

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 150
5389295

BETWEEN

HIREN DESAI
Applicant

A N D

TECH MAHINDRA LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Peter McCluskie, Advocate for Applicant
Anand Singh, Counsel for Respondent

Investigation Meeting: 24 September 2013 at Wellington

Date of Determination: 18 November 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Desai) was employed by the respondent (Tech Mahindra) from 19 April 2010 until 18 November 2011 as a senior manager – business development based in Wellington.

[2] Mr Desai says that he is owed sales commissions by Tech Mahindra for the period of the employment. Tech Mahindra resists that contention and says that it has paid all of Mr Desai's entitlements.

[3] There is dispute about Mr Desai's obligations in his role. Mr Desai says that he was instructed to simply manage Tech Mahindra's relationship with Telecom, a large client in the Wellington region. He says he was specifically told not to seek to obtain other clients and in particular was not to bid for work at general manager level because he was told that was the role of the country manager for Tech Mahindra who was based in Auckland.

[4] Mr Jagdish Mitra, a senior manager with Tech Mahindra, told the Authority that he thought it inconceivable that Mr Desai would have been given such a limited brief and he emphasised the need for services companies like Tech Mahindra to expand their client portfolio in order to continue growing their businesses. Mr Mitra thought that far from precluding approaches at general manager level, all that Mr Desai would have been told was to keep his country manager informed of approaches that he made for new business.

[5] There was an individual employment agreement entered into between the parties. For present purposes, it is appropriate for the Authority to refer to clause 6. That clause provides for a gross annual salary for the position of NZ\$110,000.

[6] The final two sentences of clause 6(a) of the operative employment agreement are in the following terms:

*You will be covered under company Standard Sales Incentive Plan.
For the first year your joining [sic] you will receive guaranteed
incentive of NZD25,000 which will be adjusted against your actual
sales incentive.*

[7] It is common ground that for all the period of Mr Desai's employment, the sales incentive plan for Tech Mahindra was under review. That review did not conclude until after his employment ceased. However, it is equally accepted by both parties that there was a sales incentive plan in operation for Tech Mahindra during the employment of Mr Desai, notwithstanding that the documentation of it was being reviewed for all of the period of the employment.

[8] It is also common ground that the second sentence just quoted from clause 6(a) of the operative employment agreement effectively constitutes a guarantee of NZ\$25,000 commission for the first year of the employment. Mr Mitra told the Authority that given that provision, if Mr Desai had generated more sales than would be associated with the NZ\$25,000 incentive, he would have received more payment by way of commission but the NZ\$25,000 was the minimum figure for the first year.

[9] As a matter of fact, the NZ\$25,000 commission was the only commission which Mr Desai received.

[10] In the first year of the employment, there was no company documentation identifying either a target or a commission payment that should attach to that target until Mr Desai received a letter from the employer dated 29 December 2010 which

indicated that he was eligible for a US\$50,000 bonus. Mr Desai says he did not receive this letter until 1 February 2011, more than a month after it was written.

[11] Either way, this was the first document from Tech Mahindra identifying any bonus amount and/or any target for the payment of such a bonus amount, other than the general provision referred to in clause 6(a) of the employment agreement, since Mr Desai commenced his employment

[12] Prior to the receipt of the 29 December 2010 letter, Mr Desai says that he had various discussions with his country manager and other senior managers about the targets and/or the commissions that he should expect but there is no documentary evidence of this.

[13] Mr Desai's response to the 29 December 2010 letter was to immediately complain about it on the footing that it had been provided to him so late in the financial year as to make the target virtually impossible to achieve and on the basis that the various parts of the target which are identified in the letter bear little or no relationship to the work he was actually tasked to do.

[14] Accordingly, Mr Desai entered into an extensive email communication with a variety of his superiors with a view to retaining the bonus figure of US\$50,000 but amending the targets so as to make them more achievable, having regard to Mr Desai's view about what he was engaged to do.

[15] Eventually, Mr Desai claims to have obtained the consent of a senior manager to the amendment of the targets that he had to achieve in order to justify receipt of the US\$50,000 bonus but there is no documentation to support that understanding save for Mr Desai's own email trail setting out what he understood was agreed in a previous telephone discussion.

[16] Tech Mahindra says there was never an agreement to vary the terms of the 29 December 2010 letter and while it accepts that the letter was not forwarded to Mr Desai in a timely fashion, and in particular was provided to him towards the very end of the financial year, it does not accept that there was ever a variation of the terms of the letter. It follows from that position that Tech Mahindra says in respect of the first year in question, that is to say the year ending 31 March 2011, Mr Desai has no entitlement other than the NZ\$25,000 that he has already been paid by way of commission.

[17] A similar situation developed in respect of the year commencing 1 April 2011 although a significant difference is that for this year, there was no letter from Tech Mahindra setting out what Mr Desai is entitled to by way of commission, at least not until after the employment relationship had come to an end.. Of course, Mr Desai was aware that he had not been paid the bonus he thought he was entitled to for the first year of his employment, or even at that point the NZ\$25,000 minimum to which he was entitled as of right.

[18] Accordingly, Mr Desai again engaged with his superiors with a view to getting an agreement about what his targets ought to be. Again, Mr Desai's evidence is that he reached an understanding with his managers, sought to get confirmation of that alleged agreement, but was unsuccessful.

[19] Again, all the Authority has as evidence is the email traffic generated by Mr Desai to try to confirm the agreement he thought had been reached.

[20] Again, the Authority needs to emphasise that Tech Mahindra denies that there was ever an agreement for the second year as Mr Desai maintains and of course there is no company documentation at all to support Mr Desai's claim.

Issues

[21] It will be important for the Authority to determine whether in fact it was a term of Mr Desai's employment agreement either in the first year or in the second year, for an incentive to be payable over and above the \$25,000 incentive specifically referred to in the individual employment agreement.

[22] It will be remembered that Mr Desai's evidence is that, in each of the financial years in which he was employed by Tech Mahindra, he entered into, and concluded negotiations with Tech Mahindra so as to provide that additional incentive. Conversely, Tech Mahindra maintain that no such agreement was ever reached in respect to either financial year, and that there is no documentation to suggest any such agreement.

[23] It follows that the Authority will need to consider whether an agreement was reached in respect to either of the relevant financial years for an additional incentive (that is beyond the \$25,000 referred to in the employment agreement) and if there was, what were the terms of that agreement.

[24] It will be convenient if the Authority considers each financial year in turn. Although the argument is similar in each case, there was one significant difference between the two years; in the first year, as the Authority has already indicated, there was a document dated 29 December 2010 which identified access to an incentive payment of US\$55,000. No such letter or other document exists in respect of the second year at least while the employment relationship continued.

The 2010/2011 Financial Year

[25] During the course of the investigation meeting, the Authority heard much evidence around the way in which incentives were established within Tech Mahindra's business and how sales people were able to obtain the payment of those incentives through the delivery of sales in terms of the graded system of benefits determined by the company.

[26] It is common ground between the parties that the company's standard sales incentive plan was under review during all of Mr Desai's employment. For the avoidance of doubt, the Authority accepts that the process by which the sales incentive plan was reviewed involved a number of senior managers of Tech Mahindra consulting on the document with the ultimate decision being made by Tech Mahindra's Chief Executive Officer. Implementation of the sales incentive plan was left to the Head of the Resources and the Head of Compensation and Benefits in consultation with the Chief Financial Officer and the Executive Management team.

[27] Employees were incentivised for selling to a variety of grades of customer and revenue such that the strongest incentive would apply to sales involving new revenue from a new customer and the weakest incentive would apply to sales on existing revenue streams to existing customers with a mid-point involving sales for new revenue streams to existing customers.

[28] Obviously, revenue growth was the key determinant of whether the incentive would apply or not. Percentage figures were usually identified, achievement beyond which attracted the incentive payment.

[29] In this first financial year of Mr Desai's employment, it is common ground that he received a letter dated 29 December 2010 which identified his overall revenue target and identified the payments that he would be entitled to if he achieved those

revenue targets. They were broken down in terms of the type of revenue required to generate payment of an incentive.

[30] It is also common ground that for whatever reason, Mr Desai received this letter late in the financial year and in particular that he received it more than a month after the letter was actually dated.

[31] Mr Desai's evidence to the Authority was that he immediately protested to his managers both the lateness of the notification and the terms of the incentive on the footing that he claimed the effect of what was proposed in the 29 December 2010 letter was completely unachievable.

[32] Amongst other things, he raised his general objection to being incentivised for work outside of the ambit of Telecom New Zealand Limited's work; as the Authority has already observed, there is dispute between the parties about whether Mr Desai was to bid for work outside of his obligations to look after the Telecom account, or not.

[33] Whatever the truth of that particular argument, for present purposes all that the Authority needs to decide is whether the letter of 29 December 2010 created an incentive entitlement for Mr Desai or not and whether, by his actions in protesting both the lateness of the notification and the nature of the incentive actually offered, he changed the legal position.

[34] For the avoidance of doubt, the Authority is satisfied that if Mr Desai had simply accepted the 29 December 2010 letter as evidencing the incentive that applied to him in the first year of his employment and, whatever the difficulties in terms of timing, had achieved additional sales which were incentivised by that arrangement, then he would have been entitled in terms of his individual employment agreement to the incentive that flowed from the additional sales that he had made.

[35] This is because the terms of Mr Desai's employment agreement, referred to in para.6 of this determination, make clear that he is to be covered by the company's standard sales incentive plan, has a guaranteed minimum incentive of NZ\$25,000 but that he could aspire to more than that figure by delivering additional sales.

[36] While it may not be apparent from a construction of the words in clause 6 of the individual employment agreement that that is what that provision means, the

Authority is satisfied on the evidence it heard from both parties that each accepted that was the purport of the clause.

[37] In effect then, there was a sales incentive plan to apply, both parties understood how that sales incentive plan was created, and the Authority has already described that process, and in respect to the first year in question, Mr Desai had been advised of the incentives that applied to him beyond the guaranteed minimum of NZ\$25,000 which is referred to clause 6 of the individual employment agreement.

[38] So the Authority is satisfied that if Mr Desai had achieved additional sales in accordance with the 29 December 2010 letter he would have been entitled to additional incentive payments pursuant to the formula set out in the letter. But that did not happen. The Authority is satisfied on the evidence it heard that Mr Desai did not achieve those targets.

[39] Given the lateness of the notification of the nature of the incentive, it might be thought that Mr Desai would only have a limited period of time within the balance of the financial year in order to achieve the targets identified. But one would have thought that a person deriving income in part from an incentive system would have done everything in their power to ensure that they were making as many sales as possible throughout the whole of the financial year so as to be best placed to attract an incentive payment. After all, the individual employment agreement made clear that there was an entitlement to additional incentives and the Authority did not understand Mr Desai to be claiming that he did not understand how the sales incentive plan was derived.

[40] What is more, Mr Mitra gave evidence that any sales person whose income was partly derived from incentive payments would do everything in their power to sell even in circumstances where the actual basis of the incentive had yet to be determined. This conclusion is reached, at least in part because Mr Mitra did not accept that the receipt of the letter was the first time that Mr Desai would have been confronted with his targets, and/or the incentives derived from them. Mr Mitra accepted this was the first occasion that information had been documented but he indicated that the sales process was facilitated by weekly or fortnightly meetings with the country manager and then monthly meetings with a more senior manager still. Those sales meetings would habitually discuss targets and incentives.

[41] Even if Mr Desai is to be understood as claiming ignorance of how the sales incentive plan is prepared, the Authority is satisfied on the evidence it heard that the sales incentive plan is a company plan generated by the company and advised to the employee.

[42] That understanding is absolutely consistent with the effect of the 29 December 2010 letter which simply sets out what Mr Desai must do in order to achieve the incentives contemplated. The letter arrived without fanfare or notification apparently and there is nothing in the evidence to suggest, nor did Mr Desai maintain, that he was in anyway involved in the negotiation of the incentive payment.

[43] Indeed that would be inherently unlikely as his immediate response to receipt of the letter was to complain about it, indicating both that it was received too late in the year to be efficacious and in any event was unachievable. Not only did Mr Desai engage with his superiors with a view to trying to vary the terms of the incentive proposed but as a matter of fact he did not achieve the targets set out in the letter for the first year and as a consequence was not paid any additional incentive beyond the N\$25,000 that he was guaranteed.

[44] As the Authority has been at pains to note, if he had achieved the targets set in the 29 December 2010 letter, then the Authority I satisfied he would have been entitled to the incentive payments and had there been any dispute from Tech Mahindra as to his entitlement to those monies, he would have been able to maintain a case for receipt of those incentive payments on the footing that Tech Mahindra's letter constituted a statement of the sales incentive plan for the year in question which by virtue of the words in the employment agreement, the parties were to entitled to rely upon.

[45] But as the Authority has already made clear, that did not happen, Mr Desai did not achieve the targets and indeed protested the timing and calculation of the targets while seeking to maintain the US\$50,000 incentive payment.

[46] Mr Desai wants the Authority to effectively imply agreement to a reduced set of targets based essentially on the email traffic which Mr Desai engaged in with his superiors at Tech Mahindra which Mr Desai claims resulted in an agreement to vary the terms of the target. The consequence of that amendment of the target is alleged to

be the creation of a more realistic set of targets which it is suggested Mr Desai met and is therefore entitled to additional incentive payment.

[47] But this is effectively asking the Authority to write in terms of the agreement which the parties have not themselves agreed to and that cannot be right. There is simply no evidence whatever that Tech Mahindra ever agreed to the revised targets. It is true that there were discussions initiated entirely by Mr Desai with his superiors at Tech Mahindra but the Authority cannot assume that Tech Mahindra agreed to the revised targets simply because they failed to quarrel with Mr Desai's conclusion that there was an agreement between him and the employer on the revised figures.

[48] Even if agreement could somehow be implied, it would still be necessary for the Authority to write in a provision for the calculation of the incentive payment based on the revised figures and that is effectively what Mr Desai is asking the Authority to do. Indeed he goes so far as to offer the Authority a variety of different ways in which the calculation could be made.

[49] It is not the role of the Authority to write in provisions into an employment agreement where the parties have been silent on that matter. The only way of getting an enforceable provision in an employment agreement is by having the parties to that agreement agree it and ideally, document it. In the Authority's considered opinion, there has been neither agreement nor documentation of such an agreement in the present case.

[50] This is not a case where there are basic provisions in an employment agreement which indicate how an incentive or bonus payment is to be made or even where there is a course of conduct relating to the payment of such monies in previous years. As such, this case can be contrasted with Member Doyle's decision in *Anderson v. Clough Agriculture Ltd* [2012] NZERA Christchurch 195 (basic contractual provisions relied upon to calculate a bonus entitlement) and with cases where custom and practice would determine entitlement, as was discussed in *Bradshaw v. James Pascoe Ltd* AA 226/07 (Member Campbell) although that case was decided on the different point that, because the incentive policy was not included in the employment agreement, and the policy left discretion with the employer, no claim could lie.

[51] Nor can there be any certainty about the way that the alleged new agreement would work in practice. It is fair to say that the email exchanges which Mr Desai asks the Authority to rely upon changed the whole fabric of the incentive plan set out in the 29 December 2010 letter so that even if it were to be accepted as evidence of a new arrangement, the Authority is not persuaded that all of the elements of the agreement so relied upon are covered by the email traffic. On that basis any new understanding would be void for uncertainty in any event.

[52] In summary then, the Authority is not persuaded that Mr Desai has made out his case that there was an agreement between the parties which somehow superseded the incentive plan set out in Tech Mahindra's letter of 29 December 2010. There being no agreement, there can be no entitlement to payment and so Mr Desai's claim falls away.

[53] As the Authority has already made clear, if Mr Desai had performed in terms of the 29 December 2010 letter and attracted incentive payments as a consequence of that in the financial year in question, then in the Authority's judgment, Mr Desai had entitlement to those incentive payments, as of right. This is because the 29 December 2010 letter was provided to him by Tech Mahindra, and he was entitled to rely on receipt of those payments if he met the target, because the letter constituted Tech Mahindra's assessment under the sales incentive plan.

The second financial year

[54] The fundamental difference between the first year and the second year is that in the second year there was not even a letter from Tech Mahindra during the employment, setting out the targets and the incentives that would apply, if those targets were met.

[55] In fact, a determination of a target for the new financial year was not set until after Mr Desai had left the employment. Tech Mahindra maintain that they are not obligated in law to pay an incentive payment in respect to an employee who is not in the employment at the time that the payment is made. But in any event, and more particularly, Tech Mahindra maintain that Mr Desai did not qualify for an incentive payment because he did not meet the targets set by Tech Mahindra.

[56] In the Authority's judgment, implying an agreement in the second year would be even more challenging than in the first because there is even less clear evidence about what was allegedly agreed between the parties.

[57] The Authority's conclusion in relation to the second year must be the same as its conclusion for the first year, namely that there is no evidence there was an agreement between the parties, silence not giving consent, and even if it were to be accepted that there had been an understanding, the terms of that understanding are so vague as to require the Authority to write in provisions which rely on making assumptions about what the parties might or might not have agreed. In all the circumstances, the Authority is not persuaded there is any evidence of an agreement in the second year and therefore there cannot be any entitlement to commission as a consequence of such a purported agreement.

[58] It is no part of the Authority's function to write in provisions to an employment agreement where none exist and there is nothing before the Authority which would suggest any meeting of the minds on the terms of any understanding.

[59] Indeed, in both years in question, the Authority is asked to fix an entitlement to commission when the evidence does not disclose that the parties were of one mind on the issue. In the Privy Council decision in *Kofi Sunkersette Obu v. A Strauss & Co. Ltd* [1951] AC 243 their Lordships held that the relief sought was beyond the competence of any court to grant because the court could not determine the basis and rate of the commission since that would involve not only making a new agreement between the parties but also varying the existing agreement by visiting powers of the donor party on the court.

[60] That is precisely the situation here and the Authority is satisfied it has no power to grant the relief sought in either year in question.

Determination

[61] The Authority has concluded that the employment agreement between these parties is complete in its terms and that there is no evidence any variation to the agreement was arrived at by the parties subsequent to the execution of the individual employment agreement.

[62] It is plain that the individual employment agreement contemplates, by its words, the operation of the employer's sales incentive plan but in fact that plan was under review during the whole period of Mr Desai's employment and there is nothing in the employment agreement itself which with sufficient particularity would enable an entitlement to incentive payments to be read into the bargain that the parties struck.

[63] It follows from the foregoing that Mr Desai's various claims fail in their entirety.

Costs

[64] Costs are reserved.

James Crichton
Member of the Employment Relations Authority