

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 329
5426798

BETWEEN NEIL RICHARD GLADDEN
Applicant

A N D ABLE OWL XL LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Craig Purcell, Advocate for the Applicant
Greg Bennett, Advocate for the Respondent

Investigation Meeting: 30 July 2014 at Auckland

Submissions Received: 31 July from the Applicant
01 August from the Respondent

Date of Determination: 7 August 2014

DETERMINATION OF THE AUTHORITY

- A. The respondent, Able Owl XL Limited (Able Owl) is ordered to pay the applicant, Mr Gladden, sales commissions of \$4,104 and performance commissions of \$590, such sums totalling \$4,694 together with interest at the rate of 5% from 12 June 2013 down to the date of payment, within 14 days of the date of this determination.**
- B. Able Owl is ordered to pay Mr Gladden holiday pay of \$376.32 on the above commissions within 14 days of the date of this determination.**
- C. The withdrawal by Able Owl of commissions owing to Mr Gladden constituted unjustifiable action by it which affected Mr Gladden's employment to his disadvantage. Able Owl is ordered to pay**

Mr Gladden compensation in the sum of \$2,000 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) within 14 days of the date of this determination.

D. Costs are reserved.

Employment relationship problem

[1] The applicant, Mr Neil Gladden claims the respondent, Able Owl XL Limited (Able Owl), his former employer, unjustifiably withdrew commissions owed to him, totalling \$4,694 and holiday pay of \$376.32.

[2] Mr Gladden says Able Owl's refusal to pay commissions and holiday pay in the circumstances amounted to an unjustifiable disadvantage and he has suffered distress. Mr Gladden further claims that Able Owl's failure to participate in the mediation process in order to resolve the commissions and holiday pay issues amounted to a breach by it of its good faith obligations to him.

[3] Mr Gladden seeks payment of the commissions and holiday pay together with distress compensation for the unjustifiable disadvantage under the Employment Relations Act 2000 (the Act). Mr Gladden seeks the imposition of penalties against Able Owl in respect of its alleged breaches of good faith.

[4] Able Owl denies Mr Gladden's claims and states that Mr Gladden was overpaid commissions and owes it \$1,880.93. Able Owl also alleges that Mr Gladden engaged in a "scam" in order to obtain further commissions to which he was not entitled.

[5] The parties were unable to resolve the differences between them by the use of mediation.

Issues

[6] The following issues are to be determined:

- (a) Is Mr Gladden owed commissions in the sum of \$4,694 by Able Owl or did Able Owl overpay Mr Gladden by \$1,880.93?;
- (b) If Mr Gladden is owed the commissions, is he entitled to holiday pay on such amount?

- (c) If Mr Gladden is owed the commissions, was Able Owl's refusal to pay such sums in the circumstances an unjustifiable action which affected Mr Gladden's employment to his disadvantage?
- (d) Did Able Owl refuse to participate in the mediation process and if so did that failure constitute a breach of its obligations of good faith under the Act?
- (e) Is Able Owl liable to a penalty under the Act?

First Issue

Is Mr Gladden owed commissions in the sum of \$4,694 by Able Owl?

[7] Mr Paul Oulton is the sole director and shareholder of Able Owl, a company which specialises in Microsoft Excel training and products. Able Owl provides courses, training and webinars on Microsoft Excel and Microsoft products including Genie. Able Owl describes itself as a "*Microsoft Excel centre of expertise*"¹.

[8] Mr Gladden was initially employed by Able Owl on 9 August 2012 as a trainer/writer/consultant on a salary of \$60,000 per annum reporting to the Managing Director, Mr Oulton. An individual employment agreement was entered into between the parties and signed by Mr Oulton and Mr Gladden on 9 August 2012. Mr Gladden's role was a purely salaried one.

[9] Approximately three months after commencing employment, Mr Gladden was informed by Mr Oulton that he was not happy with Mr Gladden's presentation skills. Mr Gladden was offered and accepted a sales role on the same conditions of employment. Mr Gladden requested the new role be documented but Mr Oulton was of the view the existing employment agreement was flexible enough to incorporate the change to Mr Gladden's role.

[10] In mid-February 2013, Mr Oulton decided in response to poor business conditions to alter Mr Gladden's remuneration structure from being solely a base salary to that of base salary and commission on sales of services and products.

[11] The commission scheme proposed by Mr Oulton was contained in a document entitled "*Neil proposal*" and was discussed by Mr Oulton and Mr Gladden on about

¹ www.ableowl.com

20 February. The proposal was that Mr Gladden would continue to receive a base salary but this would be at the reduced rate of \$2,500 per month, together with commissions. Commissions could be earned in two ways under the proposed scheme. Firstly, on points achieved by Mr Gladden and secondly, on all Genie renewals achieved by Able Owl.

[12] With regard to the first way in which to earn commission, (points based commission), listed products sold by Able Owl attract a certain number of points. Upon the sale of a product on the list, Able Owl pays a commission of \$4 per point. For example, if products totalling 300 points are sold, commission payable is \$1200.

[13] With regard to the second way in which Mr Gladden could earn a commission, (performance commission). In order to achieve a greater level of Genie renewals, Able Owl agreed to incentivise Mr Gladden by paying him \$100 for each Genie renewal achieved by Able Owl over a renewal rate hurdle of 50%. The *Neil proposal* set out examples of what Mr Gladden's likely performance commission would be if Able Owl achieved an expected Genie renewal rate of 75% , a high renewal rate of 80% or a low renewal rate of 60%. According to the proposal, Mr Gladden was expected to earn an annual salary including commissions of \$63,900. This was almost \$4000 more per annum than the base salary Mr Gladden was receiving in his salaried role.

[14] Mr Gladden was informed that if he did not agree to the new remuneration structure it was likely his role would be made redundant.

[15] The proposal was complex and Mr Gladden took it away to consider. Before accepting the proposal, Mr Gladden sought to ensure his understanding of the way in which the commission scheme would work was correct. Mr Gladden also proposed Able Owl pay him an extra amount of \$31 per hour for any 'non sales related' tasks requested of him from time to time such as Webinar presentations, co-presentations, telephony, knowledge-based updates. Mr Gladden set out in a document, his understanding of how the commission scheme would work and his proposal to be remunerated for extra work at \$31 an hour. Mr Oulton and Mr Gladden discussed it.

[16] Mr Oulton was not agreeable to the payment of \$31 per hour to Mr Gladden for extra work which he believed was covered adequately by his base salary and commission. This part of Mr Gladden's document was struck out.

[17] At the investigation meeting, Mr Oulton denied ever receiving Mr Gladden's document clarifying the commission scheme. Mr Oulton denied Mr Gladden was entitled to both the points commission and the performance commission, describing this as "double dipping".

[18] However, subsequently during questioning, Mr Oulton recalled having a discussion about the extra payment of \$31 per hour referred to in Mr Gladden's document.

[19] Further, one of the documents produced at the investigation meeting, by Mr Oulton dated 25 March 2013 was almost identical in every respect to Mr Gladden's document clarifying the commission scheme. The document is entitled:

*Able Owl XL Limited; Neil Gladden
To be added to the employment contract as an addendum; 25 March
2013*

[20] This document sets out Mr Gladden's new base salary and the performance commission of \$100 per Genie renewal over the 50% hurdle, it sets out the points commission of \$4 per point and the proposal that Mr Gladden be remunerated at the rate of \$31 per hour for extra work is struck out.

[21] I prefer Mr Gladden's evidence to that of Mr Oulton. Mr Oulton was not familiar with the documentation which he produced to the Authority, his evidence was inconsistent and he often had no recollection of events and his answers were vague.

[22] I find that Mr Gladden and Mr Oulton discussed the proposed remuneration package in mid February 2013. I find that Mr Gladden and Mr Oulton agreed that Mr Gladden was entitled to both a points commission and a performance commission as clarified by Mr Gladden but that no payment would be made for extra work at \$31 an hour as proposed by Mr Gladden. This new remuneration structure was to be payable to Mr Gladden from 25 March 2013.

[23] Mr Gladden spoke with Natalie in the administration department about his new remuneration structure and how the points and performance commissions were to be paid. Natalie confirmed with Mr Gladden that she had spoken with Mr Oulton who had explained to her that Mr Gladden was on a different commission scheme to that of other sales staff and that they needed to sort out payment of commissions

between them. Mr Gladden produced a spreadsheet twice a week highlighting Able Owl's Genie renewal percentages from which Natalie was able to calculate his performance commission.

[24] On 13 May 2013, Mr Gladden was informed by Mr Oulton that he was to be made redundant with his last day of employment being 12 June 2013.

[25] On 12 June 2013, Mr Gladden was owed base monthly salary and points commissions payable for clients who had paid their invoices on products and those clients who had yet to pay. Mr Gladden was also owed a performance commission for Able Owl exceeding the Genie renewal threshold.

[26] Mr Gladden was not paid on his final day of employment. On 20 June 2013, Mr Gladden requested Leanne, who had replaced Natalie in the administration department for his payslip. The payslip Leanne provided to Mr Gladden dated 20 June 2013 was for the period ending 25 June 2013 and set out a total gross of \$6,719.41 owing to Mr Gladden.

[27] Mr Gladden was not paid the amount set out on his payslip and on 28 June 2013 received a new payslip totalling \$3,835.83 gross, almost \$3,000 less than the first payslip.

[28] Mr Gladden contacted Mr Oulton who told him that the commission had been withdrawn because Mr Gladden had not gone through the proper sales verification process which required that he produce telephone records or emails to prove his commission claims.

[29] At the Investigation Meeting, Mr Oulton stated that after Mr Gladden had left he had cause to query his final pay. Mr Oulton stated in response to questioning about withdrawing Mr Gladden's commission payment in his final pay "*....I don't get actively involved in payroll, I occasionally do spot checks or if something is brought to my attention, I adjudicate upon it. I didn't know the verification procedure had not been done...*"

[30] Mr Oulton confirmed that up until this time, he had never stopped payment of Mr Gladden's commissions. Mr Oulton relied on a document which had been emailed to staff by the administration department to justify cancelling Mr Gladden's commission payment.

[31] The document is entitled “*Checking Telesales Commission Claims*”:

2. *Open CRM and any supporting email/s. Check that it is a sale, inbound/outbound and new/existing. Check this against what they have put on sales sheet. Onus is on the sales rep to provide all supporting evidence i.e. email/AVAYA recording details. If there is any discrepancy, check with sales staff and get them to provide further evidence if required.*

[32] This document does not state that if the “supporting evidence” is not provided the commissions will not be paid. In any event, Mr Gladden had, as discussed with Mr Oulton “*sorted out*” with Natalie her requirements for payment of his commissions. Mr Gladden’s verification process differed from other sales staff who were on different incentive packages. Mr Gladden, in accordance with his arrangement produced a spread sheet twice a week highlighting Genie renewal percentages from which the calculation and payment of his performance commissions could be made. Mr Oulton was “*hands off*” when it came to payroll and administration matters. I find that Mr Gladden produced sufficient information to payroll from which his commissions could be calculated and paid. Mr Oulton unilaterally and unjustifiably in my view, decided that no commissions were due to Mr Gladden and withdrew the proposed payment to him.

[33] Mr Gladden was unable to access sales information after his termination by Able Owl. Mr Gladden calculated Able Owl’s percentage of Genie renewals based on a formula obtained from Able Owl’s IT consultant Eric Baumer. Using this formula Mr Gladden prepared a spread sheet showing product sales and Genie renewals. On the basis of this information, which was similar to the information used to calculate and pay commissions during Mr Gladden’s employment, Mr Gladden calculated he was owed \$4,104 in performance commissions and \$590 in points commissions.

[34] Able Owl did not produce wage and time records to the Authority despite being directed to do so and could not satisfy me that these amounts were not due to Mr Gladden. At the investigation meeting Mr Oulton claimed Mr Gladden had attempted to “*implement a scam*” in order to get more commissions. Three members of Able Owl’s current staff were called in order to support this claim.

[35] These witnesses were all asked by Mr Oulton to attend a meeting with him approximately two weeks before the Authority’s investigation meeting. Mr Oulton asked them whether they had observed anything “*about Mr Gladden which was*

incorrect". Mr Oulton prepared a witness statement for each. In two cases the witness statements were almost word for word identical. Each witness described a meeting with Mr Gladden during the course of which he allegedly asked them to participate in a "scheme" to increase his commissions which they thought was dishonest. Upon further questioning it became apparent that they thought Mr Gladden's proposal had not been authorised by Mr Oulton and had drawn the conclusion Mr Gladden was acting dishonestly.

[36] I do not accept this evidence. It was clear from Mr Gladden's evidence which I prefer, that he met with the staff concerned and encouraged them to contact their clients to increase Genie renewals. By doing so he would be incentivised but that is exactly how Mr Gladden's performance commission worked and exactly what Mr Oulton wished to achieve- an increase in Able Owl's Genie renewals. I find that Mr Oulton's description of Mr Gladden's actions as being a "scam" to be unsupported and inflammatory.

[37] I find that Mr Gladden is owed the sum of \$4,694 in commissions by Able Owl. Able Owl did not overpay Mr Gladden in commissions. I order Able Owl to pay Mr Gladden within 14 days of the date of this determination, the sum of \$4,694 together with interest at the rate of 5% from 12 June 2013 down to the date of payment pursuant to s.87 of the Judicature Act 1908.

Second Issue

If Mr Gladden is owed the commissions, is he entitled to holiday pay on such amount?

[38] I find the commissions were due to Mr Gladden because he met the required targets for payment of them. Holiday pay is therefore payable on the commissions which were not purely discretionary payments. I order Able Owl to pay Mr Gladden holiday pay totalling \$376.32 gross under the Holidays Act 2003 within 14 days of the date of this determination.

Third Issue

If Mr Gladden is owed the commissions, was Able Owl's failure to pay such sums an unjustifiable action which affected Mr Gladden's employment to his disadvantage?;

[39] Mr Gladden received a final pay slip which included commission payments. Mr Oulton, without any discussion with Mr Gladden withdrew the commission

payments and instructed his payroll staff to issue a new payslip with no commissions payable to Mr Gladden. When challenged by Mr Gladden, Mr Oulton demanded he produce emails and other verifying information to substantiate the commission payment.

[40] It is my finding that Mr Gladden had provided the necessary information to payroll as was his practice since the new remuneration scheme had commenced. Mr Oulton had instructed Mr Gladden and Natalie to “*sort out*” what information was necessary for the payment of Mr Gladden’s commissions and this had been attended to by them and acted upon. It was not open to Mr Oulton to subsequently change the rules for payment.

[41] Section 103A of the Act states that for the purposes of ss.103(1)(a) and (b) whether an action was justifiable is to be determined on an objective basis, by applying the test in s103A(2). The test is “*whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the ...action occurred.*”

[42] Withdrawing the commission payments without discussing it or even informing Mr Gladden was unfair. Mr Oulton’s subsequent attempt to justify such action by alleging Mr Gladden had failed to follow a sales verification procedure not raised with or applicable in my view to Mr Gladden, was not the action of a fair and reasonable employer. Mr Oulton’s subsequent allegations that Mr Gladden had implemented a “scam” to obtain further commissions to which he was not entitled was inflammatory, incorrect and unjustified.

[43] Mr Gladden has given evidence of the stress he suffered as a result of Able Owl’s unjustifiable actions. I find that Mr Gladden did suffer an unjustifiable disadvantage and I award compensation in the sum of \$2000 to be paid by Able Owl under s.123(1)(c)(i) of the Act. This sum is to be paid within 14 days of the date of this determination.

Fourth Issue

Did Able Owl refuse to participate in the mediation process and if so did that failure constitute a breach of its obligations of good faith under the Act?

[44] Mr Oulton refused to attend mediation after being requested by Mr Gladden to do so. Mr Oulton confirmed to both Mr Gladden and to the mediation services he was

not prepared to do so until Mr Gladden had “*proved*” he was entitled to commissions. For the reasons above, Mr Gladden had provided the information he was required to from which his commissions could be calculated. Mr Oulton’s actions in refusing to attend mediation were arrogant and not in good faith, in my view. However, at the time of these allegations, Mr Gladden was no longer an employee and the provisions of s4 of the Act did not apply.

Fifth Issue

Is Able Owl liable to a penalty under the Act?

[45] Mr Gladden has claimed penalties in respect of Able Owl’s alleged breaches of its obligations to act in good faith under the Act. As mentioned those breaches occurred after Mr Gladden’s employment ended and so there is no finding of breach of good faith under s.4 of the Act. Accordingly, no penalties are payable.

Costs

[46] Costs are reserved. Mr Gladden has 14 days from the date of this determination to file a memorandum as to costs. Able Owl has 14 days from receipt of Mr Gladden’s memorandum as to costs, in which to respond.

Anna Fitzgibbon
Member of the Employment Relations Authority