

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 365/10
5284098

BETWEEN MALA REDDY
Applicant

AND DEPARTMENT OF LABOUR
Respondent

Member of Authority: Dzintra King

Representatives: Applicant in Person
Mandy Holdsworth, Advocate for Respondent

Investigation Meeting: Hearing 25 June 2010

Submissions Received 9 July and 9 August 2010 from Applicant
26 July 2010 from Respondent

Determination: 18 August 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Mala Reddy, claims that she has been disadvantaged by the respondent, the Department of Labour (“the Department”). The Department says there has been no disadvantage and that Ms Reddy’s claims are outside the 90 day period.

[2] On 19 October 2009 Ms Reddy filed a Statement of Problem. She asserted that the problem was a stalemate that she had reached with the Department regarding salary negotiations and the remedy she sought was for the Authority to vary her individual employment agreement in accordance with the counter-offer she had made to the Department

[3] On 20 October 2009 the Department filed a Statement in Reply. In it the Department raised concern that in the Statement of Problem Ms Reddy appeared also

to be attempting to raise a personal grievance challenging the performance rating that she had been given; and that in the Department's view she could not do so because it was outside the 90 day period.

[4] Ms Reddy also appeared to be contending that she should have received a salary offer in July 2008 and that negotiations should have taken place at that stage.

[5] The Statement of Problem was confused. On 23 November I wrote a Minute setting out a number of issues that the parties might like to consider regarding clarification before a conference call was arranged.

[6] On 26 November Ms Reddy responded with an email stating that her concerns were that she had not been informed of the new salary at the time the performance agreement was signed off and that RSI had affected her work to her detriment. The remedy of variation of the individual employment agreement remained.

[7] The following day I asked that the remedies section of the Employment Relations Act 2000 be emailed to Ms Reddy.

[8] On 8 December a conference call was held and in the course of this the remedies were discussed and it was agreed that Ms Reddy would file an amended Statement of Problem and the Department would file an amended Statement in Reply.

[9] On 11 December 2009 an amended Statement of Problem was received asserting that Ms Reddy had been disadvantaged. The grounds for disadvantage were that she was unaware of the new salary and therefore could not challenge it and the performance rating. She had been disadvantaged by not being notified on time. The other disadvantage was that she was suffering from RSI and that that had not been taken into account when the performance assessment was completed. The remedies now sought were reimbursement for loss of wages and recommendations by the Authority.

[10] On 24 December an amended Statement in Reply was received which asserted that the matters were outside the 90 day period.

Background

[11] On 20 March 2006 Ms Reddy commenced employment with the respondent as an Immigration Officer – Verification in the respondent's Central Verification Unit

("CVU"). On 22 November 2006 Ms Reddy was offered a variation to her employment agreement which incorporated the new Departmental 2006 remuneration framework. She accepted this offer on 5 December 2006 whereupon she moved to a new salary that was back paid to 1 July 2006. This remained Ms Reddy's current employment agreement.

[12] The current employment agreement sets out that performance will be reviewed at least annually according to the Department's Performing for Outcomes policy. It also provides that the Department will review the individual's remuneration annually and that movement of salary within the remuneration range for the position will be based on the performance progression matrix and demonstrated high performance. Salary increases are performance linked only and there are no additional across the board increases.

[13] In July 2008 managers conducted performance reviews with their staff for the previous performance year, 1 July 2007 to 30 June 2008. Ms Reddy received a performance rating of "Satisfactory Performance/Meeting Most Expectations" in her July 2008 performance review. Applying the performance progression matrix for her current salary, which fell between 96% - 110% of the existing salary band, gave no salary movement for that particular performance rating. She was therefore ineligible for any salary progression effective 1 July 2008.

[14] Following collective bargaining between the Department and the PSA a new collective employment agreement was settled in August 2008 effective from 1 April 2008.

[15] On 19 September 2008 the Department initiated consultation with employees who were not union members on proposed changes to its remuneration policy. These were a result of feedback received from staff and managers during the Performing for Outcomes evaluation process following its first year of operation.

