

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 117
3229320

BETWEEN KELLY REID
 Applicant

AND SEDGWICK
 NEW ZEALAND LIMITED
 Respondent

Member of Authority: Peter Fuiava

Representatives: Applicant in person
 Scott Alcock for the Respondent

Investigation Meeting: 13 February 2024 in Auckland

Submissions and further Up to and including 20 February 2024 from both the
information received: Applicant and the Respondent

Determination: 28 February 2024

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Kelly Reid, a citizen of the United States who moved to New Zealand sometime in 2021, brings a claim against his former employer, Sedgwick New Zealand Limited (Sedgwick, the company or the employer) for breach of a purely verbal agreement that was allegedly made by its chief executive officer, Philip van Zyl, during an online induction call to newly-employed staff on 4 May 2022 on Microsoft Teams. It is alleged that during the induction call, Mr van Zyl “solicited” new ideas or processes from staff by promising them a share of the proceeds for their idea or process if it benefitted the company financially.

[2] Mr Reid further says that he accepted Mr van Zyl’s offer by providing Sedgwick with information about an estimating software program known as Xactimate which he had used extensively during his 30-year career as a self-employed insurance service provider in the United States. Xactimate is software developed by Verisk in the United

States. It enables contractors and loss adjusters to capture the process better which in turn makes their jobs more efficient and easier to do.

How did the Authority investigate?

[3] Mr Reid's case comprised his statement of problem, various supporting documents including a PowerPoint screenshot of the induction call, email correspondence with the Authority (which was shared with Sedgwick) and his written witness statement for the investigation meeting (25 August 2023).

[4] No other witnesses were called to give evidence for Mr Reid who says that other Sedgwick employees were reluctant to assist for fear of retaliation by the company. However, I find no basis for this assertion especially as I asked the respondent's inhouse counsel, Mr Alcock, to have one of Mr Reid's witnesses, Sedgwick building consultant services manager Kerry Young, to join the investigation meeting remotely. While Mr Young was on annual leave at the time, he attended by audio-visual link (AVL) and was more than willing to assist with my investigation.

[5] For Sedgwick, the Authority received written witness statements from its chief executive Philip van Zyl, head of building consultancy services for Sedgwick, Skot Penfold, human resources manager and corporate counsel, Scott Alcock, and recruitment and colleague resources advisor, T-La Matthews.

[6] The investigation meeting was originally scheduled for Wednesday 6 December 2023 but was adjourned by me at short notice to the parties as a result of poor weather and protest action in cities across the motu including Whangarei where the meeting was to be held. By agreement, the investigation meeting was adjourned to Tuesday 13 February 2024 and in an effort to reduce further costs and expenses being incurred by the parties, I granted leave for them both to attend the investigation meeting remotely by AVL.

[7] On the morning of the investigation meeting, I learnt that Sedgwick and its representative and witnesses with the exception of Ms Matthews (and subsequently Mr Young) were attending the investigation meeting in person. Mr Reid attended the meeting by AVL. There was good internet connectivity with Mr Reid whose evidence was received clearly.

[8] All witnesses answered questions under affirmation from me and the parties' representatives both of whom gave oral closing submissions. Subsequent information was received from both parties up to and including 20 February 2024.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

What are the issues?

[10] The issues requiring investigation and determination were:

- (i) What was said by Sedgwick's chief executive officer Philip van Zyl during Mr Reid's induction training in May 2022?
- (ii) Who else was present at the time and can give evidence as to what Mr van Zyl had said?
- (iii) Did Mr van Zyl say, mention, or infer at any stage, that if a colleague presented an idea or an improved process that they would share in any proceeds or profit share of some kind?
- (iv) Was what was said by Mr van Zyl ever reduced to writing?
- (v) Did Mr van Zyl set out the payment structure as to how profits would be shared?
- (vi) If so, what were the specifics of the payment structure?
- (vii) Is Mr Reid entitled to be compensated by the respondent for his idea?
- (viii) Should either party contribute to the costs of representation of the other party?

What happened?

[11] Among other things, Sedgwick provides forensic accounting and loss adjustment services to insurance businesses and corporates in New Zealand and around the world. Mr Reid had lived in New Zealand for over a year before he was employed by Sedgwick on 28 March 2022 as a building consultant. He agreed to a salary of \$90,000 per annum which he later took exception to in an email to Mr van Zyl on 29 June 2022, which is set out in greater detail later in this determination.

[12] An online induction to formally introduce approximately 30 newly-employed staff to Sedgwick, which included Mr Reid and Ms Matthews, was held on 4 May 2022. The induction was held online because a lot of people were still nervous to travel due to COVID-19. The induction call lasted for over an hour and was not recorded.

[13] Mr van Zyl's segment of the induction call lasted approximately 10 to 15 minutes. He spoke about the company's core values of empathy, accountability, collaboration, inclusion and growth. During the call, he encouraged new employees to have a voice at Sedgwick and to feel empowered enough to make suggestions on how to improve things when required.

[14] Mr Reid alleges that during the induction, Mr van Zyl promised staff a 'share of the proceeds' for presenting Sedgwick with an idea or improved process that benefited the company financially, Mr van Zyl denies making any such offer during the induction call which he regrets was not recorded as it would have shown that no offer was made. He also denies taking advantage of employees by soliciting them for their ideas or making an offer of a 'profit share' of some kind to them.

[15] A copy of Sedgwick's PowerPoint presentation for the induction call includes a slide that sets out the benefits of working for the company which included its (EAP) employee assistance programme, annual flu vaccinations, annual wellness allowance, day off during an employee's birthday month, lucrative referral programme, discounted Southern Cross health insurance, life and critical illness cover and external training provided by the ANZIF (Australian and New Zealand Institute of Insurance and Finance).

[16] Mr Reid stated that the absence of anything in writing that could verify Mr van Zyl having made the offer was a deliberate move on his part to deny him compensation for introducing Xactimate to the company. Mr van Zyl rejects the assertion.

[17] Mr Reid had used Xactimate since 1993. While he admits to not being its creator, he did not have to be to benefit from Mr van Zyl's offer, which was a share of the profits for presenting an idea or improved process that benefited Sedgwick financially. If Xactimate was implemented by the company, it stood to benefit from it significantly in winning new bids. However Mr van Zyl denies Xactimate was ever

used by Sedgwick in New Zealand and the company's methodology in providing a service was not something that would be disclosed in a potential bid in any event.

[18] The first written record of Mr van Zyl's alleged offer of compensation for an improved idea or process is found in Mr Reid's email of 29 June 2022 in which he mentions that his \$90,000 salary is significantly less than other building consultants providing the same services for Sedgwick. Mr Reid stated that he assisted one of its branches with reducing its backlog of claims and that he had recently returned from another branch with the same issue, inspecting an average of 4.66 homes per day and out producing anyone sent to assist that office. Mr Reid stated that he would be turning 57 later that year but that he was on the same salary he had more than 30 years ago. He questioned why Sedgwick valued him less.

[19] Mr Reid further stated in his email that he had mentioned Xactimate to Mr Penfold and to Mr Young sometime during his first week of employment. However, the company had simply moved forward with implementing his idea without compensating him for it. Mr Reid stated:

During my induction training, you explained that if we presented a business idea or process which results in profitability, we can expect to personally share in the proceeds. No one has had any discussion with me about the Xactimate process. I discussed with Skot (Penfold) and Kerry (Young). I was notified that I would be appointed the North Island Administrator for Xactimate. This essentially means that I would travel across the entire North Island, training employees in Xactimate so that Sedgwick receives \$1,650 per file minimum. Of course, there was no discussion about my salary being adjusted to reflect those services because apparently someone believes all of this should be undertaken with the same extremely low salary of \$90,000.

[20] Mr Reid ended his email by requesting a salary review adjustment commensurate with his 30 years of experience. He also requested from Mr van Zyl details concerning compensation for informing Sedgwick of the revenue to be gained from implementing Xactimate within its business and how his salary would be addressed if his services as software trainer for the North Island were required.

[21] Mr van Zyl responded to Mr Reid's later by email that same day stating that he was "a little surprised" and was not sure where he sourced his information. Mr van Zyl further stated:

One correction I want to point out is that I never said, at any stage during the induction, that if a colleague presents an idea or improved process *they will share in any proceeds*. I have always encouraged colleagues to have a voice when it comes to improved operational efficiencies and to feel valued by

contributing to the organisation they work in. At no stage have I ever mentioned or inferred that it translates to a 'profit share of some kind'.

[22] Mr van Zyl referred Mr Reid to his supervising manager Skot Penfold to discuss the other concerns he had raised in his email who Mr Reid was encouraged to speak to at the first instance.

[23] At the investigation meeting, Mr van Zyl stated that Mr Reid's email of 29 June 2022 was the first he had heard from him. This was despite Mr van Zyl emailing him on 1 April welcoming him to Sedgwick and stating that he was pleased to have him on the team. Mr van Zyl expected some kind of acknowledgement of his email by Mr Reid as it opened a potential dialogue between them but he was not contacted by Mr Reid until his email of 29 June 2022.

[24] On 1 July 2022, Mr Reid emailed a terse response to Mr van Zyl calling him a "liar" and that his "attempt to deflect was very poor." Mr Reid alleged there was a video of him promising to compensate employees for their ideas as well as encouraging them to excessively bill its insurance clients so that Sedgwick could afford to pay staff their bonuses. Mr Reid further stated:

Now you believe you are going to steal my process as well, simply because you have a long successful track record of stealing from the insurance companies. I will see you and Sedgwick in a court of law before I would ever allow that. The fee for my process or any derivative therefrom is 10% of annual gross revenue from my process for a period of two years. Thereafter, you will owe me 3% of annual gross revenue from my process for a period of 3 consecutive years immediately following the first 2 years. Conversely, simply do not use my process at all.

[25] Mr Reid's statement of problem to the Authority records his projection of what is owed to him by Sedgwick in compensation for introducing Xactimate to the company. He estimates that Xactimate could generate additional revenue streams for Sedgwick amounting to \$41M over the next five years. Total payment to him would be almost 10% of that amount or \$3.8M.

[26] In addition to denying the existence of an offer by Mr van Zyl, Sedgwick says that it was aware of Xactimate before Mr Reid presented his improved process to Mr Young and Mr Penfold. Sedgwick denies there was a formal arrangement in place for Mr Reid to be the North Island Administrator of Xactimate whereby he would be the caretaker or the on-the-job trainer for the software for a North-Island based employee who expressed interest in using it.

[27] While denying the existence of such an offer, Sedgwick stated that it was advised by Xactimate's parent company, Verisk, in July 2022, that it was withdrawing from the Australasian market and therefore its services would no longer be available. For this reason, Sedgwick states that it has never used (and will never use) Xactimate in New Zealand.

[28] Mr Reid resigned from Sedgwick on 1 July 2022. He worked for the company for approximately 14 weeks and left without serving out his notice period. He later emailed various stakeholders and clients of Sedgwick and the Insurance Council of New Zealand (ICNZ) alleging that the company engaged in excessive billing practices. However, the allegation was found to be meritless by the ICNZ which informed the recipients of Mr Reid's email that there was no substance to his allegations and that the ICNZ did not believe Sedgwick had acted fraudulently.

[29] During my investigation meeting, I was able to speak with building consultant services manager Kerry Young who Mr Reid claimed had appointed him to the position of North Island Administrator for Xactimate. Mr Young made himself available to speak to me while on annual leave. He had not been prepared in advance to give evidence for either party in this investigation. The spontaneous circumstances of him doing so adds much to his credibility and reliability as a witness.

Discussion

[30] The difficulty with Mr Reid's case is the lack of supporting evidence of the offer purportedly made by Mr van Zyl to compensate an employee for their idea or improved process that generated revenue for Sedgwick. The offer was purely oral and was not evidenced in writing.

[31] As a newly-employed staff member at the time, Ms Matthews attended the Teams induction call together with Mr Reid. It was her evidence under affirmation that during the call, Mr van Zyl did not make the promise as described by Mr Reid. This was never spoken of during the call or at any other induction that Ms Matthews attended in which Mr van Zyl presented. Ms Matthews denied giving evidence to help her employer and that her evidence was the truth and nothing but the truth.

[32] Ms Matthews' evidence that Mr van Zyl did not make the alleged offer during the induction call is consistent with the evidence of Mr van Zyl himself and Mr Alcock, both of whom attended the same induction call which was not recorded. Mr van Zyl has checked if there was a recording but there is none. Mr Reid submits that Ms Matthews gave evidence under oath that not only was there a recording of the call but that it had been saved to the 'cloud' for months or longer.

[33] Mr Reid's recollection of what Ms Matthews said at the investigation meeting does not accord with my written notes which were made simultaneously as she gave her evidence. Ms Matthews did not say that there was a recording of the induction call. Her evidence was that they usually record the induction training which is stored on Share Point, which she believed is cloud-based. Ms Matthews further stated that the person responsible for recording the meeting was whoever organised it and that only they (as host) could record.

[34] Had Ms Matthews said that the induction call in question was recorded, Sedgwick would have produced it as part of its case as exculpatory material. It did not because it does not exist. Moreover, there was no re-examination by Mr Alcock of Ms Matthews on this point because what Mr Reid claims she said about the induction being recorded was not her evidence.

[35] The induction was supplemented by a PowerPoint which made no expressed mention of the alleged offer of compensation. The PowerPoint includes a slide that sets out specific benefits to new employees (see above [15]) of which a share in the proceeds for a revenue-generating idea or process is not included. The PowerPoint presentation is internally consistent of there being no offer made by Mr van Zyl which aligns with his evidence and that of Ms Matthews and Mr Alcock.

[36] There is nothing in writing that is contemporaneous with the verbal offer when it was allegedly made in early May 2022. The first mention of it is in an email from Mr Reid himself some eight weeks later. His reason for the delay is that no one from Sedgwick had bothered to approach him about Xactimate which he could see the company was moving forward with implementation.

[37] As a matter of plausibility, given what is known of Mr van Zyl's work history with Sedgwick, I find it very unlikely that he would have offered compensation to newly-employed staff in order to 'solicit' new ideas or processes from them. At the investigation meeting, Mr van Zyl stated that he migrated to New Zealand from South Africa and that he started working for the company in 2002 as a loss adjuster. From there, he worked his way to the top as chief executive officer.

[38] It is noted that the verbal offer of compensation as claimed by Mr Reid has no mechanism for awarding compensation and no expiry limit as to how long Sedgwick would be required to compensate an employee for their idea or process. Such a wide and open-ended offer exposes the company to liability for an indeterminate amount for an indeterminate period which Mr van Zyl would not have done given his long tenure at Sedgwick. Its business and personnel mean a lot to him having "been in the trenches, digging with the spade" himself as a loss adjuster.

[39] When I consider the information and evidence before me on a cumulative basis, there is a paucity of evidence that supports Mr Reid's claim of an alleged offer by Mr van Zyl. However, there is ample evidence and information to support Sedgwick's theory of the case that no such offer was in fact made.

[40] Even if an offer had been made (not the case) any benefit to the company for using Xactimate could not be credited to Mr Reid because the software was already on its 'radar' and therefore Mr Reid's idea or process was neither new nor novel to Sedgwick.

[41] As noted earlier, I find building consultant service manager Mr Young a credible witness. He had no inkling that he would be requested by me to give evidence as part of this investigation and it was his affirmed testimony that Xactimate had been around for some time. Other people in Sedgwick's Christchurch office had raised it with him and from there he undertook a Google search of Xactimate which led to informal discussions with other staff, including Mr Reid.

[42] When I asked Mr Young whether Mr Reid ought to be credited for introducing Xactimate to the company, his response was in the negative as the software was "already in the picture". When cross-examined by Mr Reid as to whether the company

had learnt something new from him, Mr Young stated that what he got from Mr Reid was his impressions of Xactimate as a user.

[43] Having regard to Mr Young's evidence, even if the offer had been made by Mr van Zyl, which was not the case, Xactimate was known to Sedgwick. Mr Young had looked at its possible use in New Zealand which included speaking to Mr Reid who had made known to Mr Penfold that he was very familiar with the software having previously used every version of it in the United States. However, the evidence falls well short of establishing Mr Reid as the one who introduced Xactimate to the company which Mr Young acknowledged was already in the picture.

[44] It is accepted that in exploring the possibility of using Xactimate in New Zealand, Mr Young contacted Mr Reid and indicated to him that he would be the North Island Administrator or caretaker of training for any staff member who had questions about using the software. However, that conversation occurred on an informal basis and it was the evidence of Mr Penfold, Mr Reid's supervising manager, that before that could occur, a formal process needed to first be put in place. However, this did not eventuate because in July 2022, Verisk, Xactimate's parent company, withdrew its services from the Australasian market.

[45] Mr Reid submitted that while services had been withdrawn, Sedgwick held a license for Xactimate and that the company could therefore use the estimating software after this proceeding without needing to compensate him for his process. However, an email from a member of Verisk's sales team (15 February 2024) makes clear that there is no evidence of Sedgwick having purchased any of Xactimate's licenses.

[46] Not only was there no offer of compensation made, no Xactimate license was purchased by Sedgwick either. Now that Verisk has withdrawn its services from the Australasian market, even if Sedgwick wanted to, without a licence and/or the support services to boot, there is no viable means for it to use the software in any meaningful way in New Zealand.

[47] Finally, having regard to the information and evidence before me, the assertion by Mr Reid that because Sedgwick has allegedly been dishonest with excessive billing that this somehow establishes his present claim for compensation. However, this is

nothing more than a bare assertion that does not advance his case. As an applicant, the responsibility is on Mr Reid to establish his claim in the Authority and he has not done so by a considerable margin.

Conclusion

[48] It is not disputed that the alleged offer of compensation was never evidenced in writing. Even so, verbal contracts are just as legally enforceable as written ones. That said, there must first be an “offer” made by the offeror who intends to be immediately bound by the terms of their offer. For the reasons given above, I find that no such offer of compensation was made by Mr van Zyl to those who attended the induction call in early May 2022, Mr Reid included. His application must therefore be dismissed and is unsuccessful.

What about costs?

[49] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Sedgwick may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Reid would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[50] For more information as to how costs are awarded in the Authority the parties are referred to the Practice Direction of the Employment Relations Authority, Te Ratonga Ahumana Taimahi, effective 1 February 2024.¹

Peter Fuiava
Member of the Employment Relations Authority

¹ <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>