvement.

[6] As is obvious, an important part of sales people's performance is their actual revenue to target revenue. Primary targets set by Lenovo are personal to the individual, while secondary targets are group targets, in Ms Hinde's case being the New Zealand group. Ms Hinde was involved in the setting of her personal target.

[7] In 2006 all staff were paid the retention bonus whatever their sales performance to target, or their P3 rating. Mr Munro justified this on the basis that Lenovo had only recently taken over the business, that it would take staff time to become familiar with Lenovo's culture and expected performance standards and that it was therefore unfair to deny anyone a retention award on the basis of unsatisfactory performance or lack of active contribution to the business.

[8] In 2007, however, Mr Munro adopted a more stringent approach. He obtained a spreadsheet from his managers in New Zealand and Australia on all staff eligible for the retention awards and determined on an individual basis whether or not to pay the award. In Ms Hinde's case he was concerned that not only had the New Zealand operation, which provided her secondary target, performed poorly, but that she had only achieved 71% of her last two quarter's personal budget targets and had been rated by Lenovo as needing improvement in her overall performance for the period January to September.

[9] Ms Hinde remains concerned that she was rated as needing improvement, because she had not been subject to formal evaluation by Lenovo management, that there were good reasons outside of her control as to why she had not met targets set for her and that she was performing well by comparison to other Lenovo staff. Ms Hinde's country manager at the time supported her claim for being paid the retention award.

[10] Mr Munro confirmed that Ms Hinde was not being paid the award because she had not maintained satisfactory performance throughout the period on the basis of her personal sales levels against quota and her performance review of needing improvement for the first three quarters of the year. This decision contrasted with that of a more senior staff member, Mr Stuart Gane. He was originally denied a retention

award, but after further submissions by Mr Gane Mr Munro relented. Mr Munro's explanation for this apparent disparity in treatment was that as Mr Gane had no personal target and did not have personal responsibility for the whole of New Zealand sales figures he should not be held responsible in a performance sense for poor performance by the New Zealand staff generally. I note also that Mr Gane was rated as having a performance assessment rating of strong.

[11] While Mr Munro accepts that the performance review for Ms Hinde was not done formally, I accept that he was told by the New Zealand manager that Ms Hinde did not meet her targets, was one of the poorest performers in the first three quarters of the year and was assessed as needing improvement accordingly.

[12] Analysis of Mr Munro's decisions show that all staff rated a 3 for the first nine months of the year were not paid the retention award and that only one person rated a 2 or 1 was ultimately denied the award. I accept that the basis for this was that the relevant person had failed to comply with business conduct guidelines.

[13] Ms Hinde remains aggrieved on the basis that she had been previously paid the award, that she did not consider her performance to be poor, that she had had no formal review to conclude that her performance needed improvement and that other employees with similar performance to target ratios had been paid the awards. Furthermore, Ms Hinde considered that as she had continued working without any disciplinary proceedings or performance management taken against her, she was entitled to the award.

[14] The meaning of the letter setting out the agreed retention award process is quite clear I find. As it is unambiguous it should be interpreted on its face. The word "pre-promised" is merely a technical term which relates to sales staff being promised something in advance provided they can meet the standards required. This does not override the paragraph relied on by Mr Munro. That paragraph requires satisfactory performance to be maintained, as well as an active contribution to the business for the entire period, as determined in Mr Munro's reasonable discretion.

[15] Mr Munro must therefore use his discretion in a fair and reasonable manner. I conclude that he has done so. Satisfactory performance does not necessarily coincide with an absence of disciplinary or performance management procedures being used

against an employee. Rather a wider assessment is required under the retention award assessment process.

[16] I conclude that Mr Munro was entitled to rely on Ms Hinde's manager's assessment of Ms Hinde's performance as needing improvement for the first nine months of the year, even although the formal process had not been completed. This is basically because Ms Hinde's performance could easily be assessed on a revenue to target basis, as she was a sales person. As Ms Hinde herself accepted, sales staff live and die by their sales results. It was therefore within Mr Munro's reasonable discretion to decide that Ms Hinde had not maintained satisfactory performance over the whole of the period to January 2007 because she had not met the sales targets that she had had an input in setting. Thus although Ms Hinde is to be congratulated for improving her performance to strong for the last three months, the criteria relate to the entire year.

[17] I accept Mr Munro's explanation that Mr Gane's position was different because he did not have any personal targets to meet. Furthermore, it should not be held against Mr Munro that in the first year he applied a very lenient approach. As Mr Munro appears to have acted in good faith and exercised his discretion reasonably, I decline the applicant's claim.

Costs

[18] Costs are reserved.

G J Wood
Member of the Employment Relations Authority