

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 34
3015774

BETWEEN MARK HAUGHAN
Applicant

A N D STUART AND KATHRYN
WILLIAMSON t/a CERTA
SOLUTIONS
Respondent

Member of Authority: David Appleton

Representatives: Lucia Vincent, Counsel for Applicant
Rachel Brazil, Counsel for Respondent

Investigation Meeting: Determined by consideration of the papers

Submissions Received: 12 January 2018 from Applicant
14 February 2018 from Respondent

Date of Determination: 16 March 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. A sale for the purposes of Mr Haughan’s commission scheme occurred when the customer accepted an estimate or quote, and not when the job was invoiced.**
- B. The parties are to seek to agree what further commission payments are due to Mr Haughan using the guidance set out in this determination. If they cannot agree within 21 days, Mr Haughan may apply to the Authority for a determination.**
- C. I decline to impose a penalty upon the respondent.**

D. Costs are reserved.**Employment relationship problem**

[1] The issue in contention relates to how commission payments payable to Mr Haughan should be calculated. The respondent asserts that they are due only on sales made and invoiced prior to Mr Haughan's termination date whilst Mr Haughan asserts that they are due on sales made prior to his termination date, whether invoiced before or after the termination date.

[2] Affidavit evidence was lodged with the Authority by Mr Haughan on 17 October and 2 and 17 November 2017, with affidavit evidence lodged by Mr Williamson on 26 October 2017 and 13 November 2017. The parties wished for the matter to be determined on the papers in order to save costs. As the matter relates principally to a contractual interpretation issue, I agreed to this approach.

Material facts

[3] The respondent operates in the commercial printing industry. Mr Haughan sold his printing business to Mr and Mrs Williamson in late 2015 and was then employed by the respondent pursuant to the terms of an individual employment agreement which took effect from 6 October 2015. Mr Haughan was employed as the respondent's Wide Format and Signage Team Leader, which was a new role, created in order to help the respondent set up a wide format and signage offering, using Mr Haughan's experience and expertise.

[4] Mr Haughan's key duties were described as "*To manage and promote all activities of the Company relating to Wide Format and Signage activities*" and the salary for the position was cited as follows:

\$65,780 plus 5% of all wide format and Signage sales excluding GST.

[5] The individual employment agreement contained an entire agreement clause as follows:

2.2 This agreement constitutes the entire agreement between the Employer and the Employee and supersedes all previous agreements and commitments.

[6] The agreement also contained a clause as follows:

28 COMPLETENESS AND VARIATION

- 28.1 The terms and conditions set out in this agreement are deemed to be a complete record of the agreement between the parties and may only be varied by mutual consent, which should be recorded in writing should they occur.

[7] Both parties signed the agreement. The parties agree that commission would be due to Mr Haughan on all wide format and signage sales even if they were made directly by members of the team other than Mr Haughan. The dispute, therefore, is confined to whether Mr Haughan should be paid commission on sales which were invoiced after his termination.

[8] Following Mr Haughan's dismissal by reason of redundancy on 24 March 2017, being paid pay in lieu of three weeks' notice, and his raising of a personal grievance, a record of settlement was entered into by the parties on 6 April 2017. The relevant clauses of that record of settlement are as follows:

- B. The parties agree that the applicant is owed commission on sales as provided in his employment agreement but at the date of settlement the parties have not agreed on the amount owing.
 - C. Except for matters relating to the unpaid commission which will be determined in accordance with the individual employment agreement between the parties (agreement) the parties have agreed to resolve all matters relating to the applicant's employment including the personal grievances with the following agreed terms of settlement.
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- 6. The parties agree that the Applicant's commission payments must be paid pursuant to the agreement in all matters relating to the payment of the Applicant's commission payments are not resolved by and are excluded from these terms of settlement.

[9] Correspondence continued between the parties, in an attempt to resolve the issue of commission, up until July 2017 when the Statement of Problem was lodged with the Authority.

Principles of contractual interpretation

[10] The parties made extensive submissions about the rules of interpretation that are to be used by the Authority in determining this issue, citing the well-known,

seminal authorities of *Vector Gas Limited v Bay of Plenty Energy Limited*¹, *Silver Fern Farms Limited v New Zealand Meat Workers and Related Trade Unions Inc*² and *New Zealand Professional Fire Fighters Union v New Zealand Fire Service Commission*³, amongst others. The key principles may be summarised as follows:

- a. The principles of contractual interpretation applicable to employment agreements are the same as apply to all contracts.⁴
- b. The starting point is the natural and ordinary language of the parties.⁵
- c. If the language used is not on its face ambiguous, then the court (or Authority) should not readily accept that there is an error in a contractual text.
- d. It is valid to cross-check the provisional view of what the words mean against the contractual context and extrinsic evidence, if admissible, to identify contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear.

[11] I shall adopt these principles in determining the issue before the Authority.

The natural and ordinary language of the parties

[12] The key issue to decide is what is meant by the word ‘sale’ as the right to commission payment was triggered by a sale of the respondent’s wide format and signage services.

[13] Ms Vincent, in her written submissions, refers to a dictionary definition of the word “sale” as ‘the exchange of goods, property or services for an agreed sum of money or credit’. She says that the dictionary definition does not require invoicing and payment to amount to a sale. Performing the work, processing the job through creating a job bag, then invoicing are all steps that followed the sale in Ms Vincent’s submission. Ms Brazil submits that Ms Vincent has fallen into error by submitting

¹ [2010] NZSC 5, [2010] 2 NZLR 444

² [2010] NZCA 317

³ [2011] NZEmpC 149

⁴ *Silver Fern Farms*

⁵ *Vector Gas*

that the meaning of a “sale” in business does not include the completion of the job and payment, simply because a dictionary definition does not mention it.

[14] The word “sale” is a word which every fluent native speaker of English will understand in a broad sense. A glance at the New Zealand Oxford Dictionary⁶ shows that the word “sale” has at least four different definitions. It is a word which, even when confined to the concept of ‘exchanging a commodity or service for money’ does not have a narrow, precise meaning as it describes an activity which will have different elements to it depending on the precise nature of the transaction. Indeed, the very dispute before the Authority illustrates that.

[15] Whilst the word ‘sale’ as used in the clause under scrutiny is not ambiguous in the sense that it could carry different meanings, it is still a word which is vague or imprecise in its meaning when considered for the purposes of deciding when the right to a commission payment is triggered. I therefore accept that it is appropriate to take into account extrinsic evidence from the parties as to the practice that occurred when the respondent took part in a transaction with a customer, resulting in the supply of goods and services to that customer.

[16] The reason that this is necessary is because the concept of “sale” will depend on the nature of the business in which the sale occurs and the nature of the transaction which characterises the sale. For example, it would be reasonably uncontroversial to conclude that a supermarket makes a sale of apples to a customer when the checkout assistant accepts the money tendered by the customer for those goods.⁷

[17] On the other hand, where the supply of goods or services is considered, a number of steps may be involved so that it is far less obvious to the ordinary observer as to when the ‘sale’ actually crystallised. For example, in the respondent’s business, the following could occur:

- a. The respondent receives an initial enquiry from a prospective customer,

⁶ Oxford University Press 2005

⁷ I refer to the English case of *Pharmaceutical Society of Great Britain v Boots Cash Chemist (Southern) Limited* [1952] 2 QB 795, to All ER 456, affirmed [1953] 1 QB 401, 1 All ER 482, cited at page 44 of Law of Contract in New Zealand, Burrows, Finn and Todd, 5th edition which analysed the concept of ‘sale’.

- b. the respondent makes enquiries about the prospective customer's requirements;
- c. the respondent makes a visit to the customer's site to measure up, assess hazards and so forth;
- d. the respondent supplies art work to the customer for approval;
- e. the respondent supplies a written estimate;
- f. the respondent has a discussion with the customer about the estimate,
- g. the respondent makes adjustments to the estimate;
- h. the respondent receives notification of the customer's acceptance of the estimate;
- i. the respondent sources materials from its supplier,
- j. the respondent prepares the materials and the site ahead of installation,
- k. the respondent installs those materials, and
- l. the respondent invoices the customer.

[18] As extrinsic evidence is necessary to determine the meaning of 'sale' for the purposes of the parties' agreement, I refer to the evidence given by the parties in their respective affidavits.

[19] Mr Haughan deposed that he and Mr Williamson did not discuss what was meant by the term "sale". He stated the following:

I think about a sale as when you get a job with a client. We would often get a quote which a client might sign with payment terms. The client might literally email "*please go ahead with that quote*". For smaller jobs we may not have required a client to sign a quote. For a regular client we might discuss the job over the phone but we usually still had a quote approved by them even if it was set pricing – there weren't many clients like that. After getting the job we would do the work. Exact details and price were worked out later when we got to invoicing.

[20] In his affidavit in reply to Mr Williamson's affidavit Mr Haughan deposed the following:

What actually would happen is a lead would be given to me, then I would go and sell large format/signage concepts to the client. This generally involved photographs, site survey, art work, proofing and a quote. All of which I would do, generally with Wendy's [Mr Haughan's wife] help.

[21] In his second affidavit in reply Mr Haughan deposed the following:

At the time of signing our contract, Stuart and I didn't talk about what a sale meant. I think about a sale as when you get approval to do a job from a client. We would often submit an estimate which a client might sign with payment terms. A client might literally email "*Please go ahead with the estimate/job*". For a regular client we might discuss a job over the phone but we usually still had a price approved by them even if it was set pricing. A good example was the Dunedin City Council which required a price prior to them issuing a purchase order – there weren't many clients like that.

After getting a job we would create job bag. We would then put it into production.

So I understand a sale is when a quote or estimate was accepted, an order placed or a client requested something to be done, and we had a job bag. For example, a client might ask for us to put a stone guard onto a vehicle. Once that job had been requested (and a job bag created) then we would consider it a sale.

All work (prior to production) was given a job bag. A job bag is an envelope with details on the job and an estimate or likely sale price. The job bag is created by entering information into Tharsten (our electronic print management programme for quoting and invoicing referred to as MIS). This gives the job an electronic number for tracking/filing purposes and to make final invoicing simple.

We only recognised a sale once a job bag was created. With complex signage jobs, a lot of work was done to "get the sale" prior to a job bag being created. Even then this could change a bit with add-ons like traffic management and access, but an estimate price was entered to create a job bag prior to production.

A sales graph was posted on the wall, which was updated daily by Stuart, showing how we were tracking throughout the month. This graph showed all sales (wide format, signage, traditional print, out work etc). Stuart created this graph from Tharsten reporting based on job bag information entered, not what was invoiced.

[22] With respect to this step by step process for a typical wide format sale, from initial contact with a customer with his request to final invoicing, Mr Haughan described it as follows:

A wide format sale or signage sale could occur in different ways depending on a type and complexity of the job. It sometimes could be as simple as:

- (a) A client placing an order for something then a job bag would be created;
- (b) A digital file would be created or supplied then placed into production;
- (c) A proof may be provided for approval;
- (d) Production completed (generally within a week or two);
- (e) Then the job bag was given to Tracey, our accounts lady for invoicing which, depending on how busy she was, was usually done within a week.

On complex jobs, especially signage:

- (a) Site survey would need to take place;
- (b) Art work/digital representations made along with an estimate;
- (c) Client approval sought and maybe changes made due to budget constraints etc;
- (d) Once client approval was given, it would be entered into the MIS system and a job bag created;
- (e) The job bag would then be put into the production box;
- (f) Production strategy would be discussed with the timeline and materials ordered;
- (g) Production would be completed and then installed which could be a week or a month or more, depending on production and installation requirements;
- (h) Once completed, the job would be priced and checked and costed for margin, then given to Tracey for invoicing.

Quite often with these more complex jobs it would take longer for Tracey to charge out as they could be quite complex and could be different from what was originally entered into the MIS system.

[23] Mr Haughan deposed that a job bag would be given to Tracey for production of the invoice either because the job had been completed, which was in most cases, or because the payment terms between the respondent and the business required it. Sometimes this would be because a deposit would need to be created up-front. It

appears that payment would be required prior to the completion of a job when the job was particularly big, such as the rebrand of premises and vehicles.

[24] Mr Haughan also deposed that the time taken between the completion of a job and the sending out of the invoice varied a lot for a variety of reasons including additions or changes to the original estimate. Once the wide format and signage team had completed a job they would then have to check pricing, costings and so forth and get the job bag to Mr Haughan for checking, then to Tracey for invoicing. There could be delays at that point as the team waited for a supplier, outsourcing, invoicing, costings related to a job. This could be because of weather issues which caused them to require scaffolding or mobile access equipment for longer than envisaged or need traffic management for longer than expected.

[25] Mr Haughan also deposed that the terms and conditions in place between the respondent and the customer in relation to a wide format or signage sale varied depending on the work involved. Complex signage work could involve terms over three months, some with deposits, some with progress payments and others just monthly account payment terms.

[26] Mr Williamson affirmed an affidavit in which he deposed that the commission payments were not commission in the true sense of the word and that they were part of Mr Haughan's salary which ended on the last day of his notice period. In other words, Mr Williamson asserts that payments are not due on the work in progress but only on invoiced sales. Mr Williamson says that the reason for this is "*the myriad of possible problems that can lead to a change, failure or even cancelation of a job*". Mr Williamson also states in his affidavit that Mr Haughan only ever asked for the commission to "*inspire*" him and "*subsequently he expected it without effort or without any link to his actions, hence it essentially became part of his salary*".

[27] Mr Williamson also stated that with the new MIS system implemented in April 2016, sales only appeared in the sales reports once they were invoiced.

[28] In a further affidavit from Mr Williamson he answered some questions from the Authority about the process of how a sale takes place in his view. This is what Mr Williamson asserts:

In the broad sense of the word, once you have received an order from a customer, you could say you've got a "sale" – especially from a salesman's point of view. "Hey, I've made a sale to XYZ Limited".

Strictly though, this actually means we have "taken an order". Orders received but not actioned are called "Orders in Hand". Once orders are started to be processed, they are called "Work in Progress" (WIP).

That order is not recorded in the system as a "sale" until it is actually invoiced and it then becomes part of the sales figures for whatever month it gets invoiced in.

We do track "orders taken", but only from a reference point of view to see how the month is going.

The order handling procedure has always been this way for the last 24 years of our business.

From the beginning of his employment, the applicant's commission was always calculated in the actual invoiced figure – there was never any mention, discussion or question about this. It is accepted as normal practice.

There is an orderly distinction how things are handled and the job isn't completed until the invoice is raised (sent to the client) when everything is finalised.

[29] With respect to the step by step process of a typical wide format sale, from initial contact with the customer with its request, to final invoicing, Mr Williamson deposed as follows:

A customer might call, for example, and say he wanted his vehicle sign written.

We'd discuss his requirements and usually do a written quote for the work.

Upon acceptance, the MIS system (our computerised management system) carries the quote through and creates a job, assigns a job number, and produces a job bag with all the instructions printed on it to complete the job.

The art work will be done, the signage cut out of vinyl on the wide format printer and one of the signage team would apply it to the vehicle.

Whoever did the job then signs off on the job bag and gives it to our admin manager to process for invoicing. Once the client is invoiced, the job then becomes a "Sale" for the purposes of the applicant's 5% calculation.

[30] Mr Williamson said that the signed off job bag with the date of completion on it triggers the invoicing and that the time between a job being completed and

invoicing varies. He said that the Admin Manager processes completed job bags in batches, depending on what else she is doing at the time, but generally every two or three days, but usually no longer than a week. He also said that, unless there were special arrangements made with customers like split payments or extended terms, all sales were due for payment on the 20th of the month following the invoice.

Discussion

[31] The nub of the issue to be determined is to identify the point in the process described by Mr Haughan and Mr Williamson when contact between the respondent and the customer became a “sale” for the purposes of the commission scheme.

[32] A starting point is to consider what the purpose of the commission payments was. Mr Williamson acknowledges that Mr Haughan wanted commission payments in order to “inspire” him. I understand this to mean that the payments were an incentive. Mr Haughan would directly benefit from all sales of wide format and signage products and would therefore be encouraged to ensure that such sales were maximised.

[33] I believe that the payments were also a reward for making such sales. I do not accept the statements in Mr Williamson’s affidavit that, because Mr Haughan allegedly expected the commission payments “without effort or without any link to his actions” the payment therefore “essentially became part of his salary”. Whether or not Mr Haughan put in little effort (and I make no findings in respect of that allegation) the nature of the payments did not change. They were clearly linked to sales. In any event, the entire agreement clause and the variation clause in the employment agreement would prevent any changes to the terms of the agreement without mutual consent.

[34] Having concluded that the purpose of the commission payment scheme was to incentivise Mr Haughan to make more sales and to reward him for doing so, I do not believe the payments were just another form of salary in the sense that his entitlement automatically ceased when his employment ceased. The linkage between payment of commission payments and sales distinguishes the payments from payments of ordinary salary in respect of which there was no such linkage.

[35] So, what was a sale for the purposes of this commission scheme? I do not accept that a sale does not crystallize until the work done has been invoiced. How the respondent happened to record sales in its internal sales reporting software is neither here nor there. That is an administrative or recording issue. Invoicing is the means for the respondent to call on the customer for payment of the price of the work done. That work done (called 'work in progress' until it is invoiced) is still an asset of the business, even if it has not yet been invoiced. It has value to the business, and that value must underlie the purpose of the commission scheme.

[36] The significance of invoicing in the commission scheme is to enable the respondent to quantify the value of the commission due. It does not define a sale, however. Evidence in support of this conclusion is that it was agreed between the parties that Mr Haughan was not entitled to receive commission on a sale until after the respondent had received the moneys from the customer in relation to that sale. However, the respondent is not attempting to argue that the sale only takes place for the purpose of the commission scheme once the customer has paid the invoice. The invoicing is therefore a mechanism for quantifying the value of the commission only.

[37] When I analyse the process described by both Mr Haughan and Mr Williamson, my conclusion is that the "sale" takes place at the point when the customer accepts the estimate given by the respondent business. From that point on, the job is entered into the computerised management system, creating a job bag with all the instructions printed on it to complete the job. It is at that point that the respondent knows that it has tangible work to do for the customer. Labour will be engaged, and materials ordered and utilised.

[38] Whilst I accept Mr Williamson's evidence that the job may change or be cancelled after acceptance by the customer of the estimate or quote, that does not mean that a sale has not been made. What that signifies is that the specifications of the sale have been varied. If that job is cancelled, the customer may still be invoiced for materials used, and/or labour expended. I would expect Mr Haughan to be paid a commission on the value of that invoice. This is not to say that the invoice defines a sale, but it defines the value of the sale.

Determination

[39] The parties have provided a number of printouts showing sales made by the respondent. Details of these printouts have never been explained to the Authority and it is not appropriate for the Authority to try to guess how much further commission may be due to Mr Haughan, if any. However, I believe that the following guidance will enable the parties to calculate how much further commission, if any, is owed to Mr Haughan:

- a. The starting point is that a sale occurred at the point when a customer accepted a quotation or estimate given by the respondent business in respect of that customer's wide format or signage requirements.
- b. It appears that the dates of these acceptances can be ascertained from the respondent's records by reference to the date when a job or job bag was created in the respondent's MIS computerised management system. Therefore, Mr Haughan is entitled to be paid commission payments in respect of all such wide format and signage jobs created in the MIS system up to and including 14 April 2017, the date when his employment would have ended if he had worked his notice.⁸
- c. The amount of the commission for each such job is then calculated by computing 5% of the pre-GST total stated on the invoice or invoices eventually raised for each such job, even if they were raised after 14 April 2017.
- d. However, if any elements of such invoices, such as the cost of supplies, were normally excluded in calculated commission, or some other uncontested practice was adopted, such a practice should be used in calculating the commission owed in accordance with this determination.

⁸ I note that Ms Brazil, in her written submissions, confirms that Mr Haughan's last day of employment was 12 April 2017. Whilst I do not believe this is correct, and that it should be 14 April 2017, putting that detail aside, it would appear that the respondent accepts that employment for the purposes of the commission scheme continued during what would otherwise have been Mr Haughan's notice period.

[40] The parties shall have 21 days from the date of this determination to agree how much commission is owed to Mr Haughan, if any, in accordance with this determination. If the parties are unable to agree within that timeframe, Mr Haughan may make an application to the Authority for determination of that quantification. However, this is likely to require an investigation meeting and I urge the parties to therefore bear that in mind in seeking to reach their agreement due to the additional costs that would be necessarily incurred.

[41] Mr Haughan also seeks holiday pay, Kiwisaver compulsory employer contributions and interest, presumably all calculated in relation to the unpaid commission. Until the parties either agree how much commission is owed, or the Authority has determined that question, the Authority is not in a position to make any determination with respect to these questions.

[42] However, I will indicate at this point that holiday pay would be due with respect to any commission payments that are owed to Mr Haughan as “productivity or incentive-based payments (including commission)” are to be included in the calculation of gross earnings for the purposes of the Holidays Act 2003.

[43] In addition, I am likely to find that interest is payable on any commission payments that are overdue at the rate of 5% per annum in accordance with Regulation 11 of Schedule 2 of the Employment Relations Act 2000, calculated from the date such commission payments fell due (namely, when the relevant invoices were paid).

[44] Similarly, the Authority is likely to order that a sum be paid to Mr Haughan in respect of compulsory employer Kiwisaver contributions calculated by reference to any outstanding commission payments.

Application for a penalty

[45] Mr Haughan seeks the imposition of a penalty of \$10,000 to be imposed upon the respondent for breaching Mr Haughan’s employment agreement and the record of settlement. I can deal with this quite easily. I do not accept that it is appropriate to impose a penalty upon the respondent when there has been a genuine dispute between the parties in relation to the interpretation of the employment agreement. Whilst I have found against the respondent in respect of its interpretation of the employment

agreement, its interpretation was not in any way outlandish and it was clearly arguable. I therefore decline to impose any penalty upon the respondent in respect of the non-payment of the commission payments hitherto.

Costs

[46] I reserve costs. The parties are to seek to agree how costs are to be dealt with as part of their discussions in relation to agreeing what commission payments are due to Mr Haughan. However, if they are unable to agree costs within 21 days of the date of this determination, costs shall remain reserved until after any subsequent investigation meeting to quantify what commission payments are due.

David Appleton
Member of the Employment Relations Authority