

**ATTENTION IS DRAWN TO THE ORDER
PROHIBITING PUBLICATION OF CERTAIN
INFORMATION (REFER PARAGRAPH 4)**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 472
5359058**

BETWEEN PAUL VLUG
Applicant

AND ASNET LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
Michael Quigg, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: from Applicant
and Respondent

Date of Determination: 21 December 2012

SUPPLEMENTARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] By determination [2012] NZERA Auckland 174 the Authority found that the Applicant, Mr Paul Vlug, had not been unjustifiably dismissed by the Respondent, Asnet Limited (Asnet). The Authority's substantive decision dealt in principle with the employment relationship problem raised by Mr Vlug, but left the question of whether or not Mr Vlug had an entitlement to outstanding commission payments to be addressed by the Authority by means of a supplementary determination.

[2] The Applicant, Mr Paul Vlug, who was employed by Asnet in accordance with an individual employment agreement dated 24 April 2006 (the IEA), claims that he is entitled to outstanding commission payments in respect of a number of matters.

[3] It was agreed between the parties in a telephone conference call that the commission payment claims would be limited to 7 items at the values stated, which agreement was confirmed in the Member's Minute dated 24 September 2012. I intend to address each of

these claims as agreed individually. Mr Vlug has a further claim for outstanding unpaid absence.

Prohibition on publication

[4] **I order that certain technical details of the claims not be published but will be referred to by way of claim number only and/or substituted identification. This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.**

[5] Mr Vlug claims that he is entitled to payments in respect of the following:

- Commission Claim No.1: \$600.00
- Commission Claim No: 2 : \$4,816.00
- Commission Claim No. 3:: \$4,047.65
- Commission Claim No.4::\$1,126.50
- Commission Claim No5:: \$5,268.60
- Claim No. 6 Payment for 0.5 day's absence: \$230.00
- Commission Claim no. 7:: \$15,412.28

Determination

Commission Claim No.1: \$600.00

[6] Mr Vlug has confirmed that the full amount of commission payable to him under this claim had been paid therefore this claim is extinguished.

Commission Claim No: 2: \$4,816.00

[7] Mr Vlug has claimed in his witness statement dated 11 November 2012 that he is owed the sum of \$4,816.00 in respect of this claim.

[8] I am prepared to accept the Asnet invoice to A as being the definitive amount invoiced to A in respect of this transaction. I am also prepared to accept Mr Harrington's assertion in his witness statement dated 30 October 2012 as to the 'product sales value' of this invoice.

[9] Schedule B of the IEA refers to commission being payable on *direct product sales*, and under a separate section other sales are defined as *direct sales of services*. In both cases the gross profit margin of the relevant sale affects the rate of commission payable. This claim refers to direct product sales only.

[10] Both parties agree that this sale was fraught with difficulties and that remedial actions were taken.

[11] As a result the project incurred additional costs which for whatever reason would affect the projected gross profit margin and I am prepared to accept Mr Harrington's sales/order analysis which details the gross profit margin calculation subject to the matters set out below.

[12] A large part of the purchase cost in US\$ is subject to the effect of the conversion figure to NZ\$, either upwards or downwards. Mr Harrington has used a conversion rate of 0.77; upon checking the historical rates for 2008 I accept that this rate would have been reasonable to use. Also I accept Mr Harrington's statement that Asnet used the conversion rate for administration purposes only, because he also engaged in buying forward and hedging elements of foreign currency which did not impinge on individual buying or selling of contracts.

[13] I have considered the points made by Mr Vlug in his witness statement relating to the Equipment. In normal trading I would have expected the Equipment to have been returned to the Asnet stock at the same cost as that at which it had previously been held. Any loss or gain would therefore be realised at the next point of sale of the Equipment and therefore would not impact on the gross profit margin of this project. However if a discrete piece of equipment was purchased specifically to prove that a project was operating satisfactorily, and the cost of that equipment was fully charged to the cost of the project, and the equipment was subsequently returned into the ownership of Asnet and held in stock, I consider that the stock value should be offset against the cost of sales of the project.

