

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 123
3094772

BETWEEN GIRISH SHETTY
Applicant

AND VR GROUP LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Nadia Tu`itahi, advocate for the Applicant
Mark Ryan, counsel for the Respondent

Investigation Meeting: 12 March 2021 at Auckland

Submissions and/or further evidence 17 March 2021 from the Applicant and from the Respondent

Determination: 30 March 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Girish Shetty, claims that he is owed \$30,000.00 as a bonus payment by the Respondent, VR Group Limited (VRG).

[2] VRG declines to pay any bonus payment to Mr Shetty on the basis that he did not achieve any targets during his employment as required in order to qualify for payment of the bonus.

The Authority's investigation

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[4] The issues requiring investigation are whether or not:

- Mr Shetty is entitled to a bonus payment by VRG:
- Mr Shetty was disadvantaged by VRG not confirming the bonus targets.
- VRG breached the terms of the employment agreement entered into with Mr Shetty by failing to act in good faith and set bonus targets.

Background

[5] VRG operates in the area of hotel management. It has two directors, one of which is Mr Rakesh Sharma.

[6] Mr Shetty commenced employment with VRG on 11 June 2018 as National Head of Strategies & Business Development with responsibility for a team of three employees. He reported to Mr J R Chaturvedi, Director of Group Operations and Sales, Marketing and Revenue.

[7] Mr Shetty was provided with an individual employment agreement which the parties signed on 11 June 2018 (The Employment Agreement).

[8] Schedule A clause 3 of the Employment Agreement stated:

3 REMUNERATION

Annual gross salary \$90000/- plus
\$30000 gross on achieving targets set by Management

[9] It is accepted by the parties that the '\$30,000 gross' refers to bonus.

[10] The Employment Agreement in Schedule B, the Job Description, set out that Mr Shetty's key responsibilities included:

- Responsible for procuring new business revenue to VR Group on set targets;
- Developing the Sales and Marketing plan, budgets and forecast and present to Management for approval;
- Develop a sales activity plan; and
- Develop and present a sales department budget and staffing plan.

Targets

[11] Mr Shetty said that his understanding of 'targets' in Schedule A clause 3 of the Employment Agreement was that the targets set for him by VRG were projects outside of the duties set out in the job description provided as Schedule B of the Employment Agreement. He

said there had been no discussion or agreement about the targets either verbally or as set out in writing outside of the Employment Agreement clause.

[12] Mr Chaturvedi said the targets were financial budgets. He said Mr Shetty had objected when he joined VRG to the financial budgets which had been already set, and he requested time to understand the operation of VRG and to set up the off line sales team. This request had been agreed by VRG.

[13] Financial budgets had been prepared by Mr Shetty and his team for the third and fourth quarters of the 2018/2019 financial year and for the whole of 2019/2020. Mr Chaturvedi said that Mr Shetty presented the financial budgets during weekly sales meetings.

[14] Mr Shetty said that the financial budgets had been set by Mr Chaturvedi. These were revenue targets and he had not been told that they were the basis for his bonus targets, although he agreed that they may have been used to calculate part of it. However this had never been specifically stated to him.

[15] In addition he said that no measures had been set in place to assess his performance, and he believed his bonus would be assessed on his exceeding his role responsibilities.

Performance Appraisal Meeting 5 January 2019

[16] There had been a performance appraisal meeting held on 5 January 2019 attended by Mr Shetty, Mr Chaturvedi and Mr Rakesh Sharma which Mr Chaturvedi said had been held to discuss Mr Shetty's performance and VRG's concern that the financial budgets were not being achieved.

[17] Mr Shetty said the performance appraisal meeting had taken place because he had requested a salary increase, and the purpose of the meeting was to discuss that request. He said no performance concerns had been raised with him at the meeting.

[18] A document prepared and used in the meeting provided to the Authority recorded Mr Shetty's performance ratings as predominantly 'Exceptional' or 'Above Expectations'. Also provided was a paper sheet with various notations on it which contains various numeric figures, the words 'budget' and 'actual', and the word 'Bonus' with the number 100 below it.

[19] Mr Chaturvedi said this confirmed that Mr Shetty understood he had to achieve 100% of the budget to be paid a bonus.

[20] There is however no evidence before the Authority in the form of notes taken at the meeting, or documentation following it, confirming what exactly had been discussed at the

meeting, or any agreement having been reached by the parties about the target parameters and measures.

Bonus Requests

[21] Mr Shetty resigned from VRG with his last day of employment being 5 July 2019. During his notice period Mr Shetty said he had a meeting with Mr Rakesh Sharma regarding the payment of his bonus. During the meeting Mr Shetty said that Mr Sharma told him that he would consider paying a certain amount of the bonus payment to him, but no specific sum was mentioned.

[22] Mr Shetty wrote to Mr Sharma by email dated 16 July 2019. The email stated:

Request to consider the bonus amount which was a part of my employment offer at NZ 30000 to be paid as discussed in our last meeting at the Royal Oak office.

The same was to be paid according to the amount you felt was appropriate for my work done with VR group in the last one year.

[23] Mr Shetty also forwarded the email to Ms Sudha Sharma, HR Manager, that same day advising that he had escalated the issue to Mr Rakesh Sharma by email and by text message.

[24] Mr Shetty did not receive a response from either Mr Rakesh Sharma or Ms Sudha Sharma so he emailed Ms Sudha Sharma on 22 July 2019 requesting an update.

[25] He received an email dated 24 July 2019 from Arun David, General Manager Human Resource and Training, which stated:

In the matter raised by you, Rakesh Ji is expecting a revert from you on your achievements against the targets as was discussed in your last meeting with him. You are requested to revert on the same, to enable us to take a decision in the matter.

[26] Mr Shetty said he was surprised to receive the email because he did not consider it reasonable that he had to establish his right to the bonus. However he had responded by an email dated 25 July 2019 in which he set his achievements between July 2018 – July 2019.

[27] Mr Chaturvedi said that the ten items listed were all included as tasks on Mr Shetty's job description, but whilst Mr Shetty agreed a few items were on his job description, he said at least seven were tasks outside of his job description parameters.

Is Mr Shetty entitled to a bonus payment from VRG?

[28] The Employment Contract states that Mr Shetty was entitled to be paid: "\$30000 gross on achieving targets set by management".

[29] In *Firm P1 1 Ltd v Zurich Australian Insurance Ltd*, a case which addressed the interpretation of collective agreements but is applicable to the principles of contractual interpretation, the Supreme Court stated at paragraph [62] that the language used in a written contract records a consensus reached during a process of negotiation and it will have: “the important purpose of creating certainty, both for the parties and for third parties.”¹

[30] The Supreme Court also stated:

.. the proper approach is an objective one, the aim being to ascertain “the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”. This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as “background”, it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.²

[31] Examining the Employment Agreement the wording viewed objectively states clearly that \$30000 gross would be paid upon Mr Shetty achieving targets set by management.

[32] The Employment Agreement contains no clause referring to the method of calculating the bonus, and there is no other written document which sets out the parameters and/or formula for bonus calculation.

[33] I find that financial budgets were drafted for part of the period that Mr Shetty was employed at VRG, however there is no evidence that supports that the financial budgets were the sole targets for calculation of the bonus, or that Mr Shetty was unequivocally informed that was the case.

[34] I note that Mr Chaturvedi confirms in his written evidence that: “Carrying out his routine responsibility was part of his annual salary of \$90,000 and the bonus was for achieving annual set targets. No such targets were put up for approval by the applicant for the year, so these could not be set by management”.

[35] On the basis that no targets were set by management, Mr Shetty could not be assessed as having achieved them.

[36] I determine that Mr Shetty is not entitled to a bonus payment from VRG.

¹ *Firm P1 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147.

² Above n 1. See also *New Zealand Air Line Pilots' Association Inc v Air New Zealand Ltd* [2017] NZSC 111.

Has Mr Shetty been disadvantaged by VRG not confirming the bonus targets?

[37] Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[38] The elements of s103 (1) (b) are twofold:

- a. An unjustifiable action by the employer, which
- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[39] The Employment Agreement Schedule A clause 3 stated that Mr Shetty would be entitled to a bonus of \$30,000.00 based upon targets set by management.

[40] Irrespective of whether or not the financial budgets set by Mr Shetty were to constitute the 'targets', and I note that he disagreed with that view, there is no evidence confirming that VRG management either set targets for Mr Shetty to achieve or informed him that the budgets constituted the targets.

[41] Moreover in his response dated 25 July 2019 to Mr David who had requested that Mr Shetty set out his achievements against targets, Mr Shetty set out what he believed were his achievements during the period. These were not financial achievements referenced to the financial budgets.

[42] I find this highlights the lack of certainty in the wording of Schedule A clause 3 of the written Employment Agreement.

[43] There is no evidence that Mr Shetty had not been performing satisfactorily in terms of the key responsibilities set out in Schedule B of the Employment Agreement. Further there is no evidence that performance against the key responsibilities of his role was a basis of the targets referred to in Schedule A clause 3.

[44] The failure to clearly identify in the Employment Agreement the basis on which the bonus would be calculated I find to be an unjustifiable action on the part of VRG which resulted in Mr Shetty believing that his performance, in the absence of being advised otherwise, merited the payment of the bonus referred to in Schedule A clause 3 of the Employment Agreement.

[45] I find there has been an unjustifiable action by VRG which affected Mr Shetty's terms and conditions of employment to his disadvantage.

[46] I determine that Mr Shetty has been unjustifiably disadvantaged by VRG.

Did VRG breach the terms of the Employment Agreement entered into with Mr Shetty by failing to act in good faith and set bonus targets?

[47] The terms of the Employment Agreement set out that Mr Shetty would be entitled to a bonus based upon his achieving targets set by VRG management.

[48] VRG management did not set the targets as contractually stated.

[49] I find that this breached the duty of good faith pursuant to s 4 of the Employment Relations Act 2000 which requires employers and employees to act in good faith towards each other.

[50] In particular, s 4 (1A) (b) requires the parties to be 'active and constructive in establishing and maintaining a productive working relationship' and to be: "responsive and communicative" in their dealings with each other.

[51] VRG failed to clearly set out and record any achievement targets for Mr Shetty, and failed to advise him of any performance shortfalls. This resulted in him reasonably believing that he was performing well and was entitled to a bonus payment.

[52] I determine that VRG breached the terms of the Employment Agreement by failing to act in good faith and set bonus targets set as contractually indicated.

Remedies

[53] Mr Shetty has been unjustifiably disadvantaged and is entitled to remedies.

[54] Mr Shetty gave evidence that he had been saddened by the non-payment of a bonus by VRG, especially in light of the fact that he had liked and respected Rakesh Sharma which was an influential factor in his accepting the job at VRG.

[55] I am satisfied that Mr Shetty suffered stress at the non-payment of his bonus.

[56] **VRG is ordered to pay Mr Shetty the sum of \$15,000.00 as compensation pursuant to s 123(1)(c)(i) of the Act.**

Contribution

[57] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[58] I find no contribution on the part of Mr Shetty which would affect the level of the remedy awarded.

Should a penalty should be imposed on VRG for the breach of the Employment Agreement?

[59] VRG failed to act in good faith by setting bonus targets set as contractually indicated in the Employment Agreement.

[60] Having considered the principles which should govern the imposition of a penalty, I note the factors the Court must have regard to in determining the appropriate penalty under s.133A of the Act.³

[61] These have been summarised in the Employment Court case of *Lumsden v Sky City Management Ltd* as including whether the breaches were committed knowingly or calculatedly, the duration of the breach, the number of people affected adversely and the extent of any departure from the statutory requirements. A history of previous breaches may also be relevant.⁴

[62] I find that the decision by VRG not to set the targets on which the bonus payments calculation would be based breached the contractual requirement to do so set out in Schedule A clause 3 of the Employment Agreement.

[63] Whilst the evidence is that VRG regarded the financial budgets set by Mr Shetty and his team as the targets, his evidence was that he had not been informed of this and there is no document before the Authority establishing that was the case.

[64] I regard the failure to set targets as not being a calculated breach of the contractual requirement or done with the deliberate intention of breaching the agreement. However once Mr Shetty had brought the issue to its attention by means of the meeting with Mr Rakesh Sharma during his notice period, I consider it was incumbent on VRG to address it.

³ *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143.

⁴ *Lumsden v SkyCity Management Ltd* [2017] NZEmpC 30.

[65] I order that VRG is to pay a penalty of \$2,000.00, to be paid to the MBIE Trust Account for payment to Mr Shetty. Payment is to be made within 28 days of the date of this Determination.

Filing Fee

[66] Mr Shetty is to be reimbursed the filing fee of \$71.56 by VRG.

Costs

[67] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[68] If they are not able to do so and an Authority determination on costs is needed Mr Shetty may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum VRG would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[69] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[70] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Eleanor Robinson
Member of the Employment Relations Authority

⁵ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].