

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 420  
5450060

BETWEEN                      LEROY THOMPSON  
   Applicant  
  
AND                                GENESIS  
   COMMUNICATIONS  
   LIMITED  
   Respondent

Member of Authority:      T G Tetitaha  
  
Representatives:            F Ashton, Counsel for the Applicant  
   J Douglas, Counsel for the Respondent  
  
Investigation Meeting:     16-18 September 2014 at Auckland  
  
Submissions Received:    8 and 19 September 2014 from the Applicant  
   11 and 19 September 2014 from the Respondent  
  
Date of Determination:    10 October 2014

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**DETERMINATION OF THE AUTHORITY**

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- A.    Genesis Communications Limited is ordered to pay Leroy Thompson wage arrears pursuant to s.131 of the Employment Relations Act 2000 as follows:**
- a)    Wages owed for December 2013 would be \$3,333.33 less PAYE**
  - b)    Commission totalling \$1,817.91 less PAYE;**
  - c)    Outstanding network connection fees totalling \$5,100 less PAYE**
- B.    There is an order for Genesis Communications Limited to pay to Leroy Thompson interest at 5% per annum upon the above judgment sum calculated from 30 December 2013 until payment**



pursuant to clause 11, Schedule 2, Employment Relations Act 2000.

- C. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

### **Employment relationship problem**

[1] Leroy Thompson was employed by the respondent company, Genesis Communications Limited, as a Sales Executive. He was dismissed following allegations he was competing with his employer, absent from work and for alleged dishonesty.

[2] Mr Thompson alleges he was unjustifiably dismissed. He also alleged he was unjustifiably disadvantaged in his employment by the non-payment of wages and sexual and racial harassment. He also seeks wage arrears totalling \$45,641.94.

[3] For the reason's set out below, this determination is dealing with the wage arrears claim only.

### **Facts leading to dispute**

[4] Mr Thompson was employed as a Sales Executive commencing on 18 July 2011. The employment relationship between the parties was governed by a signed employment agreement dated 18 July 2011. Although the employment agreement referred to a job description, none was attached to the agreement the parties signed.

[5] Clause 7 set out Mr Thompson's base salary of \$40,000 per annum to be paid weekly on Thursday into a bank account nominated by him. He also had the use of a motor vehicle (clause 7.2).

[6] He was also entitled to payment of commission. Clause 7.3 sets out the basis for payment of his commission:

#### *7.3 Commission*

*The employee shall be entitled to receive performance based commission as agreed from time to time in addition to their base salary. Commission shall be paid quarterly on the 20th*



*of the month following the end of each quarter by direct credit into a bank account nominated by the employee.*

*The commission structure shall be reviewed after the first three months.*

[7] At various times during his employment, Mr Thompson was paid commission. No document setting out how Mr Thompson's commission was calculated was produced.

[8] During his employment he alleged the sexual and racial harassment occurred in 2012. He did not raise a personal grievance about those matters within 90 days.

[9] On or about 30 December 2013 Mr Thompson was dismissed following allegations he was competing with the respondent, failed to come to work, was using a motor vehicle for his personal travel and alleged dishonesty by gifting and/or selling unauthorised product to friends. He denied the allegations.

[10] Mr Thompson filed a statement of problem on 27 February 2014. An amended statement of problem was filed on 23 June 2014. The matter is now before me for determination.

### **Issues**

[11] At the start of the hearing, discussions were held with the applicant's counsel about his unjustified disadvantage claims. From his evidence, the sexual and racial harassment claims occurred in 2012 and he did not raise a personal grievance with his employer within the 90 day time period pursuant to s114 Employment Relations Act 2000. Whether he had in fact been owed any wages was dependent upon my determination about the terms of his commission. This was not a disadvantage claim. It was clearly a wage arrears claim only.

[12] In the circumstances, the applicant's counsel agreed that the nub of this dispute is the unjustified dismissal and wage arrears claims. Accordingly, the unjustified disadvantage claims about non-payment of wages and sexual and racial harassment were not being pursued. Those grievances are dismissed. The non-payment of wages shall continue as a claim for wage arrears under s131.

[13] Both parties agreed the applicant was dismissed on or about 30 December 2013. Therefore the issues for determination are:



- (a) Was the applicant's conduct that for which a fair and reasonable employer could have dismissed him;
- (b) Was the process leading to dismissal what a fair and reasonable employer could have done in all the circumstances;
- (c) What wage arrears for December 2012, commission and network connections are owed to the applicant?

[14] Partway through the second day and after Mr Thompson's evidence about both his personal grievances and the wage arrears had been completed, it became clear evidence about both issues would not be completed within the three hearing days. The principal dispute was about the wage arrears claims of \$45,641.94. The parties agreed the three hearing days could be used to determine the wage arrears claim only. The parties wished to discuss settlement of the unjustified dismissal claim to prevent further hearing time being required. Accordingly I heard evidence from Steve Hall, Rex Caulfield, Lisi Pone, Logan Caulfield about the wage arrears only. I agreed to reserve judgment until today in the event they were unable to settle all matters.

[15] The respondent advised there was no settlement. Accordingly I shall determine the wage arrears claims and make timetabling directions for hearing of the unjustified dismissal claim.

**What wage arrears are owed?**

[16] The wage arrears claim comprises three components - non-payment of salary for December 2013, sales commissions and network connection fees.

[17] This dispute is about the interpretation and application of the clause in an employment agreement pertaining to wages and commission. The necessary inquiry is what a reasonable and properly informed third party would consider the parties' intended the words of their contract to mean. To be properly informed, I must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on these parties'



minds. The objective in a contractual interpretation dispute is to establish the meaning the parties intended their words to bear<sup>1</sup>.

[18] I can consider context in ascertaining meaning. It is permissible to go outside the written words for the purpose of identifying the context in which the contract was made and its objective purpose.<sup>2</sup> Objective evidence directed to the context in which negotiations were taking place can inform my approach to meaning<sup>3</sup>.

*What wages were owed for December 2013?*

[19] Both parties accept that Mr Thompson was not paid his wages owed for the month of December excluding commission. By dividing his base salary of \$40,000 by 12, the gross salary he would have received for the month of December would be \$3,333.33 less PAYE.

*What sales commission was owed for the duration of the employment contract?*

[20] Mr Thompson submits there was an agreement at the beginning of his contract for the payment of 3% on all of his sales inclusive of tax. If this had not been offered, he submits he would not have taken the job on a \$40,000 salary. He was counting on the commission to top up his “weak salary”. He gave evidence about the respondent’s owner and director, Rex Caulfield, telling him he could make in excess of \$100,000 based on 3% over an all sales structure along with network fees. He denies any other conditions about payment of commission were discussed or agreed. He denied signing any commission agreement.

[21] The respondent company submits clause 7.3 contemplates that there will be further agreement around commission and how commission will be calculated. It submits that this did occur but the document which sets out the calculation of commission has been misplaced. The appropriate formula for calculating commission in that agreement would have been:

- (a) Three percent of the value of the sales revenue generated by Mr Thompson (company accounts will be excluded);

<sup>1</sup> *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [2010] NZSC 5; [2010] 2 NZLR 444; (2010) 9 NZBLC 102,874 (SCNZ) at [19]

<sup>2</sup> See fn1 *Vector Gas Ltd* at [23]

<sup>3</sup> See fn1 *Vector Gas Ltd* at [29]



- (b) Provided that in the quarter, Mr Thompson achieves \$50,000 sales in each month (averaged over the quarter); and
- (c) Provided the average margin on sales was no less than 26%.

[22] Both parties agree commission was to be 3% of Mr Thompson's sales. There is a dispute whether the calculation is carried out on gross or net sales and whether there were any other conditions before commission became payable.

[23] There was little detailed evidence about who or when the respondent Mr Thompson was presented with this commission agreement. The respondent relied upon circumstantial evidence to prove the existence of a signed agreement setting out the respondent's above terms for calculating commission.

[24] Mr Caulfield referred to the respondent's stated practice of signing such an agreement at the beginning of employment. He believed they would have done so with Mr Thompson but it has been misplaced. Mr Caulfield admitted their filing system was lax and documents had been misfiled before. He also produced a performance plan<sup>4</sup> and review which he alleged Mr Thompson had signed. There is reference within this document to a "target" of "*\$50,000 per month in sales with the margin not less than 26%*" within a column headed "key responsibilities (from job description)". Mr Thompson denied signing the performance review document.

[25] The performance plan refers to a job description as the basis for the target of \$50,000 per month sales and a profit margin of 26%. No job description was produced in evidence. Mr Caulfield told me there was a draft job description on his computer at work which would have been given to Mr Thompson when he was employed. Mr Caulfield again states the signed document was misplaced. Mr Thompson denies any such document was given to him.

[26] The impression I have is the respondent's recordkeeping is haphazard. Several crucial documents it alleges have been signed are missing. This does not assist the credibility of its submission that they existed in the first place.

[27] I heard evidence from the respondent's former office manager, Lisi Pone. Ms Pone was in charge of the payroll and commission. She stated all sales staff had the same basis for commission namely 3 % of gross profit made as opposed to gross sales

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<sup>4</sup> Tab 4 joint bundle of documents



excluding company clients. She prepared the spreadsheet setting out commission owed then sent it to Mr Caulfield for approval prior to payment. She believed the respondent paid what it could afford and deducted this from the commission owed. She believed Mr Thompson had commission owing when she finished in April 2013. Her evidence was the document used for commission calculation was different from the job description. She could not recall any such document being given to Mr Thompson. She did recall typing up a performance review type document similar to the one produced. She believed there was a sales threshold prior to commission being paid and \$50,000 gross monthly sales target "*sounded right*." She believed 26% gross sales margin was unachievable.

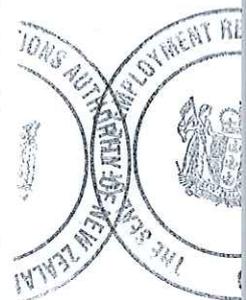
[28] I do not accept Mr Caulfield's evidence that he did not approve the commission payments. He struck me as a savvy businessman whom kept a close eye upon his company's profitability. Payments of commission to sales agents would affect his bottom line. He should have been aware of the commission payments going to Mr Thompson. Commission was paid to Mr Thompson at various periods during 2012 and 2013.

[29] I do not accept the performance review evidenced an agreement about payment of commission. The purpose of performance review is to improve performance. The stated targets are simply targets. Even if those targets are not met, an employer may still pay commission. In this case there was evidence the respondent did pay commission even though Mr Thompson had not been meeting the targets in the performance review.

[30] Even if I accepted the performance review evidenced some agreement, it does not evidence any agreement to payment on the basis of a quarterly average of \$50,000 per month. There is no evidence supporting this proposition.

[31] In short I reject the respondents submission there was complete agreement to the terms for payment of commission it has set out above. The evidence does not support this proposition.

[32] I must now stand back and consider objectively what reasonable people in these parties shoes would have agreed was the basis for payment of commission.



[33] Commission is defined as “a percentage paid to the agent from the profits of goods etc. sold or business obtained.”<sup>5</sup> This aligns with Ms Pone’s evidence that 3% of the profit margin would be paid. It would appear more logical to pay commission of 3 % of his gross profit margin. However the parties agree Mr Thompson was to be paid 3% of his gross sales. They disagree whether that was inclusive or exclusive of tax. I do not accept commission would have been calculated upon his gross sales inclusive of tax. There would be no benefit for an employer to agree to pay an employee 3% of the tax as well as the gross sales made.

[34] Having heard Ms Pone’s evidence, I accept there was a gross sales threshold and that it was likely to be \$50,000 per month. Mr Caulfield gave evidence about the need for Mr Thompson to achieve \$50,000 sales in each month to ensure the company met its obligations to one of their suppliers. A supplier required turnover of at least \$850,000 to retain the re-seller’s licence. If Mr Thompson had achieved \$50,000 monthly gross sales, this would have contributed \$600,000 to the annual turnover.

[35] I do not accept there was a condition he achieve a profit margin of 26%. I accept Ms Pone’s evidence this was unachievable, especially if combined with the required gross sales threshold. It appeared even more unachievable following largely uncontested evidence about the competitive nature of this industry.

[36] The respondent had a reseller agreement with one supplier. The supplier set the cost price on the basis of a 33% profit margin. Some competitors were selling this supplier’s products at cost price to induce customers to sign up to other products such as network connections. There were times when no profit was possible due to the industry conditions. It seems improbable Mr Thompson would agree to a profit margin of 26% in these circumstances.

[37] It would be reasonable for an employer to pay commission after a threshold profit margin was achieved to ensure commission is a percentage paid from profits to its employee. Otherwise Mr Thomson’s 3% commission may be drawn from sales where no profit was made, resulting in a loss to the employer.

[38] Mr Thompson gave uncontested evidence that the respondent would offer discounts to clients of between 10-15% on the 33% profit margin. Taking the midrange of 13%, it was more likely he could be expected to achieve at least 20%

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<sup>5</sup> *New Zealand Oxford Dictionary*, Oxford University 2005

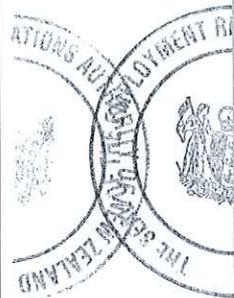


gross profit. Looking through his months between 2011 and 2013, this was achievable.

[39] It is my view that it is more probable the parties would have agreed to pay Mr Thompson commission when his sales were more than \$50,000 and his profit margin was at least 20% in the same month. I do not accept his sales and profit margin needed to average \$50,000 and 20% or 26% per quarter. There is no evidence supporting that proposition.

[40] Accordingly, I have calculated Mr Thompson was owed commission totalling \$8,835.19 for 5 months during 2012 and 2013. This has been calculated based upon the respondent's sales commission report (exhibit 1)<sup>6</sup> as set out below:

Month	Leroy Gross Sales (GST incl)	Leroy Gross Sales (ex GST)	Leroy Margin (%)	3% Commission on Leroy Gross Sales (ex GST)
February 2012	57,379.66	49,895.36	29%	1,496.86
March 2012	74,965.23	65,187.16	27%	1,955.61
August 2012	82,724.83	71,934.63	22%	2,158.04
June 2013	62,086.66	53,988.40	24%	1,619.65
September 2013	61,526.23	53,501.07	31%	1,605.03
<b>Total Commission owed</b>				<b>\$8,835.19</b>



[41] The parties accept Mr Thompson has received commission payments of \$7,017.28. Accordingly the respondent owes him the balance of \$1,817.91 less PAYE.

#### *Network connections*

[42] Both parties agree Mr Thompson was to be paid for network connections. Mr Thompson says there was an agreement for payment of \$75 per network connection.

<sup>6</sup> Respondent Exhibit 1 produced L Caulfield 18/09/14

The respondent submits the payment was for new connections and not “roll-overs”. By roll-over it refers to existing clients with radio service agreements (RSA).

[43] The respondent referred me to a document which set out the reasons it rejected various claims by Mr Thompson<sup>7</sup>. It accepted connection fees payable to Mr Thompson totalled \$1,575<sup>8</sup>. The other claims are defended on the basis there was no RSA. In short, the absence of paperwork was the basis for declining claims as well as some being existing customers.

[44] Mr Thompson submitted he did sell clients with existing RSAs new handsets and this should result in a new connection fee for the handset being added to the network. The fees generated for new handsets joined to the network were minimal (\$35 per handset) as opposed to the sale of a new connection with several handsets. Both parties accepted the real revenue would have been gathered from a new customer joining several handsets to the network. Accordingly it is more probable than not, the agreement for payment of a connection fee related to new clients connecting to the network as opposed to roll overs for existing clients.

[45] The respondent denies it is liable for payment of a new connection fee for clients whom have not signed a RSA. One client (Enviro) was alleged to have had no RSA despite Mr Thompson obtaining a new radio connection for eight radios. He is adamant he provided an RSA for this client at the time the new connection was set up. He gave evidence that the radios could not have been connected by him. This was done by a radio connection form completed by another staff member when an RSA was signed. There was evidence the respondent’s recordkeeping and filing was haphazard. It is possible it has lost the RSA it relies upon to deny Mr Thompson’s claim. In the circumstances I determine Mr Thompson is entitled to a new connection fee for eight radios at \$75 per radio totalling \$600.

[46] Similarly the respondent rejected Mr Thompson’s claim for a new connection for the Maori Wardens totalling \$33,380.15 because of the absence of an RSA. Mr Thompson gave evidence the Maori Wardens had prepaid the handsets and the network connection fees and that he did sign an RSA. There was evidence the respondent’s recordkeeping and filing was haphazard. It is possible it has lost the RSA it relies upon to deny Mr Thompson’s claim. Accordingly I determine he is

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<sup>7</sup> Tabs 50 and 60 joint bundle of documents

<sup>8</sup> Paragraph 48 witness statement Logan Caulfield



entitled to recover connection fees for 13 radios at \$75 per radio totalling \$975. At hearing the respondent accepted that a further five radios at \$75 per connection are payable to Mr Thompson totalling \$375.

[47] There are 21 radios sold to a client which has allegedly become a bad debt. The fact it is a bad debt does not deflect the respondent's obligation to pay the commission on the connection fee. Accordingly I determine he is entitled to recover connection fees for 21 radios at \$75 connection fee totalling \$1,575.

[48] Accordingly the total network connection fees owed by Genesis Communications Limited to Leroy Thompson are \$5,100 less PAYE.

### **Orders**

[49] I accordingly make the following orders:

- (a) Genesis Communications Limited is ordered to pay Leroy Thompson wage arrears pursuant to s.131 of the Employment Relations Act 2000 as follows:
  - (i) Wages owed for December 2013 would be \$3,333.33 less PAYE
  - (ii) Commission totalling \$1,817.91 less PAYE;
  - (iii) Outstanding network connection fees totalling \$5,100 less PAYE.



### **Interest**

[50] This is an appropriate matter for me to exercise my discretion to order payment of interest. Mr Thompson's wage arrears were due and owing at the date of termination (30 December 2013). He has lost the use of that money for a substantial period of time.

[51] There is an order for Genesis Communications Limited to pay to Leroy Thompson interest at 5% per annum upon the above judgment sum calculated from 30 December 2013 until payment pursuant to clause 11, Schedule 2, Employment Relations Act 2000.

## Costs

[52] Costs are reserved. If either party seeks an order for costs a memorandum should be filed within 14 days of the date of this determination. The other party will have 14 days from that date to file and serve a reply.

## Personal Grievance

[53] There is time available in the week of 8 to 12 December 2014 to resolve the part heard personal grievance of unjustified dismissal. I intend allowing two days for the hearing of that matter. All of the evidence has now been filed. No further evidence is required.

[54] Mr Thompson has completed his evidence. The remaining witnesses (Rachel Thompson, Eric Dean George Smith, Lisi Pone, Rex Caulfield, Logan Caulfield, Steven Hall, Jillian Mills and Rodney Vialoux) still need to be examined about the personal grievance.

[55] The parties are to advise their availability for hearing during this week by **17 October 2014 3 pm**. The Registry shall then set down a hearing date. No further evidence shall be filed without leave.



**T G Tetitaha**  
Member of the Employment Relations Authority

