

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 224
5623098

BETWEEN THERESA VAN DER MERWE
Applicant

A N D ROLLERFLEX LIMITED
First Respondent

MICHAL CIGANEK
Second Respondent

Member of Authority: Nicola Craig

Representatives: Applicant in person
Michal Ciganek for Respondents

Investigation Meeting: On the papers

Submissions Received: 9 April 2018 from Applicant
27 April 2018 from Respondents

Date of Determination: 19 July 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY
(No 3)**

- A. The Applicant has not established that she is owed any commission by the First Respondent.**
- B. Costs are reserved.**

Employment relationship problem

[1] Rollerflex Limited (Rollerflex or the company) is a provider of made-to-measure blinds, screens and awnings. Michal Ciganek is the sole director of Rollerflex and manages the business.

[2] Theresa van der Merwe worked for Rollerflex from September 2015 to March 2016 as a sales representative.

[3] The Authority has issued two previous determinations in this proceeding. The first concerned Mrs van der Merwe's personal grievance claims and claims that she was owed wages and other money by Rollerflex.¹ A second determination was issued regarding costs.²

[4] In the first determination the parties were directed to attempt to resolve between themselves the issue of whether Mrs van der Merwe is owed any further sales commission by Rollerflex. In the event that they are unable to, leave was given to return to the Authority on that issue.

[5] Mrs van der Merwe then informed the Authority that the commission issue had not been resolved and asked the Authority to determine it.

[6] The commission issue was dealt with on the papers, having regard to material received prior to and at the investigation meeting for the first determination, and subsequently.

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

The commission arrangements

[8] Mrs van der Merwe claims that she was not paid all the commission which she was entitled to, for sales she made for Rollerflex.

[9] The employment agreement between the parties did not specify any commission arrangement. However, Mrs van der Merwe was paid commission by Rollerflex. In the first determination the Authority concluded that payments were regularly made for commission based on a set rate for each sale and that Mrs van der Merwe was entitled to be paid for commission on sales which she made.³

¹ *Van der Merwe v Rollerflex Ltd and Ciganek* [2017] NZERA Auckland 200

² *Van der Merwe v Rollerflex Ltd and Ciganek* [2017] NZERA Auckland 371

³ Above n 1 at [60]

[10] The rate for commission where only one sales representative was involved was 4% of the value of the sale. Where two representatives were involved that commission was split, giving each 2%.

[11] A less straightforward issue was when commission was paid and what happened if the sale and installation process was not completed as originally arranged by the sales representative. For example, if the sales representative made a wrong measurement or sold a customer an incorrect product, resulting in a loss of revenue by Rollerflex. In that event, Rollerflex made a deduction, sometimes of the whole amount of the commission.

[12] As outlined in the first determination Mr Ciganek understood that commission was not paid to a sales representative until the customer's payment and supply of the product was finalised, thus meaning that no payments were made when an order was wrong or rejected by a customer. However, it appeared from Fatima Zanoria's evidence that that was not the case and full payments were made early after a deposit for an order was received and deductions made later if there was a problem.⁴ A number of deductions were made from Mrs van der Merwe according to commission sheets filed by Rollerflex.

Mrs van der Merwe's concerns

[13] In the first determination the Authority noted that Mrs van der Merwe's concern that she may not have been fully paid for her commission was understandable.⁵ Rollerflex did not have a written policy on commission and nothing else was provided to her setting out how the system worked. Her employment agreement did not assist.

[14] The Authority's impression in the first determination was that Mrs van der Merwe's claim was at least partly based on a sense that she did not receive as much as had originally been indicated to her could be earned in commission. Rollerflex's position was that there was no guarantee made to Mrs van der Merwe that she would receive a certain amount in commission. I accept that. There had been no detailed discussion at the job interview with Mr Ciganek about the commission arrangement.

⁴ Above n 1 at [59]

⁵ Above n 1 at [61]

[15] Rather Mrs van der Merwe's impression was based on discussions with staff once she started at Rollerflex. The other sales representative gave her an indication, from his experience, that commission payments would usually amount to several hundred dollars a week and could be more than the hourly rate paid. However, Mrs van der Merwe's commission would not necessarily have been at the same level, particularly as she was new to the business.

[16] Mrs van der Merwe says that she was told by an accounts staff member that commission was where her opportunity to earn money was. The company doubted that such a statement was made but, in any event, it is not a promise by anyone in authority, that a particular total of commission would be received.

[17] I also consider that Mrs van der Merwe's expectations were partially based on a family member's extensive experience as a sales representative. However, representatives in different industries may have different commission arrangements and resulting commission payments.

[18] Given that, prior to the Authority's process, Mrs van der Merwe had no idea of the percentage that commission was paid at, the divided commission if two representatives were involved and the reduction if there were problems, it was not surprising that she felt that she might have not been paid properly. She frequently did not receive as much as she expected, however she did not have robust information about how the Rollerflex system worked.

Commission documents

[19] Mrs van der Merwe did not raise the issue of whether her commission was being paid correctly whilst she was still employed at Rollerflex. It became apparent during the Authority's process that there were difficulties with documentation regarding the sales made by Mrs van der Merwe.

[20] The Rollerflex weekly payslips showed a total commission amount paid that week and in the year to date. There was no breakdown of which sales were covered.

[21] Rollerflex expected that Mrs van der Merwe would keep a notebook of her sales, as the other sales representative did. This is a not uncommon practice for sales representatives, so they can track their own sales. However, Mrs van der Merwe appears not worked under a commission system before. She was not told by the

company, or by the other sales representative, to fill out a notebook and she did not keep one. She has no record created by her of the sales she made.

[22] Rollerflex filed in the Authority the commission forms on which Mrs van der Merwe's payments were made. Mrs van der Merwe did not fill out the commission forms as she was unaware that she was supposed to. She did not see the forms while she was at Rollerflex. It appears that one or more of the accounts staff filled out forms which resulted in the commission payments to her. There was no evidence of accounts staff deliberately filling these out inaccurately. Mrs van der Merwe was paid on the basis of the forms.

[23] Mrs van der Merwe is entitled to challenge what was in these forms in terms of clients, orders or monetary figures. She was questioned in this regard at the investigation meeting. However, she was unable to identify any particular sales which she had not been paid for. Having seen the commission sheets, Mrs van der Merwe could not tell if all the work that she had done was captured there, not being able to remember details of clients or their work. This made identifying which sales she made next to impossible.

[24] Electronic diary sheets for Mrs van der Merwe were filed by Rollerflex and the company indicated which visits to clients resulted in sales orders, payments by clients and commission payments to her. These appeared to show that appropriate commission was paid.

Quantum of commission claimed

[25] Mrs van der Merwe provided a weekly figure of \$650.00 which she thinks she should have earned in commission. That figure appears to be a slightly rounded down amount from the commission of \$662.31 which she received in one specific week. She described that commission rate as a conservative estimate. That figure was considerably higher than what she earned for other weeks, although she says that this was because she was underpaid her commission.

[26] Rollerflex did not accept that there was any commission owing, as payment had been made as per the commission sheets. Rollerflex said that if Mrs van der Merwe could provide details of particular products and/or customers it would check that she had been paid properly. She was not able to do so.

[27] Rollerflex provided details of some of the difficulties with orders which resulted in reductions from the amounts paid to Mrs van der Merwe. She did not accept that there was the frequency of difficulties which Rollerflex specified but did accept a smaller number of problems.

[28] The company indicated that \$291.51 in deductions, from commissions paid for sales which were not completed as expected, could have been made to Mrs van der Merwe's final payment but were not.

Is there any commission still owing?

[29] The onus of proof is on Mrs van der Merwe to establish that any commission is owing to her.

[30] I am not satisfied on the balance of probabilities from the evidence before me that there is any further commission owing from Rollerflex to Mrs van der Merwe. She claims an average weekly figure which she regards as reasonable, based on what she once earned and the indication from two other staff that commission at somewhere around that level could be earned. I do not find that approach sufficient to establish an entitlement. Mrs van der Merwe is unable to identify particular sales that were not included or were wrongly accounted for.

[31] I therefore dismiss Mrs van der Merwe's claim for commission.

Costs

[32] The issue of costs regarding this determination is reserved. However, I note that neither party appears to have used paid representatives in relation to their dealings with the Authority on the commission issue, so it may well be that there is little, if anything, which they are likely to be awarded by way of costs.

Nicola Craig
Member of the Employment Relations Authority