

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Neil Richard Taylor

AND eCom New Zealand Limited

REPRESENTATIVES Deborah Mallagahan, Counsel for Applicant
Chris Patterson, Counsel for Respondent

MEMBER OF AUTHORITY Dzintra King

INVESTIGATION MEETING 13 June 2006

DATE OF DETERMINATION 10 October 2006

DETERMINATION OF THE AUTHORITY

The applicant, Mr Neil Taylor, says he is owed the sum of \$88,904.00 in unpaid commissions. eCom is an IT services company which provides business process solutions using specialist services in document management and forms recognition. He was employed as the Business Development Manager and his job was to acquire new business and to be responsible for customer relationship development. Central to determining the commission issue is a provision in Mr Taylor's employment agreement which provided that he was to be paid a performance incentive of 5% on "all new business closed from new or existing clients". The respondent, eCom New Zealand Ltd says he did not close any new business and so is not entitled to any commission payments.

In my earlier determination I stated that the performance bonus was to be paid on any new business arising from Mr Taylor's efforts and not on any new business simply concluded whilst he was a company employee.

"New" business must mean something that was not a continuation of existing business. Ms Mallaghan argued that "new" could include a support agreement or a modification to an existing agreement. She submitted that Mr Taylor had had some involvement with a number of agreements which constituted "new" business because each time a customer came to eCom that customer had the opportunity to survey what was in the market and a choice to stay with eCom was a result of Mr Taylor's efforts. That, however, does not constitute "new" business; it is merely a continuation or a variation of an existing arrangement. It is the retention of existing business.

Mr Patterson said the question was whether Mr Taylor's efforts caused a sale to take place which would otherwise not have taken place. Developing relationships and marketing, for example, were all just parts of the job for which he was paid a salary unless they were the

cause of a sale. Mr Taylor had to identify an opportunity, manage the process of capitalising on the opportunity and conclude the sale. Whether his efforts were minimal or substantial was irrelevant unless they directly resulted in a sale. Mr Patterson said that any other interpretation implied that the bonus constituted a profit share.

Mr Aaron Cornelius, the director, said the purpose of the Business Development Manager's role was to enable eCom to obtain new business from either new or existing customers beyond eCom's then current ability to derive such business through its current structure.

He said eCom employed a number of account managers whose role was to maintain the existing client relationship to ensure the continuation of the existing and forecasted future revenue streams. The BDM role was to develop new lines of revenue. I think is the intrinsic difference: one is the continuation of what exists and the other is the development of something different or new. This distinction will not always be easy to make hence this dispute.

There were criteria that had to be satisfied: it had to be new business and it had to be "closed" by Mr Taylor. Mr Cornelius said that the mere fact that Mr Taylor had had some involvement in certain sales did not mean that he had "closed" the sales; the question was the extent to which he had had involvement and his level of contribution to the sales being completed. Mr Cornelius said he was involved in every sale generated by eCom and that he was familiar with the existence of every lead and who was involved.

Mr Taylor said that the company had long term outsourcing contracts which were in place for around four to five years. He said that with new customers business was not considered closed until a MOU or a contract was signed but that with existing clients business could be closed simply with a phone call or an email. Mr Cornelius did not agree with this; he said the process was the same as for new clients. Mr Cornelius' view is consistent with an interpretation that new does not mean something that is a continuation of an existing arrangement.

Mr Cornelius said eCom purchased software from Stellent. eCom had the knowledge of how to put the software and hardware together and customise it. eCom supplied the expertise to configure the systems and maintain them and also provided support.

A salesperson would develop the relationship, identify opportunities, extend the system, perhaps find more users, amend the contract and close a deal. Or he could alter the system to provide more functionality in the system or perhaps get more users in a different department. New business was something other than the business the company would get on a day to day normal running. This is a sensible interpretation; it refers to something that differs from the norm, that constitutes a change that is other than minor from something that currently exists. By way of analogy, if a hem on a skirt is lowered or raised, that does not make the skirt a "new" skirt.

Mr Cornelius said new business was closed when an opportunity was found, a feasibility study was carried out, a solution designed, a proposal put together, a negotiation took place and a contract was generated. All that could take place without his involvement. The Manager of Technical Services would have to do the designing. Mr Taylor's role was to manage the process as he did not have the technical expertise.

In order to qualify for a commission Mr Taylor has to show that the business was "new" and that he was instrumental in obtaining that business and closing the deal.

Coke

A disaster support programme was put in place for Coke. Mr Cornelius said Coke was a longstanding client and that there was a casual support agreement in place. eCom provided the specialised software and professional services. There had been a hardware failure which

eCom had dealt with. This was not an opportunity generated by Mr Taylor and it was not a sale. It was recovery work and was part of a day to day service.

Mr Cornelius said Coke complained about Mr Taylor and Coke had no option but to call upon eCom. Mr Cornelius said even if there was a sale it was nothing to do with Mr Taylor; it was the engineers who were contacted by Coke, then Mr Cornelius. When Coke signed the original agreement there was a clause for support.

Mr Taylor said no contract was in place and it was an example of his nurturing the customer. He had to manage the issue and attended meetings. It was new revenue coming in.

Mr Cornelius is correct and Mr Taylor is not entitled on any commission. This was not new business.

APN Support Services

APN had been a customer for many years. They were on a casual support contract and wanted a definitive support agreement so that they could budget. ECom made a calculated estimate of the hours. Mr Cornelius said it was only a formality to go from a casual to full term arrangement as eCom would have got the revenue in any event and eCom's income was not increased.

Mr Taylor said there was no contract for support or maintenance and APN had complained about that and asked him to put a contract together. He put it together and sent it off before he went on leave. The invoices are for new services.

Mr Cornelius noted that there were previous invoices for APN. The rearrangement had made it more formal but did not increase the sale. It was a change in the terms of business rather than a new sale. A different billing arrangement was wanted. It was not Mr Taylor identifying the opportunity; he was just part of a wider deal.

This was not new business but a rearrangement of existing business. Mr Taylor is not entitled to commission.

APN Document Automation

This was a change to the system and it was raised by APN. Mr Cornelius said the software sold by the company was capable of doing extra functions and it was simply a matter of turning those functions on. This had been discussed when Mr Taylor was not involved and he did not go to the customer and promote it. The client identified the need, not Mr Taylor, and his involvement did not cause the sale.

Mr Taylor said they had a system which was nothing to do with eCom and needed more licences. APN thought eCom might have a system that could do this and eCom quoted for the work. This was a completely new solution which he had worked on. There had been revenue for this previously but was new business.

This was not new business and Mr Taylor is not entitled to a commission.

APN Services

Mr Cornelius said this was also a software development, an improvement to an existing deployment. Again, it was not a case of Mr Taylor going to the client; it was the client saying a particular thing was wanted.

Mr Taylor said this related to other ongoing developments at APN and he was involved with it.

However, Mr Taylor did not obtain the business nor close it. Mr Taylor is not entitled to commission.

Progressive PDF

Progressive had been a customer for many years. Progressive used to send their invoices to eCom for scanning and then decided they would do the scanning and then send the invoices to eCom. This resulted in a reduction of revenue for eCom.

Mr Taylor said there were a number of competitors who could do this work. eCom used to scan now would just do PDF. This was new invoicing. However, Mr Cornelius said eCom was the only company that could process raw PDFs so Progressive could not go anywhere else.

There is no commission due.

Fidelity Scanner

Mr Cornelius said they had been a customer for about six and a half years. Every six to twelve months options were explained. They did all their scanning in-house but eCom thought it could be done more efficiently at eCom. A small pilot test was done which was costed at \$1,600 and Mr Taylor had been invited to the meetings as part of relationship building. He had not created or closed the business.

No commission is due.

Fidelity Life

This was another support arrangement which eCom had been dealing with for a number of years. It was an ongoing issue and Mr Taylor's involvement did not result in anything new.

No commission is due.

Pacific Retail

Mr Cornelius detailed his involvement with the predecessor companies. He had a call from a person he had been dealing with who told Mr Cornelius that he had an opportunity for him. The potential client was interested in dealing with eCom but would have to go to two other suppliers as well to get quotes. Mr Cornelius put a proposal together, then drew up the contracts and a sale was concluded. He said Mr Taylor was not really involved because Mr Cornelius knew the person contacting him and that was the basis on which the contact was made and the sale concluded.

No commission is payable.

Fisher and Paykel

Mr Cornelius said the Fisher and Paykel deal happened before Mr Taylor joined the company. He went to a couple of meetings but did not influence the sale. At first eCom had lost the opportunity but Mr Cornelius recovered it by contacting the company. He got a call saying Fisher and Paykel wanted to talk and while Mr Taylor went to the meeting he did not influence the outcome. Mr Cornelius had to reconsider and reprice the proposal and then eCom was awarded the contract.

The initial sale was worth \$70,000 to eCom. There was an eighteen month contract which was extended out to five years. Mr Taylor was away for a month and did not generate the sale nor influence it. He was away when the deal was closed.

Mr Taylor said the proposal had been done before he arrived but it had not been closed.

Mr Taylor did not generate the opportunity nor close the deal. No commission is due.

Ministry of Fisheries

Mr Cornelius said this was similar to Coke. Software and professional services were purchased. The software required upgrades once a year or every eighteen months. Mr Cornelius said this was basically an account management issue. The Ministry contacted eCom which carried out the upgrades. The Ministry could not have gone elsewhere for the particular software in question.

Mr Taylor said no agreement had been in place. The Ministry asked him for a price and he asked Mr Cornelius but Mr Cornelius dealt with it himself and Mr Taylor was shut out. Clearly Mr Taylor did not close the deal.

No commission is due.

Crane

This was a long term contract and when a contract of this type was entered into eCom had a financial obligation to pay off the software and hardware equipment. eCom built the monthly payments into the contract. Each year eCom was billed by the suppliers, Stellent, for the sum of \$17,569 for annual software assurance. eCom would pay that to Stellent and then bill the client because it was covered in the contract. It was not a sale.

No commission is payable.

GE

Mr Cornelius said GE had come to him before Mr Taylor joined eCom. He had several discussions with GE whose contract was coming up for renewal. It went to RFP before Mr Taylor was employed and had been put on hold. GE phoned Mr Cornelius and told him nothing would happen in the next six months and asked whether the existing services could continue pro tem. eCom was now on a casual monthly basis which was the same arrangement that had existed in the past. Mr Cornelius had put the proposal together.

Mr Taylor said he did the RFP. Mr Cornelius agreed he did. Mr Patterson said it was accepted that Mr Taylor would have been entitled to commission on this sale but what is in dispute is when the sale actually happened. Then they started to acquire a new business and asked if they could continue on the service and renew the contract until December. So the amount claimed is until December. He says the contract was terminated in August and eCom confirmed it would be renewed until December.

Mr Patterson said this was a good example of what the clause meant. Mr Taylor did everything except close the business.

No commission is payable.

Confidentiality breach

The respondent claimed Mr Taylor had breached the confidentiality of mediation by telling a Support Officer at the Authority that no offer had been made. A penalty is claimed. Mr Taylor is a layperson and it is unfortunate that he included the comment about no offer being made in his email to the Authority but I am of the view that this was an unthinking inclusion designed to explain why he wanted the matter to progress to a hearing rather than a deliberate breach. I decline to award a penalty.

Reinstatement and Reimbursement

Mr Taylor obtained interim reinstatement in an earlier determination (AA 474/05). Subsequently, I found that Mr Taylor had been justifiably dismissed and at the substantive hearing the application for reinstatement was withdrawn. The respondent now seeks

reimbursement of the wages paid to Mr Taylor in the sum of \$8,836.94 and interest on that amount at the rate of 14.5 % from 9 February 2006.

Mr Taylor provided an undertaking as to damages and the respondent has suffered damages as a result of complying with the order by paying the sum in question and by paying it at the overdraft rate of 14.45%.

I made it clear to Mr Taylor at the time of hearing the interim reinstatement application that if I were to grant interim reinstatement and make an order that the interim reinstatement be on a garden leave basis that a consequence, if he was ultimately unsuccessful in his personal grievance, could be that he would have to abide by the undertaking he had given.

Mr Taylor is to pay the sum of \$8,836.94 plus interest at the rate of 14.45% to the respondent as that is the measure of damages suffered by the respondent.

Costs

If the parties are unable to resolve the matter of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member
Employment Relations Authority