

\$100,000 in earnings. His weekly pay was calculated on the basis that the commission target would be achieved, so in effect, he was paid commission in advance.

[3] However the commission entitlement was agreed to be based on achieving a clear margin target of \$1 million in the year. In the event that the target was not met, commission paid in advance would be recovered from commission due in the following year.

[4] By September 2009 CCL and Mr Coppard recognised the level of sales being achieved would not reach the margin target and his payment arrangement was renegotiated. The basis on which his weekly pay was calculated was revised by reducing the advance commission element to \$50,000 a year.

[5] The letter recording this variation of the agreement, signed by both parties, included a provision that CCL would not reduce Mr Coppard's income below \$150,000 or "*make any attempt to recover any commission excess paid ... unless you decide to terminate your employment*".

[6] When Mr Coppard did give notice of resignation, CCL sought to recover commission paid to him in advance of the level to which he was entitled under his employment agreement.

[7] CCL agreed to Mr Coppard finishing work on 30 April 2010 without serving the full four week notice period. It exercised an option in its employment agreement to pay wages in lieu of notice. However it also operated another provision of the agreement under which Mr Coppard had authorised CCL to deduct from his pay whatever monies CCL might be owed under the employment relationship. Under that provision CCL withheld the pay in lieu of notice and credited it against the amount of advance commission said to be due for repayment by Mr Coppard. It also wanted repayment for 15 days of annual leave taken in excess of his entitlement.

[8] At the time he left work Mr Coppard had not agreed on any amount due to be repaid for advance commission. Rather he told CCL director Darryl Swann by email on 28 April 2010 that he believed he had "*a good case to defend myself from a*

disgruntled employer” and it “*will cost a lot more than you are seeking or I am ever prepared to repay*”.

[9] By July 2010 the matter remained unresolved and CCL lodged an application in the Authority for orders requiring Mr Coppard to repay overpaid commission, interest on that amount, and its costs.

[10] In reply Mr Coppard stated the amount claimed was inaccurate and unsubstantiated, his ability to achieve the targets required for the commission was affected by having to perform functions beyond his job description, CCL was being “*morally unfair*” because he had never experienced any demands for repayments of such commission in his 10 years of selling IT in the Auckland market, and his terms of employment regarding the commission were “*vague and subject to interpretation*”. He suggested that, while not within the strict terms on which commission was calculated, CCL should recognise the value of future sales and business relationships he helped develop and write off any perceived loss on the commission paid to him. He also claimed CCL had wrongly cancelled his fuel card before his employment ended, that he was poorly treated by CCL directors after the death of his wife in January 2010 and that he had a case for a personal grievance.

The investigation

[11] The matter was not resolved in mediation. For the Authority’s investigation written witness statements were lodged by Mr Swann, CCL director Bruce Abel, CCL service delivery manager Malcolm Fraser, and CCL Auckland branch manager Greg Carter. Mr Coppard did not lodge a witness statement. At the opening of the investigation meeting he said that he had not seen the statements of the CCL witnesses. CCL’s representative had served copies on the address for service Mr Coppard had given to the Authority but Mr Coppard had since moved address. The investigation meeting was adjourned briefly so Mr Coppard had an opportunity to read those statements.

[12] Under oath the CCL witnesses confirmed their written statements and, along with Mr Coppard, answered questions from the Authority member. Mr James, for

CCL, and Mr Coppard both had an opportunity to ask additional questions and provide oral closing arguments.

[13] In preparing this determination I reviewed the witnesses' written and oral evidence, the closing submissions, and the relevant background documents provided. As allowed for under s174 of the Employment Relations Act 2000 (the Act), I have not recorded here all evidence and submissions received but state findings of facts and law and express conclusions on the issues for determination.

Issues

[14] The issues for determination were:

- (i) Is CCL entitled to an order for payment of \$31,886.79 (with interest)?
- (ii) Should any CCL entitlement be reduced because of unjustified actions?
- (iii) Are there any outstanding wages or holiday pay owed to Mr Coppard or otherwise reducing any amount due to CCL?

Overpaid commission

[15] From the evidence of the CCL witnesses and Mr Coppard I am satisfied he was paid commission in advance of his entitlement and CCL is entitled to recover that overpaid amount from him.

[16] The terms of his employment agreement, including the variation agreed from 25 September 2009, were clear that the entitlement to commission was subject to the requirement of meeting the specified margin target. Failure to do so would result in recovery of anything in excess of that entitlement either in the following year, if still employed, or as noted in the 25 September letter, on termination of employment.

[17] CCL acted within the terms of the employment agreement by withholding wages it would otherwise have paid in lieu of notice, I find.

[18] I also accept CCL's submission that there was no evidence supporting Mr Coppard's contention of an industry or market practice not to recover overpaid commission. While Mr Coppard may consider this "*morally unfair*", CCL is entitled

at law to have the overpaid amount repaid. Mr Coppard referred in his evidence to CCL having agreed to take the risk of paying commission in advance. That is true but he also agreed to take the risk of being required to repay commission if he did not reach the sales targets.

[19] The amount to be repaid must be accurately identified and calculated. The evidence as it emerged in answers to questions in the Authority investigation showed the amount claimed by CCL was inaccurate in two important respects.

