

[4] Mr Varma in his resignation letter made the following claim that he had not been paid fully for his work;

On a separate but related topic, I was given an incentive scheme when I moved to sales. Your letter to me of 3 March 2005 states that if the agreed criteria are met I will be paid an incentive of a maximum of three thousand dollars per quarter. I have never received any incentive payment but believe I have met every target ever given to me. I therefore claim from Burnards the sum of \$18,000 being 6 quarters worth of incentives

[5] He concluded the resignation letter by raising a personal grievance, claiming BIL had constructively dismissed him through its failure to provide the incentive payments.

[6] Mr Varma's problem with BIL was not resolved, even with mediation assistance. Consequently it has reached the Authority and has been investigated, to enable a determination to be given.

[7] The remedies expressly sought on behalf of Mr Varma are orders for payment to him by BIL of outstanding incentives for 6 quarters, to a total of \$18,000, interest on that sum, compensation of \$10,000, for humiliation, loss of dignity and injury to feelings, and reimbursement of legal costs.

[8] The inclusion of Mr Varma in an incentive scheme operated by BIL was referred to in a letter dated 3 March 2005 signed by Ms Chris Paulsen, the General Manager of BIL. This letter addressed to Mr Varma was drawn attention to by him when giving notice of resignation and raising a grievance.

[9] Ms Paulsen's letter of 3 March 2005 confirmed to Mr Varma his promotion to Sales Executive with an increase in salary to \$55,000. The letter then went on to state the following:

If selected and agreed sales criteria is achieved a further \$5,000 or part thereof will be considered, the final amount dependent on performance.

An incentive scheme will be available after 3 months. If the agreed criteria is attained, the incentive will be a maximum of \$3,000 per quarter.

[10] Major issues in resolving this claim brought by Mr Varma are what were "the agreed criteria" that he was required to attain before becoming entitled to the stipulated incentive payment, and were there any criteria agreed at all?

[11] Ms Paulsen and BIL have steadfastly maintained that criteria were agreed and that they were the criteria stipulated in a BIL Bonus Scheme which had been devised in about 2003, before Mr Varma joined BIL. That scheme had been published in a document which displayed a triangle shape to show how the scheme operated. This depicted the highest level of bonus at the apex, where the target for margins was 25% and with the sales budget to be exceeded by 10%, and lowering to the base of the triangle where sales margins were to exceed 15% and monthly sales were to be at 90% of budget.

[12] Ms Paulsen's evidence was that before Mr Varma had commenced in the Sales Executive position she met with him in late February or early March 2005 to discuss his remuneration for the position he had been newly promoted to. Mr Varma had asked for more than a salary of \$55,000 per year and Ms Paulsen told him that amount would be reviewed after six months, with consideration given then to an increase of \$5,000. Ms Paulsen said that Mr Varma was concerned to receive as much remuneration as he could because he had recently bought a house and needed to make the usual payments for that. She said:

At my meeting with Rahul I showed him the Bonus Document. When the Bonus Document was discussed we moved closer together around the table so that we could both see the triangle diagram clearly. I explained to Rahul how the bonus scheme worked and how it would apply to him.

...

Rahul was told his sales target was set at \$97,000 per month.

...

The Bonus Document was not given to Rahul as he did not request a copy of it.

Rahul's promotion was confirmed in a letter of 3 March 2005.

I said in the letter of 3 March 2005:

"An incentive scheme will be available after 3 months. If the agreed criteria is attained, the incentive will be a maximum of \$3,000 per quarter."

The "agreed criteria" I was referring to was what I had discussed with Rahul at our meeting, namely average sales of \$97,000 per month with a minimum average sales margin of 20%.

[13] Ms Paulsen noted in her evidence that she had incorrectly advised Mr Varma at their meeting that the minimum average sales margin was 25% rather than 20% as expressed in the bonus document. Ms Paulsen insisted in her evidence that she had met with Mr Varma to discuss his remuneration before writing him the letter of 3

March 2005 in which she referred to “the agreed criteria.” She said there had been a lengthy meeting which she could recall as it was about an important matter. Ms Paulsen said that her letter had reflected the discussion at the meeting and the concern of Mr Varma to maximise his remuneration for the Sales Executive position, which he was not to begin performing until May 2005.

[14] In his evidence Mr Varma denied that he had ever seen the Bonus Scheme with its graphic representation of the three levels of reward. He said there had been no meeting or discussion over the letter of 3 March 2005 which he had received from Ms Paulsen and of which he said;

At the time I was just happy to get it as it provided me with a \$5,000 salary increase, enough for me to get my loan, a car and the possibility of another \$5,000 in 6 months along with incentives that I was determined I would achieve even though I did not know what the criteria was.

[15] Mr Varma went on in his evidence:

Some time around July 2005 after I had been in a semi-sales role for over three months, I realised that I could be working towards an incentive but did not know what the criteria was. I went and asked Chris and she told me that I had to achieve sales of \$1m per annum at a reasonable profit. Once again, this was just an informal discussion and Chris’s response was “off the cuff”.

[16] Mr Varma said he had calculated his monthly sales target to be \$83,333, which is 1/12th of \$1m. As to the target margin he said he had been set, he insisted this was given to him as being “a reasonable profit.”

[17] During the course of its investigation the Authority was made aware of the wider background to the employment of Mr Varma by BIL and also the termination of that employment. Included in those circumstances is the fact that shortly after Mr Varma resigned his employment BIL brought a claim against him for breach of fidelity and breach of confidence in relation to his setting up in business in competition with BIL. In their evidence Mr Varma and his supporting witness Ms Saraya Povey, also a former employee of BIL and now a partner with Mr Varma in a new business, painted a picture of BIL as having had a dysfunctional management, with poor reporting, recording and retrieval of information systems.

[18] This background however does not assist me to determine a major factual issue as to the agreed criteria (if any were agreed) that were to be met before Mr Varma became entitled to an incentive payment or bonus.

[19] I accept Ms Paulsen as a credible witness and I accept the account she gave as likely to have been what did occur. I regard Mr Varma as mistaken in his evidence that there had been no meeting to discuss the BIL Bonus Scheme and to agree that the documentation of that scheme contained the criteria for the payment of incentives.

[20] The letter of 3 March with its reference to “the agreed criteria” may be taken as referring to a particular agreement already reached as at that date. Clearly this is not a reference to criteria to be agreed at some future date. A flaw in the evidence of Mr Varma is that he says he did not know what part of the criteria was until several months later, and even then rather than giving his consent to it he was simply told what it was by Ms Paulsen. I find that to be unlikely as it does not accord with the plain reference in a letter written long before there was ever any dispute between Mr Varma and BIL and which therefore cannot be viewed as containing self serving statements.

[21] Having identified the agreed criteria for payment of the bonus the next issue arising is whether Mr Varma met those criteria, which were as documented for the BIL scheme applying to selected members of the sales team.

[22] I accept the evidence of BIL that Mr Varma did not qualify in any quarter, even after an accounting has been done that is most favourable to him for the sales and margins he achieved.

[23] Had I rejected Ms Paulsen’s evidence Mr Varma’s claim had little likelihood of success. His evidence that he did not know what the criteria were, if accepted must lead to the conclusion that the criteria had not been agreed. Therefore there was no contractual basis on which he could be paid the incentive and as a matter of fundamental contract law this term of his employment as Sales Executive would have been be so uncertain as to be unenforceable.

[24] Had the Authority accepted the evidence of Mr Varma, for it to have then gone on and made an order requiring BIL to pay him the sum of bonus or incentive payments as claimed would have required the Authority to determine what a reasonable profit was and what the “agreed criteria” were for the payment of that sum.

The Authority would have had to fix those terms and conditions of employment before it could award any amount as claimed under this head. But as is made expressly clear by s 161(2) of the Act, the Authority does not have jurisdiction to make a determination about any matter relating to the fixing of new terms and conditions of employment.

[25] The achievement of a “reasonable profit” is too uncertain a target as to be enforceable by a claim under the Employment Relations Act 2000, and there is no basis for implying a term as to what such a profit is or how it is to be assessed.

[26] For the above reasons I find there is no basis upon which Mr Varma is able to succeed with his claim to recover incentive payments or bonus.

[27] There are several reasons why in any event his claim for compensation under the personal grievance remedy could not have succeeded in this case. First, I accept as a matter of principle that this was a claim brought under the Authority’s jurisdiction to determine claims for arrears of wages. Compensation under s 123 of the Act is not an add-on to those claims, although interest is available to be awarded generally as a remedy.

[28] Second, although Mr Varma claimed in his letter of resignation that he had been constructively dismissed, he continued to work out his period of notice for a month and he appears to have affirmed the contended breach of the employer by continuing over six quarters not to make a claim for the incentive payments he claimed were owed to him.

[29] Thirdly, and perhaps most significantly, Mr Varma entered into an agreement with BIL that enabled him to complete the notice period on garden leave and which, as a term of that agreement, provided that Mr Varma fully and finally settled all claims he had against BIL arising out of his employment “and the termination thereof” or otherwise howsoever arising. It was expressly an exception to this term that his claim in relation to outstanding commission payments remained able to be pursued to an Authority investigation. However, the claim of constructive dismissal is not a claim to recover commissions, as it is a separate substantive remedy on its own and must therefore be regarded as among all other claims he had and which he fully and finally settled in the agreement.

[30] It is also strongly arguable that a claim for personal grievance remedies is excluded under s 103(3) of the Act, because the alleged constructive dismissal was derived solely from a 'dispute' about the interpretation, application or operation of the employment agreement between BIL and Mr Varma.

[31] Accordingly, the determination of the Authority is that Mr Varma is not entitled to any orders against BIL in respect of any of his claims.

Costs

[32] The question of costs is reserved. It is hoped that the representatives will, after discussion, be able to reach some agreement as to disposal of this issue. If not, application in writing can be made in the usual way and a timetable for a reply will then be set by the Authority.

A Dumbleton
Member of the Employment Relations Authority