[16] On 2 October 2008 further information was provided to staff regarding the remuneration policy consultation. The consultation was to close on 8 October 2009.

[17] On 20 October 2008 the updated and approved remuneration policy and information related to feedback received was provided to staff over the respondent's intranet. As a result of the changes to the remuneration policy offers of variations to employment agreements were issued to employees on individual employment

agreements because current IEAs referred to elements of the Department's remuneration framework that had been changed following the consultation referred to above.

[18] An offer of variation dated 1 December 2008 was made to Ms Reddy. While her performance rating did not generate a further performance rated increase, had she accepted the offer her salary would have increased from \$48,481 to \$50,990.

[19] On 11 December Ms Reddy made a counter offer. The counter offer was considered by her manager and then forwarded to the group manager. The group manager did not consider there to be sufficient grounds to amend the original offer and a letter dated 12 January 2009 was drafted by Human Resources for the line manager's signature declining the counter proposal and outlining that the Department remained of the view that its original offer was a reasonable one.

[20] There were then a number of meetings between the Department and Ms Reddy to further discuss its offer and her counter proposal.

[21] Ms Reddy was able to request a review of her performance appraisal if she disagreed with it. This was to be done within 10 days of written notification. However, Ms Reddy chose not to do that. While a performance rating determined the quantum of salary increase, the decision regarding whether or not to request a review of a performance rating was not related to any salary increase it could lead to but rather to whether that rating accurately reflected the performance over the past 12 months.

[22] On 15 April Ms Reddy raised a personal grievance regarding the fact that the Department had not accepted her counter offer. Disadvantage was claimed because the offer had been made to her in December 2008 and not July 2008.

[23] If the offer had been made in July rather than in December 2008, the offer would not have been any different. It is evident that Ms Reddy's concern was precipitated by the realisation of the new salary structure. She thought that if she had got a better performance rating she might have been able to obtain more money.

[24] Ms Reddy confirmed at the 9 July meeting that she wanted to pursue a grievance with regard to her counter offer. Mediation took place on 17 September but the matter was not settled.

[25] Ms Reddy appears to have some confusion regarding the fact that there is a union negotiated collective employment agreement for union members and a separate process for other staff including herself – the people on individual employment agreements. To be on an individual employment agreement is a choice that Ms Reddy made. She cannot now complain that PSA members may have different terms and conditions.

[26] The crux of this personal grievance relates to the offer made to vary her individual employment agreement that was presented to Ms Reddy on 1 December 2008. Ms Reddy accepted at the Authority hearing that it was this offer that she regarded as an unjustified action on the part of the respondent.

[27] In her letter of counter offer on 11 December she did not refer to an injury or her performance rating. The first time she disputed the performance rating was in her letter of 29 April where she alleged that the rating was unfair because her efforts had been hampered by an injury to her right hand. It was in the same letter that she raised the matter of her injury for the first time to justify her challenge to the performance rating.

[28] It is clear that once the respondent became aware that there were difficulties with Ms Reddy's health it acted quite appropriately. The meeting on 2 April took place with Ms Reddy, Ms Christine McGaughey, the Branch Manager, and Ms Mandy Holdsworth, the Senior HR Advisor. The purpose of the meeting was to talk about the counter proposal and the Department's declining of it.

[29] Ms Reddy says that Ms Holdsworth told her to submit a grievance on 2 April. However the notes of the discussion of 2 April demonstrate that she did not raise the issue of wanting to challenge her performance rating at that stage. When she did so on 29 April 2009 her manager responded stating that the Department did not consent to her raising matters outside the 90 day period.

[30] Ms Holdsworth told Ms Reddy that if she believed she had been treated unfairly and disadvantaged in some way, she was entitled to lodge a personal grievance but she would need to seek independent advice on that. That is not an instruction to Ms Reddy to lodge a personal grievance.

[31] Ms Holdsworth also stated she was not able to advise Ms Reddy in what actions she should take. The offer that had been made to Ms Reddy in December

2008 was made again on 2 April 2009 and that was left open for acceptance until 16 April 2009.