[20] Firstly, it failed to include two transactions on which CCL accepted during the investigation meeting Mr Coppard was entitled to commission, consequently reducing the overpaid amount by \$1727.39. I did not accept Mr Coppard's evidence was sufficient to support his contention of a third transaction which should also have been included. Instead I preferred Mr Fraser's evidence that Mr Coppard was not involved with that particular transaction in a way that generated a commission entitlement.

[21] Secondly, Mr Abel, in preparing a "*statement of account*" for what was overpaid had neglected to include a provision for holiday pay on the commission to which CCL accepted Mr Coppard was entitled. That commission formed part of his legitimate gross earnings for the year and should have been included in the allowance made in the calculations for holiday pay. CCL had calculated he was overpaid \$3600.13 as holiday pay but accepted this was really no more than \$1171.06.

[22] After making those adjustments CCL's calculation was that Mr Coppard still owed the sum of \$27,730.33 in overpaid commission (around \$4156 less than it originally claimed was due as at 29 April 2010).

Holiday pay calculations

[23] I had one reservation about accepting that amount as the accurate tally of Mr Coppard's debt to CCL. That concerned CCL's account including a leave deficit of 15 days paid to Mr Coppard in excess of his entitlement. He said CCL had included leave days taken around the time of the death of his wife and the following week during which he made arrangements for her funeral and the care of their children.

[24] The evidence of Mr Swann and Mr Carter was that the leave tally did not include extra time off allowed to Mr Coppard around this time and that CCL was not attempting to reclaim those days.

[25] The leave tally included allowing for the three days of bereavement leave to which Mr Coppard was statutorily entitled and I accept Mr Carter's evidence that other leave days taken in early January 2010 were booked annual leave days although they fell around the time of the death of Mr Coppard's wife.

[26] Accordingly I accept no other adjustment of the amount due to CCL for overpaid commissions was required.

Alleged unjustified actions

[27] I did not accept CCL should be denied repayment of the overpaid commission because of what Mr Coppard alleged was a failure to provide him with sufficient resources to do his sales job and reach desired targets. I accept his evidence that he was involved in a wide range of work, including being involved in pre-sales activities such as pricing but this was, I find, within the scope of his job description which included being prepared to work outside his direct responsibilities where required.

[28] Mr Coppard alleged he was "*bullied*" by Mr Abel but I find that allegation was made only once he was asked to return the overpaid commission. His claim that he was poorly treated around the time of his wife's death was also made only after the commission dispute arose. By contrast his resignation letter, written before this dispute started, specifically thanked the company for its support during that extremely difficult time and described Mr Carter as exceptionally understanding and supportive.

[29] However even if his treatment were grounds for a personal grievance, Mr Coppard has never properly raised such a grievance, either before or at the time of his resignation. He was out of time to do so now.

[30] There was one action of CCL which was, I accept, a breach of his terms of employment. Soon after hearing of Mr Coppard's resignation Mr Abel cancelled the fuel card CCL provided Mr Coppard but did not tell Mr Coppard that he had done so.

Mr Abel considered he was entitled to do so because the card was provided following renegotiation of remuneration terms in September 2009 and was described in the letter recording those terms as “*an expression of goodwill*”. However I find, as a matter of interpretation of that document and the context it recorded, the fuel card was intended to be an additional benefit and formed part of Mr Coppard’s terms of employment from that time onwards.

[31] Mr Coppard found out about the cancellation only when attempting to refuel at a petrol station. Both Mr Carter and Mr Swann later apologised for what had happened with the card. Meanwhile Mr Coppard had refilled his petrol tank at what he said was a cost of around \$200. The amount due to CCL from Mr Coppard is to be reduced by \$200 to reimburse him for that cost.

Order for repayment

[32] Mr Coppard is ordered to pay to CCL the sum of \$27,530.33 in reimbursement of commission payments he received in excess of his entitlement.

[33] Mr Coppard did not seek an order for payment by instalments as he said he could not repay the amount due in any event. He lives in rental accommodation with his partner and has responsibilities for the care of four children. He does not own a car but has one under a leasing arrangement. He is currently employed as a business development manager with an IT infrastructure company. His current annual base salary is \$100,000 with provision for commission on sales up to \$100,000 a year.

Interest

[34] I think it fit to make an order of interest on the debt due to CCL but because of inaccuracies in the amount claimed prior to the investigation meeting, the order for interest is to run from the date of this determination only.

[35] The rate of interest is to be 4.64 percent, being the 90-day bill rate as at the date of this determination plus two percent, as provided for under clause 11 of Schedule 2 of the Employment Relations Act 2000.

Costs

[36] Costs are reserved. The parties are encouraged to resolve any matter of costs between themselves. If they are not able to do so, CCL may lodge and serve a memorandum on costs within 28 days of the date of this determination. Mr Coppard will have 14 days from the date of service to lodge any reply memorandum. To assist the parties, I indicate on a preliminary basis that costs on a matter such as this would usually be set on the Authority's usual daily tariff. In this particular case, requiring two-thirds of a day for the investigation meeting, costs under that tariff would be \$2000.

Robin Arthur
Member of the Employment Relations Authority