

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 511  
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: 21 October 2013 at Auckland

Date of Determination: 12 November 2013

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**FIRST DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Mr French), alleges that he is owed commissions from his employment by the respondent (SGS) and has suffered a disadvantage by unjustified actions of SGS in its lack of particularity in varying his employment agreement and in its failure to offer him redeployment when his position was disestablished.

[2] SGS denies that Mr French has any entitlement to unpaid commission and maintained that neither personal grievance was raised within time.

[3] By agreement between the parties, the Authority has determined that it would deal first with the question of whether either or both of the alleged personal grievances had been properly raised and/or whether the Authority ought to exercise its discretion to grant leave to allow either or both of those personal grievances to be

advanced in terms of the “exceptional circumstances” provision of the Employment Relations Act 2000 (the Act).

[4] To attend to that, the Authority convened a brief investigation meeting at which both parties had the opportunity to advance argument. This determination concerns itself exclusively with the personal grievance question; the underlying claim by Mr French for unpaid commission remains unaddressed meantime and will be the subject of further investigation by the Authority.

[5] Mr French commenced his employment with SGS on 27 June 2011 having previously received a letter of offer and an employment agreement for his consideration. The employment agreement was signed by Mr French on 11 June 2011 and that agreement contemplated a role as a sales executive with SGS’s Consumer Testing Services division.

[6] About 12 months later, on 16 May 2012, Mr French accepted a variation to his original employment agreement consequent upon the disestablishment of the Consumer Testing Services division. That variation, *inter alia*, changed Mr French’s reporting lines, changes his title, and changed the division in which he operated within SGS.

[7] On 8 March 2013, SGS announced it was considering a further restructuring which might have the effect of disestablishing Mr French’s then current role, that is, the role that he had been placed in as a consequence of the variation to his initial employment agreement.

[8] In response to that proposal, Mr French wrote a lengthy letter dated 25 March 2013 in which he set out his views on the proposal.

[9] Then, on 22 April 2013, SGS advised Mr French of its decision to disestablish his role and Mr French ceased his employment on 26 April 2013.

[10] By letter dated 1 June 2013, Mr French raised a personal grievance but the terms in which he did that will need to be examined in detail by the Authority. The justiciable period (that is the period in which a personal grievance could have been raised in accordance with the law), ended on 25 July 2013. A statement of problem was filed in the Authority on 2 September 2013 (outside the justiciable period) in which, for the first time, according to SGS, Mr French articulated the substance of his

personal grievances relating to the specificity of the material relating to his variation of employment and the failure to redeploy him when his position was disestablished.

## **Issues**

[11] The Authority's task is to establish whether Mr French has raised either or both of his personal grievances within time and/or whether it is just to grant leave for those to be raised using the "exceptional circumstances" provisions of the Act.

### **Was the personal grievance concerning the variation raised within time?**

[12] The Authority is satisfied that the personal grievance raised in regard to the variation of Mr French's employment agreement was raised by him within time. The Authority reaches this conclusion principally because Mr French's complaint seems inextricably woven into his complaint about the failure by SGS to pay him commission which he says he is entitled to pursuant to contract.

[13] While the Authority must be cautious about making judgments where the totality of the evidence is not before it, it seems more likely than not that a reasonable person, being confronted with an employee claiming they were owed commission, would conclude that that complaint was not just about the failure to pay the commission but was also about the failure to properly document the basis on which it should be paid.

[14] It is axiomatic that Mr French's claim for unpaid commission must stand; it is analogous to wages, it is part of his remuneration, and there is no statutory time bar on such a claim save for the six year limitation period relating to all civil claims.

[15] But the position is otherwise with Mr French's complaints about the way in which SGS dealt with the context of that alleged underpayment. Mr French contends that a proper construction of the variation of his employment agreement was that it changed the reporting lines and his title, and the division in which he worked within SGS, but that everything else remained as before. Whether that argument is able to be made out must be considered by the Authority in the context of whether Mr French has an entitlement to unpaid commission or not, and that is not the subject of the present determination.

[16] But what is the subject of the present determination is the question whether Mr French's complaints about the way in which SGS managed the change from the original employment agreement to the variation created a right for him to complain. In particular, Mr French says that SGS failed to identify the performance targets that were to apply in the new role (the one subject to the variation), despite numerous reminders from him.

[17] While there may be argument about whether Mr French did in fact raise these matters with SGS management, it seems to the Authority unfair and unjust to preclude him from having the matter progress at least to the stage where the Authority can hear that evidence in the substantive investigation.

[18] SGS simply says that the commission that Mr French seeks was payable in his first year, when he was covered by the original employment agreement and that it had no intention of having him derive commission in his new role. But that conclusion, if advanced, flies in the face of some of the wording anyway in the variation which as Mr French claims, appears to suggest that anything not changed by the variation remains in place. The relevant provision is at best ambiguous. It reads as follows:

*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.*

[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 had 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 action.

[20] If Mr French's claim that he regularly raised the need to formalise these arrangements both with line management and with human resources, can be made out, then it is difficult to see how SGS can contend that it did not know that this was a concern of his and it is equally difficult to see how, if that evidence were to be accepted, the question of Mr French's entitlement, or not, to commission payments

under the terms of the variation can be established, without recourse to the regime, presumably determined by the employer, by which that commission was to be earned.

[21] In addition to Mr French's claim that he raised these matters regularly with the employer in oral discussion, there are also his two letters. The simplest of those letters to deal with is the second letter in time dated 1 June 2013. It is in the following terms:

*re Grievance Claim*

*I would like to advise you of my intention to raise a personal grievance claim with the ERA against SGS New Zealand.*

*This grievance is to resolve the issue of the incentive payment to which I am contractually entitled, but which the company has refused to pay. SGS is therefore in breach of my employment agreement. Due to the dire financial position you have put me in, please be aware that I shall be taking this matter through the entire ERA process no matter how long it takes.*

*Yours sincerely,*

[22] While that letter is plainly not written by a lawyer seeking to cover all of the bases, as it were, it seems to the Authority to properly raise a grievance in relation to the arrangements around the payment of commission. It may be that it lacks the degree of specificity which ironically Mr French claims SGS is guilty of in its engagement with him on the variation, but the language he uses strongly suggests to the Authority, looking at it in the round, that any reasonable observer would believe that the letter raises an issue about the payment of commission and, by implication, the way in which that commission is to be calculated. There can be no issue about the payment of commission unless and until there is agreement about how the commission is to be earned, paid and structured.

[23] It follows from the foregoing observations that the Authority is satisfied that the 1 June 2013 letter also supports Mr French's claim that he has raised the grievance about the disadvantage to him of the way in which the commission matter was dealt with, within the justiciable period. It will be remembered that the justiciable period ended on 25 July 2013; the letter is dated 1 June 2013.

[24] The Authority now turns to consider the second and earlier letter dated 25 March 2013. This letter is primarily a response to the restructure which led to the disestablishment of Mr French's role at SGS and his eventual departure from the

business. It is an erudite and careful analysis of the position Mr French had been in since he was employed by SGS as well as a careful assessment of what the future might look like if SGS was minded to consider alternatives to the disestablishment of the role. It does Mr French credit that he was able to write so effectively at what must have been a time of great stress for him.

[25] Furthermore, this earlier letter, although targeted principally at questions raised by the proposed restructuring, also carefully summarises Mr French's various complaints about the way that he was treated from the point at which the variation applied.

[26] Amongst other things, the letter summarises the various failures of SGS to provide clarity around his employment after the variation in his employment agreement took effect. No doubt some of that material would have been hard to read for SGS because it is certainly not flattering of it, but nonetheless it serves to confirm Mr French's claim that he tried to address the deficiencies in the employment during his tenure.

[27] While he does not say in the letter in specific terms that he is raising a personal grievance about the circumstances of his employment from the point at which the variation took effect, he does indicate a future intention to raise such a grievance and he does sketch what that grievance would be about. The passage the Authority refers to is in the following terms:

*Irrespective of the outcome of this "redundancy", I shall be raising a formal grievance against SGS with the Employment Relations Authority as I believe it is unfair to employ me in one capacity, and yet treat me indifferently when I have gone through formal procedures to get HR and yourself [the managing director] to address my raised issues.*

[28] It is difficult to see how a proper construction of that provision, albeit in a lengthy letter, cannot put the employer on notice that there is an issue which, while it may not yet be a personal grievance, is to become one.

[29] That quoted passage, taken together with the earlier careful analysis in the letter of the things that SGS had failed to do in setting up the arrangements for the variation, must, in the Authority's judgement, have put any reasonable person on notice that there was an issue which needed to be addressed.

[30] That conclusion to be drawn from the 25 March 2013 letter must, in the Authority's judgement, have been reinforced by the receipt of the 1 June 2013 letter and, taken together, the Authority is satisfied on the balance of probabilities that a personal grievance in relation to the terms and conditions under which Mr French was employed under the variation, was raised with him within the justiciable period.

### **Has Mr French properly raised a grievance on redeployment?**

[31] The Authority is not satisfied that Mr French has raised the second grievance identified relating to an alleged unjustified disadvantage as a consequence of SGS's failure to explore the prospects of redeployment. First, unlike the earlier grievance which the Authority has found was raised within time, this particular claim is in no sense bound up with Mr French's claim for commission. It is an entirely separate matter relating as it does to his contention that, at the point at which he was dismissed for redundancy, SGS ought to have taken better steps to seek to redeploy him elsewhere in its business.

[32] Of course, that is a matter Mr French is entitled to raise by way of personal grievance and had he done so within the justiciable period, the Authority would have been required to consider it. But it seems plain that there can be no implication that the redeployment issue is part and parcel of the grievance which was raised in the 1 June 2013 letter because it is not intimately involved and bound up with the commission claim; it is an entirely separate issue.

[33] Further, while it is apparent that this aspect is referred to in the earlier 25 March 2013 letter, the passage the Authority relied upon in that letter referring to personal grievance, does not refer to redeployment. Nor is there any reference to it at the end of the letter where again, Mr French returns to the commission issue as obviously front and centre in his thinking.

[34] The Authority is not persuaded then that Mr French has raised his grievance about redeployment within the justiciable period, it being not referred to in the personal grievance letter at all, not referred to in the 25 March 2013 letter except obliquely and apparently referred to in the statement of problem almost as an afterthought.

[35] The Authority is obliged to consider whether exceptional circumstances exist which would encourage the Authority to consider whether, in the particular

circumstances of the case, it is just to allow the grievance to proceed notwithstanding that it has not been raised within the justiciable period. The Authority's considered view is that there are no exceptional circumstances which would justify the exercise of its authority. None of the material before the Authority suggests that this particular claim was anything other than an afterthought. There was nothing in the extensive and well developed correspondence from Mr French to SGS to draw this matter to its attention, and indeed all of the material before the Authority suggests that the matter was simply an afterthought stitched into the statement of problem.

[36] In those circumstances, the Authority is not persuaded that it should exercise its discretion to allow that matter to be responded to by the employr.

### **Determination**

[37] The Authority is satisfied that Mr French has raised a personal grievance for unjustified disadvantage within the justiciable period in relation to the arrangements for the earning and payment of the commission which he says he was entitled to pursuant to the period after the variation to his employment agreement applied. However, the position is otherwise in relation to Mr French's claim for personal grievance by unjustified disadvantage as a consequence of the failure of SGS to explore redeployment options; in that latter regard, the Authority is not persuaded that Mr French has raised his personal grievance within time and also not persuaded that it should use its discretion to allow that personal grievance to proceed on the grounds of exceptional circumstances.

[38] The matter will now proceed to a substantive hearing to deal with Mr French's claim for unpaid commission and his personal grievance relating to the employment arrangements from the period that the variation applied.

### **Costs**

[39] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority