

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 141  
5422017

BETWEEN CRAIG DAVID GORDON  
Applicant  
AND ADSHEL NEW ZEALAND  
LIMITED  
Respondent

Member of Authority: Anna Fitzgibbon  
Representatives: Robbie Bryant, Counsel for Applicant  
Stephen Langton, Counsel for Respondent  
Investigation Meeting: 7 April 2014 at Auckland  
Submissions Received: 7 and 9 April 2014 from Applicant and 7 April 2014  
from Respondent  
Date of Determination: 11 April 2014

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**DETERMINATION OF THE AUTHORITY**

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- A. Under the terms of an individual employment agreement (the employment agreement) between the applicant, Mr Craig Gordon and the respondent, Adshel New Zealand Limited (Adshel), Adshel had a discretion whether to pay commission to Mr Gordon and the amount of such commission on sales generated in April 2013 (April commission).**
- B. The exercise by Adshel of its discretion not to pay Mr Gordon the April commission was not the action of a fair and reasonable employer in the circumstances.**
- C. Adshel is ordered to pay Mr Gordon the April commission together with interest at the rate of 5% from 3 May 2013 down to**

**the date of payment, within 14 days of the date of this determination.**

**D. Holiday pay is not payable on the April commission which as a discretionary payment is excluded from the definition of ‘gross earnings’ under the Holidays Act 2003.**

**E. Costs are reserved.**

### **Employment relationship problem**

[1] This employment relationship problem originated as a claim by the applicant, Mr Craig Gordon that he had been unjustifiably disadvantaged by the respondent’s (Adshel’s) failure to pay him the April commission totalling approximately \$5,000. Mr Gordon further claimed that Adshel’s failure to pay him the April commission constituted a breach of good faith and a breach of his employment agreement.

[2] Mr Gordon’s Statement of Problem was subsequently amended to that of a claim for payment by Adshel of the April commission together with interest plus payment of holiday pay on the April commission.

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

[4] At the Authority’s investigation meeting, counsel for both parties accepted that the employment relationship problem for determination by the Authority concerned a dispute between the parties under s.129 of the Employment Relations Act 2000 (the Act) about the interpretation, application and/or operation of the remuneration provisions contained in the employment agreement.<sup>1</sup>

[5] Counsel for both parties agreed that the issues for determination by the Authority were whether under the terms of the employment agreement, Adshel had a discretion to pay commission to Mr Gordon and if so, whether it was entitled to exercise the discretion and not pay Mr Gordon the April commission.

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<sup>1</sup> Para.2.1 submissions of counsel for applicant dated 7 April 2014, para.2 submissions of counsel for respondent dated 7 April 2014

## Issues

[6] The following issues are to be determined:

- (i) Did Adshel have a discretion under the terms of the employment agreement regarding payment to Mr Gordon of the April commission?
- (ii) If the answer to the first issue is yes, was Adshel entitled to exercise the discretion and not pay Mr Gordon the April commission?

## First Issue

### **Did Adshel have a discretion under the terms of the employment agreement regarding payment to Mr Gordon of the April commission?**

[7] Adshel is in the business of selling advertising space to advertisers and media agencies on bus shelters and on buses throughout New Zealand.

[8] Mr Gordon was initially employed by Adshel on 23 March 2009 as Campaign Services Coordinator. The role was a purely salaried one. Mr Gordon was subsequently promoted to the position of Account Executive reporting to the Auckland Sales Manager, Ms Raewyn Anderson. A new individual employment agreement was entered into between Mr Gordon and Adshel on 1 February 2011 (the employment agreement). The new role was remunerated by way of base salary and commission. Benefits included carparking and a mobile phone.

[9] The employment agreement included the following provision:

- (6) *Total pay*  
*Your total pay (including both salary and, if you elect to join KiwiSaver, any KiwiSaver contributions we make, but excluding benefits referred to separately in this agreement) as set out at Schedule 1 attached. ...*

*You acknowledge that your total pay and other entitlements shall fully compensate you for the time worked and duties performed under this agreement.*

[10] Schedule 1 stated:

#### **SCHEDULE 1- REMUNERATION** **Effective from 1<sup>st</sup> February 2011**

##### **Total Pay**

- a) *Base salary; \$50,000 per annum*

- b) *Commission; \$10,000 per annum based on on-target earnings.*

*The Commission Earnings scheme may be changed or revoked by Adshel in its sole discretion at any time. Adshel also reserves the discretion whether to make any Commission payment, and in relation to the amount of any payment to be made.*

**Benefits**

- a) *Car Parking*  
b) *Mobile Phone*

[11] The recital to the employment agreement stated:

*If there are any provisions you do not understand or you wish to clarify please contact your manager or the NZ Sales Director. To accept the terms and conditions set out in this letter, including your new title and remuneration arrangements, please return a signed copy of this letter to Brani Simonovska by 7 February 2011.*

[12] The declaration at the conclusion to the employment agreement provided an acknowledgment by Mr Gordon that he accepted the employment agreement and its terms and conditions and confirmed that he had had the opportunity to read it and seek independent advice. Mr Gordon and Mr Nick Vile, the New Zealand Sales Director signed the agreement on 1 February 2011.

[13] On 5 March 2011, Mr Vile sent an email to Mr Gordon detailing the Commission scheme. The body of the email was headed “**2011 Commission Scheme: Craig Gordon**”. The Scheme set out commissions paid monthly on team targets met and commissions paid quarterly on individual targets met.

[14] Mr Vile said in relation to the Commission scheme that “... *the monthly component is based on achievement of a national consolidated budget for which 5 different revenue streams contribute ... The individual quarterly targets are based on the individual sales person achieving their quarterly sales budgets*”.

[15] Mr Vile also said that “*If an employee is eligible for a commission payment under the scheme, we consider we then have a discretion whether or not to pay that commission payment, or to pay a different amount*”.

[16] In March 2012, Mr Gordon made inquiries of Mr Vile about the 2012 Commission Scheme. Mr Gordon followed up with an email on 6 March to Mr Vile which stated:

*Just following up on what we discussed yesterday, I am after a timeframe of when I will have a confirmation either way about my commission schedule this year and what it will be. Whether it will be the same as last year or different. Ideally I would like a copy of my schedule as soon as possible.*

[17] Mr Vile responded:

*For your planning purposes you should use last year's schedule, so that anything in addition is a bonus. Also as a general comment commission is not always guaranteed so when you are planning your personal finances I would recommend using your base salary only so that once again anything in addition is a bonus.*

[18] Mr Gordon said that commissions were paid when targets were met. Mr Gordon said he understood Mr Vile's email reinforced his understanding that *"commission payments were not paid out automatically, and were only paid once your target was met ..."* and not to *"rely on commission payments as part of my monthly budgeting, as targets are not guaranteed to be met every month. The wording certainly does not confirm that even if a target had been met, it would not be guaranteed to be paid"*.

[19] It is not disputed that Adshel paid Mr Gordon commission payments for which he was eligible during his employment in his Account Executive role between March 2011 and April 2013.

[20] On 2 April 2013 Mr Gordon gave notice of his resignation which would take effect from 3 May 2013. Correspondence was exchanged between Mr Gordon and Ms Anderson about payment of the April commission.

[21] Ms Anderson informed Mr Gordon that he would not be paid the April commission because at the time it was to be paid out, in the week of 6 May 2013, Mr Gordon would no longer be employed by Adshel. Following receipt of correspondence dated 3 May from Mr Gordon's lawyer stating that Mr Gordon had performed well in his role as Account Executive, and requesting payment of the April commission, Mr Vile and Ms Anderson discussed whether to make payment.

[22] Mr Vile and Ms Anderson considered that Mr Gordon was not a *"great performer and contributor"* and were concerned at the low number of forward bookings Mr Gordon had made for the months following his termination which would affect the ability of the team to meet future targets.

[23] Mr Vile and Ms Anderson, on the basis they believed Adshel had a discretion as to whether or not to pay the April commission, decided not to.

[24] Both Counsel referred me to *Vector Gas Limited v. Bay of Plenty Energy Limited*<sup>2</sup> a case in which the Supreme Court considered the meaning of a commercial contract and what the agreed price for the supply of gas covered. The Court of Appeal in *Silver Fern Farms Limited v New Zealand Meat Workers and Related Trade Unions Incorporated*<sup>3</sup> referred to *Vector* and in particular Tipping J's contractual interpretation analysis. At para [33] Tipping J stated:

*The foregoing analysis recognises that, generally speaking, issues of contractual interpretation arise in three circumstances: mistake; ambiguity; and special meaning. A mistake can represent either a drafting error or a linguistic error. Errors of this kind are primarily the subject of rectification. But a clear drafting of linguistic error, combined with equal clarity as to what was intended, can be remedied by way of interpretation, and in that respect context can and should be taken into account. An ambiguity arises when the language is capable of more than one meaning, either on its face or in context, and the court must decide which of the possible meanings the parties intended their words to bear...*

[25] *Terson Industries Limited v. Loder*<sup>4</sup> sets out the approach taken by the Employment Court when considering a dispute under s.129 of the Act. At para.[21] Judge Shaw stated:

*In a dispute about the interpretation and operation of an employment agreement, pursuant to s.129 of the Act, the Court applies normal contractual principles of interpretation but would also take into account the special features of employment relationships and the statutory regime of the Act. The following principles apply to the construction of an employment agreement;*

- *The Court must take an objective approach to interpretation.*
- *The starting point is the words written in the agreement but the Court is not limited to giving the words a purely literal meaning. The Court looks to find the meaning which the agreement would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
- *Previous negotiations of the parties and their declarations of subjective intent are not admissible in interpreting the agreement.*

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<sup>2</sup> [2010] 2 NZLR 444

<sup>3</sup> [2010] NZCA 317 (CA)

<sup>4</sup> (2009) 6 NZELR 345 at para.21

- *There is a difference between the meaning of the words in a grammatical sense and the meaning of the document being what the parties using those words against the relevant background would reasonably have been understood to mean.*

[26] Mr Gordon had been promoted by Adshel into an Account Executive role in which he was responsible for selling advertising space to advertisers. Mr Gordon was remunerated by way of salary and commission on targets achieved by him and his team. This remuneration differed from his previous salaried role with Adshel.

[27] The employment agreement referred to “*Total pay*” in clause 6 of the employment agreement as that specified in Schedule 1. Schedule 1 split total pay into base salary and commission. Whether commission was to be paid and the amount to be paid was clearly specified as being at Adshel’s discretion.

[28] Counsel for Mr Gordon, Mr Bryant argued that “*once a commission scheme is implemented/in effect, there is no discretion to retrospectively refuse or alter payment under that scheme*”. Mr Bryant referred me to determinations of the Employment Relations Authority in support of these propositions. Neither of the determinations referred to contained a provision in the same clear terms as the one in this particular case.

[29] It is my finding that the plain wording of the employment agreement is clear. Schedule 1 states that the commission scheme can be changed “*at any time*” by Adshel in “*its sole discretion*”. It is my view that this must mean once the scheme has commenced. The clause also reserves to Adshel a discretion firstly as to whether to make a commission payment and secondly the amount to be paid.

[30] Mr Gordon’s new role was no longer just base salary, commission was paid. Mr Gordon took independent advice and agreed to the terms of the employment agreement, agreed to the commission schedule when presented to him in 2011 and when varied in 2012. Further, Mr Gordon was proactive in his discussions with Mr Vile about the operation of the scheme during his employment. This context and relevant background supports my finding that the commission provision is clear and is to be given its plain meaning.

[31] The answer to the first issue is that Adshel had a discretion in relation to whether or not to pay a commission under the Commission Scheme and if payment was to be made, the amount of the commission.

## **Second Issue**

### **If the answer to the first issue is yes, was Adshel entitled to exercise the discretion and not pay Mr Gordon the April commission?**

[32] Ms Anderson delivered Adshel's decision regarding payment of Mr Gordon's April commission in an email to him dated 29 April. Ms Anderson stated:

*Yes I have heard back and here is the official word on payment of commissions for departing employees ...*

*The person needs to be employed on the date payroll occurs, to allow time for the month to be finalised, commissions to be calculated, etc. When a sales person first joins Adshel or are first in their newly promoted role, they are commissioned on campaigns which occur in their period of employment but were signed prior to their employment. In Craig's situation, he finishes on the Friday, which is before the month ending. Commissions are not calculated until after Finance has completed and submitted our financials which is not until the week starting the 6th of May. There is also the risk when we pay commission to a departing employee then are faced with credits after they have left.*

[33] This advice was provided to Ms Anderson by Adshel Australia and appears to have been cut and pasted into Ms Anderson's email to Mr Gordon. Ms Anderson confirmed at the investigation meeting that the fact that Mr Gordon was not employed at the time the commission was to be paid out was the reason for non-payment of his commission.

[34] The employment agreement is silent on when a commission is to be paid to a departing employee. However, it is clear that the commission is calculated on sales generated in the previous month and the actual payment of the commission is a function of the Finance Department.

[35] Mr Gordon requested that his employment be extended so that he was still employed at the time payroll came to pay out the commission. This request was declined by Ms Anderson.

[36] On 3 May 2013, Mr Gordon's lawyer wrote to Mr Vile seeking payment of the April commission and stating:

*In April 2013, Mr Gordon worked tirelessly for Adshel and significantly contributed to his team, obtaining sales well in excess of Adshel's targets. It is clear that Mr Gordon and his team met the specific targets set by Adshel. As a result, Mr Gordon and his team became entitled to the commission payment pursuant to the Commission Scheme.*

[37] Mr Vile responded on 17 May setting out the reasons why commissions were not paid to departing employees and commenting adversely on Mr Gordon's performance and claiming these performance concerns had been raised with him. Mr Vile also referred to the fact that Mr Gordon had secured relatively few future bookings.

[38] At the investigation meeting Ms Anderson confirmed that the decision not to pay the April commission was because Mr Gordon was no longer an employee at the time it was to be paid. Mr Vile said employees were not told that commission would not be paid if they were not on the payroll at the time commission was paid out. Mr Gordon confirmed he was unaware of this policy or practice.

[39] Ms Anderson stated that after receiving the letter from Mr Gordon's lawyer, she and Mr Vile considered Mr Gordon's performance. They decided Mr Gordon's performance relative to the team was poor and that he had insufficient future bookings. Ms Anderson was of the view that Mr Gordon had "*mentally checked out*". For all these reasons, Mr Vile decided that Adshel was entitled to exercise the discretion referred to in Schedule 1 of the employment agreement and not pay the April commission to Mr Gordon.

[40] The issues concerning Mr Gordon having insufficient ongoing bookings, that he had "*mentally checked out*" and that there were performance issues were not raised with Mr Gordon as reasons for non-payment of the April commission. These issues were raised by Adshel following receipt of Mr Gordon's lawyer's letter on 3 May, and were raised by Adshel to justify its decision to exercise its discretion not to pay the April commission. Mr Gordon believed because the April targets had been met he would be paid the commission as in previous months. Mr Gordon's other team members were paid the April commission.

[41] Ms Anderson was Mr Gordon's immediate supervisor. A copy of Mr Gordon's performance review for January 2013 was attached to Mr Vile's affidavit of 3 March 2014. Mr Gordon's overall rating was 2.17 which meant that he

“*met expectations*”. Mr Gordon’s review shows that out of 19 factors, he exceeded expectations in 5 categories and was below expectations in 1 category. Ms Anderson’s comments about Mr Gordon at the conclusion of the review included the following:

*Another solid revenue performance by Craig! Craig is a very dependable worker who sets very high performance goals for himself. ... Craig is very focused and sometimes becomes a little bogged down in the details and although this means his work is thorough it has been at the expense of using his time to get himself in front of clients, building a market presence and building relationships so moving forward we will work on balancing Craig’s time more effectively.*

*Goals for objectives for 2013 have been developed specifically to help Craig’s development towards his goal of becoming an Account Manager.*

[42] At the investigation meeting, Mr Vile was concerned at Mr Gordon’s performance and gave it as one of the factors taken into account by him in declining to exercise the discretion to pay the April commission. Mr Vile said that there was a performance plan put in place to improve Mr Gordon’s performance. Mr Vile said that in the event that there had been no improvement in performance by Mr Gordon then Adshel would have gone through an official performance management process as required by New Zealand law. Mr Vile confirmed that no warning was ever issued to Mr Gordon.

[43] I do not accept Mr Vile’s evidence about Mr Gordon’s performance. Ms Anderson who directly managed Mr Gordon said Mr Gordon was a motivated employee who wished to set goals in order to progress to Account Manager level. A plan was specifically agreed between Ms Anderson and Mr Gordon setting out what was needed in order to fulfil his career aspirations. There was never any suggestion during Mr Gordon’s employment that he was being performance managed which could lead to a disciplinary outcome.

[44] Mr Vile confirmed that the only time at which performance was considered when deciding whether to pay commission to an employee, was when he made the final decision not to pay Mr Gordon the April commission.

[45] The relationship under scrutiny here is an employment relationship which “*has its own special character, determined by reference to a specialised body of*

*jurisprudence. The parties' overarching statutory obligations to act fairly and reasonably and in good faith must inform the exercise of any discretion*"<sup>5</sup>.

[46] Section 103A of the Act states that for the purposes of section 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*".

[47] Mr Gordon and the members of his team had been paid regularly pursuant to Adshel's Commission Scheme. In April the team met its monthly target and all except Mr Gordon were paid commission. The reason given to Mr Gordon when he queried this was that he was not employed at the date that the payment would be made. Mr Gordon was not made aware at any stage, either at the time he signed his employment agreement or when he resigned from his employment that being paid his commission following resignation was dependent upon a function of payroll. The practical reasons for this may have been well intentioned on Adshel's part but the impact on an employee not aware of the practice or policy as in Mr Gordons's case was unfair.

[48] Failing to pay the commission and subsequently attempting to justify the exercise of the discretion not to pay the April commission for alleged performance concerns which had never been raised in a manner that could be addressed by Mr Gordon, was in my view, not the action of a fair and reasonable employer.

[49] The exercise by Adshel of the discretion not to pay the April commission was subject to its statutory obligation to act fairly and reasonably. It did not. Accordingly, the discretion could not be exercised in such a manner and the April commission is payable to Mr Gordon. I order Adshel to pay Mr Gordon within 14 days of the date of this determination, the April commission together with interest at the rate of 5% from 3 May 2013 down to the date of payment pursuant to s.87 of the Judicature Act 1908.

[50] Following the Investigation Meeting, Mr Bryant sought to introduce new evidence that holiday pay had always been paid on commissions to Mr Gordon. The claim for holiday pay had been pleaded in the amended statement of problem, was

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<sup>5</sup> *New Zealand Nurses Organisation v. Whangaroa Health Service Trust* ERA Auckland AA326-10, 19 July 2010

raised during the Investigation Meeting and was the subject of submissions. The evidence attached to Mr Bryant's memorandum of 9 April does not assist the Authority in its determination of the issues. The fact that holiday pay may have been paid on commission does not alter my finding that Adshel had a discretion to pay commission but in this case had not exercised the discretion fairly. Holiday pay is not payable on the April commission which as a discretionary payment is excluded from the definition of "*gross earnings*" under the Holidays Act 2003.

### **Costs**

[51] Counsel for Adshel made submissions as to costs at the Investigation Meeting. Counsel submitted that the normal approach by the Authority to costs should apply, namely the imposition of a nominal daily tariff. Counsel submitted in the event Adshel was successful the nominal daily tariff should be increased to take into account the extra cost incurred by it as a result of the amendments by Mr Gordon to his original claim of unjustified disadvantage.

[52] Counsel for Mr Gordon requested the opportunity to present written costs submissions. Mr Gordon being the successful party has 7 days to file a memorandum as to costs. Counsel for Adshel has 7 days in which to reply.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**