[32] On 16 April Ms Reddy submitted a personal grievance. In her letter Ms Reddy states:

In response to your letter dated 02 April 2009 and the meeting held on the same day. I enquired as to what the next step would be if I am still not happy with the offer. Mandy Holdsworth Senior HR Advisor has stated that I would have to submit a grievance.

[33] This grievance clearly has to do with the counter offer not being accepted. In this letter she states that the offer and negotiations should have taken place in July 2008. She concluded by saying:

It seems as though the Department only negotiates with the Union. Am I being forced to become a PSA member.

[34] On 28 April Ms McGaughey replied to this letter saying that the Department did not accept she had a personal grievance, that she had been disadvantaged because she was not offered an increase to her salary in July 2008.

[35] In a letter dated 29 April referring to Ms McGaughey's email, Ms Reddy raised the issue of an injury to her right hand which was sustained in August 2007. She maintained that the Department had failed to take immediate action in response to rectifying the problem which has worsened her situation. Ms Reddy wrote:

In light of this, my individual target should have been reassessed and I should have been measured according to this. Had I been aware of this I would have challenged my performance rating. I am now challenging the performance rating for the 07/08.

In respect of my injury, I do acknowledge that you Christine McGaughey, Peter Saunders and Bridget Rairi had made every effort to rectify the problem and to assist with my recovery. It is appreciated.

[36] Ms Reddy then said that she was not happy with the decision and wanted to take it further even if it had to go to mediation.

[37] In a response to this letter on 22 May Ms McGaughey said expressly:

You have attempted to raise a grievance challenging this rating in your letter of 29 April 2009 which is outside the timeframe. The

Department does not consent to you raising a personal grievance on this matter after the expiration of the 90 day period.

[38] Ms McGaughey also addressed the matter of the injury to the right hand. Ms McGaughey said:

In both your letters of 16 April and 29 April 2009, you mentioned that you are prepared to take this matter to mediation. Whilst not accepting that you have a grievance, if you still wish to discuss this matter at mediation, the Department would be prepared to attend.

[39] A meeting was held on 9 July 2009. Present were Ms Reddy, Ms Holdsworth and Ms Sarah Cassidy, the Branch Manager. Ms Holdsworth said that the purpose of the meeting was regarding Ms Reddy's personal grievance regarding her counter offer and to clarify the process regarding pursuing a grievance. The meeting was not to discuss the substance of the concerns but where to go to from there.

[40] Ms Reddy indicated she wished to pursue her grievance in regard to the counter offer but understood the 90 day period had passed. If that was the case then she wanted to go to mediation. Ms Holdsworth said the 90 day period had passed with regard to any grievance regarding her performance rating for the 07/08 performance year. With regard to the Department's non-acceptance of her counter offer, if Ms Reddy wished to pursue this further, the next step would be to go to mediation.

[41] After the mediation the Department again offered to Ms Reddy the variation to the employment agreement containing an increase in salary.

Decision

[42] Ms Reddy's personal grievances regarding the challenge to the performance review and the failure to take her medical condition into account in making the performance assessment are out of time and cannot be proceeded with. Had they not been out of time I would have found that Ms Reddy did not have a personal grievances regarding either matter.

[43] Ms Reddy claims that the respondent failed to advise her of what her new salary would be so she was not able to challenge her performance rating at the time. This argument fails to recognise the difference between the performance rating itself

and whatever salary structure happens to be in place at the time – they are separate things.

[44] With regard to the refusal by the Department to accept the counter offer, there is no obligation on the Department to accept the counter offer, so there can be no disadvantage. There was an obligation to negotiate in good faith and the Department did that. The Department was not obliged to accept Ms Reddy's counter offer. This is plainly and simply a matter of the negotiating process between the parties to the employment agreement.

[45] The non-acceptance by the Department of Ms Reddy's counter offer is not an unjustifiable action.

[46] Ms Reddy does not have a personal grievance.

Costs

[47] If the parties are unable to agree on the matter of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant is then to file a memorandum within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority