

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 376/10
5286632

BETWEEN DAWN LANE-MURPHY
Applicant

AND NEWMARKET TRAVEL
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
David Law for Respondent

Investigation Meeting: 28 April 2010

Determination: 23 August 2010

DETERMINATION OF THE AUTHORITY

[1] Ms Dawn Lane-Murphy claims one or more conditions of her employment were affected to her disadvantage by unjustifiable actions of Newmarket Travel Limited (“NTL”). Further, Ms Lane-Murphy claims NTL breached its obligations of good faith toward her, and was in breach of sections 68 and 63A of the Employment Relations Act (“the Act”). Ms Lane-Murphy seeks remedies for unfair bargaining (s 69), interest, a penalty for breach of s 63A and costs.

[2] Ms Lane-Murphy resigned from her employment on 2 February 2010. On 6 April Ms Lane-Murphy lodged an amended statement of problem claiming that she was constructively dismissed. NTL denies the claims.

[3] The issues for determination are:

- What were the relevant terms of Ms Lane-Murphy’s employment agreement?
- Did NTL breach the Employment Relations Act?

- Was Ms Lane-Murphy disadvantaged in her employment?
- Was Ms Lane-Murphy constructively dismissed?

The relevant terms of the Employment Agreement

[4] Ms Lane-Murphy commenced employment with NTL trading as the Holiday Shoppe in February 2008, working as a travel consultant. Ms Lane-Murphy was employed on a temporary basis. Her rate of pay was \$25.00 per hour

[5] In April 2008 Ms Lane-Murphy was provided with a written employment agreement for a fixed term from 16 April to 30 September 2008. The rate of pay set out in the agreement was \$48,050 per annum. Ms Lane-Murphy never signed the agreement, however, a series of emails between Ms Lane-Murphy and Mr Grant Bevan, a Director of NTL, indicates that with the exception of a clause dealing with deductions for ADM's or write-offs Ms Lane-Murphy accepted the contents of the agreement.

[6] In early 2009 the Holiday Shoppe franchise changed to Harvey World Travel. This change resulted in a number of changes to the operating structure and a change of premises for NTL. The office was also restructured and Ms Silvana Jacovani was appointed as the Team Leader and a new marketing and sales consultant, Mr Heath Burgoyne, was also appointed.

[7] On 20 February 2009 Ms Lane-Murphy was provided with a new draft permanent employment agreement. This agreement varied the current terms of Ms Lane-Murphy's employment by providing for payment of salary of \$41,000 per annum plus the payment of a bonus. Ms Lane-Murphy raised concerns about the draft agreement and put these in writing to Mr Bevan on 22 February 2009.

[8] Mr Bevan says the salary and bonus package reflected current industry practice and that the bonus scheme ought to have provided Ms Lane-Murphy with additional gross income of between \$10,000 and \$30,000 per annum.

[9] Ms Lane-Murphy rejected the offer of salary plus bonus as she was not motivated by incentive payments. At about that same time an employee resigned and on the basis that NTL would have cost savings of that salary, Mr Bevan agreed to continue paying Ms Lane-Murphy on the basis of a salary only.

[10] On 3 August Mr Bevan and Ms Lane-Murphy met and discussed a new proposed employment agreement. Mr Bevan says he explained to Ms Lane-Murphy the need to update her employment agreement. Mr Bevan says Ms Lane-Murphy seemed enthusiastic about a suggested bonus structure and shared ideas about how she could achieve the bonuses set out in the agreement.

[11] Mr Bevan wrote to Ms Lane-Murphy setting out the proposed new terms of employment. The remuneration set out in the agreement proposed a reduction to Ms Lane Murphy's salary from \$48,050 to \$38,000 and offered bonuses.

[12] A second meeting on 4 August was held to discuss the proposed new agreement and discussions between Mr Bevan and Ms Lane-Murphy continued until 13 August. On that date Ms Lane-Murphy met with Mr Bevan and discussed the bonus scheme. Ms Lane-Murphy was concerned that she would not make sufficient money from the bonuses to warrant the reduction in her salary. Mr Bevan says Ms Lane-Murphy negotiated to increase the value of the incentive program from 15% to 20% commissions paid out. This was agreed to by Mr Bevan.

[13] A second version of the agreement was then forwarded to Ms Lane-Murphy on 13 August. Taking into account the discussions between Ms Lane-Murphy the bonus clause was altered to provide for two bonus calculations, one for the period 1 September 2009 – 30 June 2010 and the second for the period 1 June 2010 – 31 December 2010.

[14] Ms Lane-Murphy attended a further meeting with Mr Bevan on 14 August after requesting to meet with him. Ms Lane-Murphy arrived at the meeting and presented Mr Bevan with a signed copy of the employment agreement. The fact that Ms Lane-Murphy had signed the agreement came as a surprise to Mr Bevan who was expecting to enter into further negotiations around the bonus levels with Ms Lane-Murphy.

[15] Mr Bevan says Ms Lane-Murphy did mention at the meeting that she was unhappy about the agreement but that she enjoyed her job in the office and wanted to get on with it. At the investigation meeting Ms Lane-Murphy told the Authority that she felt she had no option but to sign the agreement as she was being bullied by her manager. She did not raise this with Mr Bevan.

Did NTL breach the Employment Relations Act?

Breach of good faith

[16] Ms Lane-Murphy says NTL breached its obligations of good faith when negotiating the terms of the 13 August employment agreement. Ms Lane-Murphy says she was told that her position would be disestablished if she did not accept the reduction to her salary as the business was in financial trouble and could not support her current level of salary.

[17] Mr Bevan denies ever discussing with Ms Lane-Murphy a possible redundancy situation or what if any other options may be available if she did not sign the new agreement.

[18] Mr Bevan says that a number of redundancies had occurred in Business World Travel due to the economic recession and downturn in business travel, however that is a separate and unrelated business to the business Ms Lane-Murphy was working in. Mr Bevan says that a number of Harvey World Travel offices had been closed and that Ms Lane-Murphy would have known of this through the intranet bulletins.

[19] I find Ms Lane-Murphy has not established to my satisfaction that NTL has breached its obligations of good faith toward her.

Unfair bargaining – section 68

[20] Section 68 of the Employment Relations Act provides for bargaining to be unfair if the person, at the time of bargaining for or entering into the agreement is induced to enter into the agreement by oppressive means, undue influence or duress¹ and NTL knows or ought to know of the circumstances.

[21] Ms Lane-Murphy claims she was told that her role would be disestablished if she did not agree to the reduction in her salary and was never told that she did not have to agree to the change. Ms Lane-Murphy says she believed if she did not agree to reduce her salary she would be dismissed.

[22] Ms Lane-Murphy says Mr Bevan knew or ought to have known that she was only accepting the change as she believed she had no choice.

[23] NTL denies the claim and says at no stage was Ms Lane-Murphy's level of performance questioned or employment threatened. During the period of negotiation over the 13 August agreement Mr Bevan provided Ms Lane-Murphy an opportunity to

¹ Employment Relations Act 2000, section 68(2)(c).

seek independent advice and/or to have a support person present during all discussions. It was common ground that when Ms Lane-Murphy produced the signed agreement it was a surprise given her previous conduct in not signing agreements and not agreeing to any reductions in salary payments.

[24] I find the bargaining over the 13 August agreement was not in breach of section 68. The evidence does not establish that Ms Lane-Murphy was told that if she did not sign the agreement she would be dismissed or in any other way induced or suffered from duress when asked to sign the new agreement. Indeed, the evidence at the investigation meeting was that Ms Lane-Murphy signed the agreement because she felt she could not easily get another job.

[25] In an email in which Ms Lane-Murphy advises Mr Bevan that she was prepared to sign the agreement Ms Lane-Murphy does advise Mr Bevan that she was unhappy with the procedure and the way they had arrived at the conclusion. However, unhappiness is not evidence of undue influence or duress.

Breach of section 63A

[26] Section 63A(2)(d) requires an employer to consider any issues that the employee raises and respond to them when bargaining for terms and conditions of employment. Ms Lane-Murphy claims NTL breached section 63A(2)(d) because it did not consider the concerns she had raised during the discussions about the agreement and respond to them.

[27] I find NTL did respond to Ms Lane-Murphy's concerns as they were raised. For example the evidence shows that on 4 August Ms Lane-Murphy raised concerns about the level of commission payments and in response Mr Bevan increased them. In fact, without any prompting from Ms Lane-Murphy the commission payment was increased to 30% for a short period to allow Ms Lane-Murphy time to adjust to the new remuneration package.

[28] At the investigation meeting there was evidence that Ms Lane-Murphy made suggestions as alternatives to the proposed remuneration structure, but she did not raise any concerns about aspects of the contract. The evidence shows that Ms Lane-Murphy did raise concerns, but this was not until October, after she had already signed and agreed to the new terms of employment.

Disadvantage grievance

[29] Ms Lane-Murphy claims her employment or one or more terms or conditions of her employment were affected to her disadvantage due to being bullied by the Marketing/Sales Manager and by the reduction in her salary of \$10,000.

[30] I am required to examine NTL's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[31] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether NTL's actions disadvantaged Ms Lane-Murphy in her employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.²

[32] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If NTL can establish justification for a disadvantageous action, there is no grievance.³

[33] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.⁴

Bullying

[34] Ms Lane-Murphy claims she was bullied by Mr Burgoyne. It was common ground that Ms Lane-Murphy and Mr Burgoyne did not get on in the office. Ms Jacovani told the Authority in her oral evidence that the relationship between Mr Burgoyne and Ms Lane-Murphy was a troubled one. Ms Jacovani gave the Authority two examples of incidents which she witnessed between the two employees.

² *Mason v Health Waikato* [1998] 1 ERNZ 84

³ *McCosh v National Bank*, unreported, AC49/04, 13 September 2004

⁴ *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

[35] In the first incident, just after he started working for NTL, Mr Burgoyne approached Ms Lane-Murphy several times, inviting her to meet with him as he wished to get to know her better. Ms Lane-Murphy rejected all approaches. After finally agreeing to meet with him, on the day, Ms Lane-Murphy refused to meet telling Mr Burgoyne that she was too busy. Both employees then raised their voices at each other.

[36] The second example was when NTL moved into its new premises. Mr Burgoyne put Ms Lane-Murphy's desk at the front of the office. Ms Jacovani says it was so Ms Lane-Murphy would be the first person seen by those entering the office and that this would assist in increasing her sales. Ms Lane-Murphy was upset that Mr Burgoyne had put her in that position and the two argued, raising their voices at each other and calling each other names.

[37] I am satisfied that the situation between Mr Burgoyne and Ms Lane-Murphy was as a result of a personality clash rather than bullying by Mr Burgoyne. Ms Lane-Murphy gave as good as she got and therefore the problems can be attributed to both employees.

[38] At the investigation meeting Ms Lane-Murphy acknowledged that she never made a complaint to Mr Bevan about being bullied by Mr Burgoyne, however at the investigation meeting she recalled telling Mr Bevan that she didn't like Mr Burgoyne. Further, Ms Jacovani told me that after the argument between Mr Burgoyne and Ms Lane-Murphy during the move to the new premises, Mr Bevan made the two of them sit down and apologise to each other, which they did.

[39] I find there was no unjustified disadvantage to Ms Lane-Murphy as a result of her poor relationship with Mr Burgoyne.

The new agreement

[40] It is common ground that the new employment agreement, signed by Ms Lane-Murphy reduced her salary by \$10,000. This alone is a disadvantage. However, I am satisfied the reduction in salary was not unjustified as Ms Lane-Murphy agreed to the reduction when she signed the employment agreement.

Constructive dismissal

[41] A constructive dismissal is a resignation or abandonment of employment alleged to be, in reality, a termination of employment at the initiative of the employer.

Circumstances that can constitute a constructive dismissal include a fundamental breach or breaches by the employer of the employment agreement, an ultimatum delivered to the employee to resign or be dismissed, and circumstances of that sort.

[42] In this case Ms Lane-Murphy alleges that treatment by the Sales and Marketing Manager together with the conduct of the employer over the negotiations for the individual employment agreement which she signed in August 2009 led her to treat the relationship as having been at an end.

[43] I have already found that NTL was not in breach of its obligations to bargain fairly with Ms Lane-Murphy during August 2009, and that it acted in good faith toward her during the negotiations.

[44] As to her relationship with Mr Burgoyne the evidence shows that Mr Burgoyne had left his employment at NTL before Ms Lane-Murphy resigned. Therefore it could not have been her relationship with Mr Burgoyne that caused her to resign.

[45] I find Ms Lane-Murphy has not established to my satisfaction that she was constructively, or otherwise, dismissed from her employment. I am unable to be of any further assistance to Ms Lane-Murphy.

Costs

[46] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Newmarket Travel Limited may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any responses to be lodged within 14 days of receipt. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority