

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 416
5632011

BETWEEN UCS LIMITED
Applicant

A N D KEVIN LEITH TERREY-
OCOCK
Respondent

Member of Authority: Rachel Larmer

Representatives: Nigel Rayneau, Director of Applicant
Mark Nutsford, Advocate for Respondent

Investigation Meeting: 14 November 2016 at Auckland
15 November 2016 from Respondent
18 November 2016 from Applicant

Additional Information:

Date of Determination: 21 December 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Mr Terrey-O’Cock and UCS Limited (UCS) were in an employment relationship that ended in March of 2014. UCS claims it overpaid Mr Terrey-O’Cock \$5,319.91 in commission so it seeks to recover that overpayment from him.

[2] Mr Terrey-O’Cock denies being over paid and says he was actually underpaid commission. His claim about that was determined under AEA 5552685.¹

¹ [2016] NZERA Auckland 142.

The issues

[3] The following issues are to be determined:

- (a) What commission structure is to be applied?
- (b) What does “*new business*” in Schedule 1 of the second IEA mean?
- (c) Did UCS overpay Mr Terrey-O’Cock commission and if so can it recover any overpayment?
- (d) What if any costs should be awarded?

What commission structure is to be applied?

[4] The parties entered into a written employment agreement on 10 or 11 May 2013. UCS sent Mr Terrey-O’Cock an unsigned proposed individual employment agreement (IEA) which he signed and says he returned without retaining a copy of it. I refer to this document as the “first IEA”.

[5] UCS claims it never received a signed version of the first IEA back from Mr Terrey-O’Cock. UCS found a copy of the first IEA he had signed (which it says he never returned to it) in his office after his employment had ended.

[6] Because UCS had not received a signed copy of the first IEA back from Mr Terrey-O’Cock it asked him to sign another IEA because it wanted all of its employment documentation kept up to date. Mr Terrey-O’Cock used that as an opportunity to negotiate more favourable terms and conditions for himself.

[7] The parties entered into a further IEA (“the second IEA”) which is incorrectly dated on the agreement as having signed by the parties on 21 November 2013. The parties agree that date is incorrect and that the correct date of signing was 20 December 2013. Both parties signed the second IEA.

[8] I note that the first and second IEAs each contained different commission structures. During the course of the Authority’s investigation meeting, the parties agreed that it is the commission structure set out in the second IEA that applies.

[9] I specifically record this agreement because each party had a different view of the contractual commission arrangements that applied but as a result of investigating

and testing the evidence, both parties ultimately agreed that the applicable commission arrangements are those recorded in the second IEA signed in December 2013.

[10] Clause 5.2 of Mr Terrey-Ocock's second IEA states:

There will be a minimum sales target set out in Schedule 1 which will specify the minimum sales required before commissions are applicable. The sales total used to calculate commission will be the total new monthly business generated in a given month minus the minimum sales target.

[11] Clause 5.3 of the second IEA also deals with commission and it states:

Your performance will be regularly reviewed and assessed in relation to your sales target. Your monthly commission will be based on ((OTE minus salary)/12) times a percentage of the monthly target achieved and subject to clause 5.2 above.

[12] Clause 7.3 of the second IEA states that Mr Terrey-O'Cock's commission will be paid "*as outlined in Schedule 1*".

[13] The material parts of Schedule 1 in the second IEA are:

- 9/. **Sales target:** \$10,000 new business monthly sales.
- 10/. **Minimum sales target:** \$5,417 new business monthly sales.
- 11/. **Initial three months minimum sales target:** \$10,833 new business sales total
- 12/. **Three year contracts:** An additional payment of 50% of the normal commission is payable for a customer who signs a three year contract. This is payable at the beginning of the third year of the contract and is conditional on the customer maintaining their spend and margin and the sales agent successfully maintaining their sales position within UCS.
- 13/. **High margin bonus applicable:** This bonus is applicable if the agent's customers are yielding margins over 25%. Quantum and timing of this bonus are at the discretion of the Managing Director.

[14] The minimum sales total of new sales Mr Terrey-O'Cock had to meet each month before he became entitled to commission was at least \$5,417. That threshold was reduced to \$10,833 total sales in new business for the first three months of his employment. The minimum threshold therefore increased to \$5,417 per month in new business sales after Mr Terrey-O'Cock had worked for UCS for three months.

[15] The terms "*sales*" and "*new business*" are defined in Schedule 1 of the second IEA as follows:

“Sales” in the context of applicable commissions is defined as and measured by actual invoiced amounts, minus client purchase, installation services and equipment and one-off charges.

“New business” means a billed service which has not been billed previously by UCS excluding one-off charges. Billed service is any service billed on the account this means internet, voice, data, fixed monthly recurring and equipment are included.

What does “*new business*” in Schedule 1 of the second IEA mean?

[16] UCS says that the reference to “*new business*” in the commission structure means that Mr Terrey-O’Cock is only entitled to commission if he brings in new sales for services that have not previously been billed to a client.

[17] UCS says that means Mr Terrey-O’Cock is only paid commissions for the first month of billings to a new client but not for subsequent months’ purchases (billings).

[18] Mr Terrey-O’Cock disputes that interpretation. Mr Terrey-O’Cock says “*new business*” means any business that a client is billed for, provided he was responsible for introducing the client to UCS and assuming the minimum sales threshold has been met.

[19] Mr Terrey-O’Cock’s interpretation means he is entitled to commission on all sales whether the sales involve new services or services that have previously been billed to clients, and therefore includes ongoing services for which clients are invoiced arising from previous contracts that Mr Terrey-O’Cock has negotiated.

[20] UCS agrees that Mr Terrey-O’Cock is entitled to commission on sales that involve a current or existing client upgrading to a new service they have not previously been billed for (provided he has met the minimum monthly commission threshold).

[21] However USC says “*new business*” clearly requires a client to be invoiced for services which that client has not previously been billed for. It therefore cannot include sales to clients which consist of ongoing or renewed services if a client has already been billed for such services, which is almost always the case when a new client comes on board because it is purchasing ongoing services (which are billed monthly for the duration of the clients’ ongoing relationship with UCS).

[22] UCS therefore says that commission is payable only on the first month of a new sale or an upgrade to a new service because that is the only period in which a client will not have been previously billed for the service being sold.

[23] UCS says Mr Terrey-O’Cock is not entitled to commission for a second or subsequent months’ sale because once the first sale has occurred the client has already been billed for the service so it is not “new business” as defined in the second IEA.

[24] In determining the meaning of “*new business*” I take into account all relevant evidence that objectively establishes the meaning of the words. Each party says that their pre-contractual intention supports their view of the meaning of “new business”.

[25] I objectively consider the plain meaning of the words “*new business*” are as expressly stated in Schedule 1 of the second IEA, namely a service that has not been billed previously.

[26] I consider that the parties specifically turned their minds to what sales were to attract commission and mutually agreed that commission would be payable only for services that had not previously been billed. While it would have been open to the parties to have agreed to pay commission based on Mr Terrey-O’Cock’s view of the commission structure I am not satisfied as a matter of fact they did.

[27] I consider that UCS’s interpretation of the commission structure makes more logical sense because I accept UCS’s evidence that the purpose of commission was to incentivise Mr Terry-O’Cock to continually generate new business by selling new services.

[28] UCS says that if Mr Terrey-O’Cock was to be paid ongoing commission on all future billings to any client he introduced to UCS, for the duration the client continued to purchase services from UCS, then there would be no incentive for him to actively seek new business. I accept that evidence.

[29] UCS says that would be contrary to the reason Mr Terrey-O’Cock was employed as UCS’s Business Development Manager because the reason for his engagement was specifically to have him focused on continually generating new business for UCS.

[30] UCS says that the scenario suggested by Mr Terrey-O’Cock would undermine the entire purpose of his employment because it meant he would be able to bring in one big new client (or expend minimal effort to reach the commission threshold) and then receive ongoing commission (assuming he met the minimum sales threshold) without exerting any more personal effort.

[31] UCS says that scenario would therefore act as a disincentive to him generating new business because he would already have a regular recurring commission merely by a client continuing to purchase a service that he had previously sold it which UCS says doesn’t make sense because he was selling ongoing services to clients.

[32] Mr Terrey-O’Cock says that any previous or existing business that results in the client being billed in any particular month counts towards his minimum sales target.

[33] Mr Terrey-O’Cock is therefore of the view that “*new business*” involves any monthly sales and only excludes sales from clients which Mr Terrey-O’Cock did not bring into the business, for example those clients who were pre-existing clients of UCS before Mr Terrey-O’Cock was employed by UCS.

[34] I do not agree with Mr Terrey-O’Cock’s interpretation because I consider that is an unduly broad interpretation. That view would require me to ignore the words “*total new monthly business*” in clause 5.2 of the second IEA and the words “*new business*” in points 9, 10 and 13 of Schedule 1 of the second IEA.

[35] I consider on the balance of probabilities that the reference to “*new business*” means new business that Mr Terrey-O’Cock had personally generated which had not been billed to that same client previously.

[36] I consider that clients who are ongoing or existing clients on a membership that Mr Terrey-O’Cock has previously sold do not fall within the category of “*new business*” unless that pre-existing or continuing client signed up for a new service for which it was not previously billed.

[37] I have therefore preferred UCS’s interpretation which means Mr Terrey-O’Cock was entitled to be paid commission based on what a new client was first billed but not for subsequent months billings when the client continued to purchase the services it had already been billed once for.

[38] I consider this accords with the parties' mutual intention that Mr Terrey-O'Cock's position was intended to continually generate new business by selling new services to current clients and by engaging new clients to purchase UCS's services.

Did UCS overpay Mr Terrey-O'Cock commission and if so can it recover any overpayment?

[39] UCS claims that Mr Terrey-O'Cock has been overpaid \$5,319.91 because it used his estimated sales figures when calculating a preliminary partial bonus payment it made to him instead of commission based on the finalised (verified) sales figures.

[40] The estimated sales figures were provided by Mr Terrey-O'Cock to UCS. I note that UCS specifically recorded to Mr Terrey-O'Cock that while it was prepared to make a partial commission payment because the calculations for that had been based on his unverified sales estimates, the actual commission payable to him would need to be finalised after UCS had verified the actual sales information upon which his commission was to be based.

[41] UCS seeks to recover \$5,319.91 from Mr Terrey-O'Cock, who accepted during the Authority's investigation meeting that if I adopted UCS's interpretation of "*new business*" then he had been overpaid \$5,319.91 commission. I have not been made aware of any reasons why UCS should not be able to recover this overpayment from Mr Terrey-O'Cock.

[42] Because I have preferred UCS's interpretation of the commission structure, it follows that Mr Terrey-O'Cock is now ordered to pay repay UCS \$5,319.91 in overpaid commission.

What if any costs should be awarded?

[43] UCS as the successful party is entitled to a contribution towards its actual legal costs. Although UCS was not legally represented at the Authority's investigation meeting I am aware (due to the production of GST receipts and from previous communications with the parties) that UCS was represented by a firm of solicitor so has incurred actual legal costs.

[44] I consider it appropriate for Mr Terrey-O'Cock to contribute to UCS's actual legal costs.

[45] I accept Mr Nutsford's analysis of the legal invoices UCS submitted in which Mr Nutsford says that only \$3207.12 of the total legal fees billed appear to relate to these Authority proceedings. UCS did not contradict that analysis.

[46] I therefore adopt \$3,200 as a notional starting point for assessing costs instead of the usual notional daily tariff of \$3,500 (which was the applicable tariff at the time these proceedings were filed – it has subsequently increased to \$4,500 for the first day of an investigation meeting).

[47] The notional starting point must then be halved to reflect that two connected but discrete matters were heard during the same day of investigation meeting. So the notional starting point for assessing costs in this matter is \$1,600.

[48] I am not aware of any factors which would warrant the notional daily tariff being increased. The parties advise that there have not been any *Calderbank* offers exchanged.

[49] I consider the fact that UCS was not legally represented at the Authority's investigation meeting is a factor which should reduce the amount of costs awarded by half because the Authority's costs tariff has been set based on the length of an investigation meeting.

[50] Mr Terrey-O'Cock is ordered to pay UCS \$800 towards its actual legal costs. He is also ordered to reimburse UCS \$71.56 for its filing fee. The amounts Mr Terrey-O'Cock has been ordered to pay UCS in this determination must be paid within 28 days of the date of this determination.

Rachel Larmer
Member of the Employment Relations Authority