[14] Mr Vlug claims that the Equipment fell into that category and I note that the cost of sales summary provided by Mr Harrington does include an amount in respect of the Equipment, which Mr Harrington confirms in his response dated 13 December 2012 is one and the same piece of equipment. Mr Harrington also confirms the technical reasons for this occurrence, which is not for me to comment upon. The important aspect is that Mr Harrington confirms that the Equipment remains in the ownership of Asnet, albeit not on their home site, and that it was not invoiced or paid for by A. It is for Asnet to recover its property.

[15] It is my view that the amount of NZ\$11006.49 should be removed from the cost of sales and thus the calculation of the gross profit margin of this project, however I am also minded that the future sales value of the Equipment may have been effectively reduced due to it being “used” on the project and therefore I reduce the amount to be credited by 50%.

[16] Using Mr Harrington’s cost of sale analysis the gross profit margin is to be increased by NZ\$ 5,503.49 producing:

	<u>Adjusted</u>	<u>Original</u>
Gross profit on product	171,567.37	166,064.12
Margin on product sale	17.8%	17.24%

[17] Mr Vlug’s claim is based on the fact that had the Equipment been accounted for correctly the gross profit margin in the original calculation would have been in excess of 18% and therefore allowed for a higher commission rate to be paid to him. I have determined that the adjusted commission rate is calculated at 17.8% which still falls below the 18% threshold, therefore there is no additional commission due under this claim heading.

Commission Claim No. 3: \$4,047.65

[18] Mr Vlug has claimed in his witness statement dated 11 November 2012 that he is owed the sum of \$1,762.65 being 1% of the invoiced amount of \$176,265.00 represented by invoice no: 10510 to Telstraclear. However I note that the amount of the claim as set out in the Member’s Minute dated 24 September 2012 was in the amount of \$4,047.65

[19] Mr Vlug’s claim involves only one invoiced sale to Telstraclear, namely invoice no: 10510 in the sum of \$176,265.00. Mr Harrington has submitted in evidence copies of two invoices which were submitted to Telstraclear in the years 2008-9, invoice no: 10758 dated 27 October 2009 to the value of \$228,480.00(excluding GST), and invoice no:10514 dated 19 August 2008, to the value of value \$176,265.00, which I shall take to be the invoice referred to by Mr Vlug in his claim and deal with under this claim heading.

[20] Schedule B of Mr Vlug’s IEA lists Telstraclear as a National account with Commission of 1% being payable on all product sales. I also note that Schedule B states under the section headed ‘Commission’ that

Current National account (sic) are currently limited to Telstraclear, and BCL. (subject to change).

[21] An undated memorandum from Mr Harrington to Mr Vlug, copied to Gillian Way and headed '*Sales Performance for 2008*' sets out Mr Vlug's revised remuneration details with effect from 1 January 2008. The Memorandum does not mention any changes to the nominated National accounts.

[22] There is no evidence that Mr Vlug challenged the changes in his terms and conditions of employment. During the Investigation Meeting held on 23 April 2012 Mr Vlug stated that he had been satisfied with the level of his remuneration following the changes made in July 2008. Further Mr Vlug confirmed he had accepted these changes in his witness statement dated 11 November 2012 in which he stated:

Officially my employment contract was negotiated 16 December 2006 to take effect from 1 January 2009 and it was now based on named accounts which did not include Telstraclear.

[23] In an email dated 24 April 2008 from Mr Harrington to Mr Vlug, Mr Harrington informed Mr Vlug that the Telstraclear account: "*... will now move solely to Wellington and be looked after by myself and Matt.*"

[24] From the documentation I find that:

- (i). Asnet had, in accordance with Schedule B of the Employment Agreement, the right to change the nominated National accounts;
- (ii). by Mr Vlug's own admission as indicated in his witness statement dated 11 November 2012 he had accepted that with effect from 1 January 2009 Telstraclear was not a named account covered by the terms of the Employment Agreement; and
- (iii). the email dated 24 April 2008 from Mr Harrington informed Mr Vlug that he had been removed from any involvement with the Telstraclear account with effect from 24 April 2008..

[25] On the basis of this information, I determine that with effect from 24 April 2008, Mr Vlug had no entitlement to any commission from sales invoiced by Asnet to Telstraclear.

[26] Schedule B of the Employment Agreement also sets out that any commission payable will be: "*for sales affected by the Employee*". I consider that 'affected' was intended to be read as 'effected' i.e. sales which have been influenced by the employee, in this particular instance, by Paul Vlug.

[27] Mr Vlug has not claimed that he was directly involved in making the sale represented by invoice 10514 to Telstraclear, but states in his witness statement dated 11 November 2012 that: “..all sales to Telstraclear should have been paid at a commission rate of 1% as per my contract”. I consider that this statement infers Mr Vlug’s view as being that commission should have been paid on any and all sales made to Telstraclear.

[28] I find that the documentation supports the position that

[i] Telstraclear ceased to a nominated National account with effect from 24 April 2008

[ii] Commissions were payable only on sales effected by, or at the very least influenced by, Mr Vlug. However I find no evidence that Mr Vlug was involved in making the sale represented by invoice no: 10514 dated 19 August 2008..

[29] I determine that Mr Vlug is not entitled to a commission payment in respect of Telstraclear sales under this claim heading

Commission Claim No.4:\$1,126.50

[30] Mr Vlug has claimed in his witness statement dated 11 November 2012 that he is owed the sum of \$1,126.50 in respect of the Infloblox renewal for Vodafone.

[31] Mr Harrington confirmed in his witness statement dated 30 October 2012 that there were 8 invoices each subject to 3% commission payable to Mr Vlug, he also produced in evidence commission payment slips to Mr Vlug detailing such payments, except for invoice no: 10331, for which Mr Harrington confirms the commission payment to be outstanding. Mr Harrington also confirmed that there was no invoice raised for \$1,126.50 during 2007.

[32] I determine that Mr Vlug is entitled to a commission payment of \$312.67 in respect of the claim under this claim heading.

Commission Claim No. 5: \$5,268.60

[33] Mr Vlug has claimed in his witness statement dated 11 November 2012 that he is owed the sum of either \$15,394.30 or \$3,017.86 in respect of this claim, however the claim as discussed in the Member’s Minute dated 24 September 2012 and as discussed during a telephone conference with the parties, is for the sum of \$5,268.60. Although Mr Vlug has amended this claim in his witness statement dated 11 November 2012, I shall proceed on the

basis of the information supplied by Mr Harrington and the original detail of this claim supplied by Mr Vlug.

[34] The claim relates to the gross profit margin calculation on the invoice to A, and therefore to the commission payable to Mr Vlug. Mr Harrington has supplied a breakdown of the relevant calculations in a document submitted in evidence titled 'A Commission Payment'.

[35] The Invoice has been analysed by Mr Harrington to show the split between product sales and services: On the basis that the installation element is part of the product sale, this appears to be correct.

[36] In order for the project to be accepted by A for whatever technical reason, I accept Mr Harrington's explanation that Asnet had to supply Equipment 2. This is clear from the sales invoice to A and therefore the cost of Equipment 2 should be used in the calculation of the gross profit margin for Product Sales.

[37] Mr Harrington confirmed that one unit was purchased on a 'not for resale' basis at a lower cost. I consider that this unit, even if purchased as a 'spare', should be absorbed into the general stock of Asnet and not form part of the gross profit margin calculation of this project, which is confirmed by Mr Harrington in an email to Mr Vlug dated 10 March 2010 which states: "*This additional unit will go into spares at this special price*".

[38] In an email which Mr Harrington forwarded to Mr Vlug, the supplier of the Equipment 2 sets out the total cost.

[39] The relevant Asnet sets out the cost. There is a notation on this document which refers to PO 10392 which has not been referred to previously.

[40] The calculations relating to this project on the two Mr Vlug commission statements supplied by Mr Harrington are inconsistent and confusing and relate only in the totals to the A commission payment statement. When examining the total costs of sales of \$605,928.00 and zero cost of sales for services and the installation element moving from services to product sales, it is apparent that the figures have been manipulated for some unknown purpose. I therefore consider that it is reasonable to ignore these documents and use the invoice and the purchase order for the purpose of calculating the gross margins.

[41] As already stated and confirmed by Mr Harrington, one additional Equipment 2 was purchased, but no actual cost details have been supplied, other than a comment by Mr Harrington that it was a “*low figure*”. For the purposes of this calculation, I have assumed a 50% discount was obtained.

[42] The relevant Asnet Purchase order No 1 states a total product cost producing a unit cost and using my 50% discount, and Mr Harrington’s currency conversion rate of 0.70 the service gross margin cost overstatement is NZ\$14,540.00. I therefore find that Mr Vlug is entitled to an additional commission payment of NZ\$1,817.50 (12.5% of \$14,540.00).

[43] The relevant Asnet Purchase order No 2 states a total service cost and using my 50% discount and Mr Harrington’s currency conversion rate of 0.70 the service gross margin cost overstatement is NZ\$6,397.00. I therefore find that Mr Vlug is entitled to additional commission payment of NZ\$799.65 (12.5% of \$6,397.00).

[44] I determine that the total additional commission payment due to Mr Vlug in respect of this claim is NZ\$2,617.15.

Claim No. 6 Payment for 0.5 day’s absence: \$230.00

[45] Mr Vlug has claimed in his witness statement dated 11 November 2012 that he is owed the sum of \$230.00 in respect of a half a day’s absence in October 2010. This claim highlights the acrimonious personal disagreements between Mr Vlug and Mr Harrington; however it is effectively a wages claim.

[46] There is no disagreement that Mr Vlug was absent for one half day, the issue is whether or not Mr Vlug was entitled to be paid for this period of absence in accordance with the terms of the IEA.

[47] The relevant terms of the IEA are set out in the clause entitled ‘HOURS OF WORK’ which states:

*4.1 The normal hours of work are 8.30 am to 5.00 pm. With general business hours operating anywhere between 8.00 – 6.00 pm. It is expected that each employee will honour their total working hours in full.
Any amendment to contracted working hours will be agreed by both the employer and the employee.*

...

4.3 *The company has from time to time allowed flexibility to staff to attend personal related matters during work hours. In instances where an employee wishes to take paid time off work, then it will be expected that each employee will advise their managers prior to taking the time off work, with the following detail*

- a). *Reason for taking time off.*
- b). *Amount of time the employee will be absent from work and time of return.*
- c). *Clearance from management that absent (sic) has been granted.*

[48] Mr Vlug claims that he was entitled to be paid for his absence on the basis that he was allowed to work from home in accordance with clause 4.3 which concludes with the statement: *For the purposes of clarity the company **DOES NOT** operate a work from home policy unless granted and approved by one of the Directors.*

[49] In the absence of any evidence to the contrary I find that Mr Harrington had given Mr Vlug permission to work from home. However I consider that working from home does not encompass attendance to *personal related matters during work hours* in respect of which the terms as outlined in clause 4.3 of the IEA apply, which are that permission must be obtained prior to the employee being absent from his or her place of work.

[50] Mr Vlug does not dispute that he did not have permission for a half day's absence. Accordingly I find that Asnet was entitled to treat this absence as annual leave.

[51] I determine that Mr Vlug is not entitled to payment in respect of the half day absence in October 2010.

Commission Claim no. 7: reference Elitecare: \$15,412.28

[52] Mr Vlug has claimed in his witness statement dated 11 November 2012 that he is owed the sum of \$15,412.28.

[53] This claim relates to Elitecare renewals for TelstraClear and again I find that Mr Vlug has changed the value of the original submission made on 14 August 2012 in respect of this claim which was the basis on which I requested the information set out in the Member's Minute dated 24 September 2012. I shall therefore proceed utilising the information requested in the Member's Minute and supplied by Mr Harrington.

[54] It is clear from the IEA and the subsequent amendment effective 1 January 2008 that:

- (i) National accounts which included TelstraClear attracted commission payments and that: *existing and renewals will be commissioned at 1%.*
- (ii) *Elitecare renewals that you have sold and invoiced in any given quarter will be commissioned at the rate of 3% at the end of each quarter...*

[55] Therefore in order to qualify for 3% commission payments Mr Vlug must have been involved in the sales of any Elitecare renewals made after 31 December 2007. However as the Telstraclear account responsibility was moved to Wellington with effect from 24 April 2008 and Mr Vlug had no further dealings with this account from that date, the only period in which any commission on Elitecare/Telstraclear sales post 1 January 2008 could have been earned by Mr Vlug was the period 1 January 2008 to 24 April 2008.

[56] Invoice no: 10355 is dated 18 December 2007 (and indicates that the period covered was from 1 Jan 2008 to 31 March 2008. It is therefore most probable that negotiations took place prior to 1 January 2008, that is during December 2007 at the latest, which would have included Mr Vlug as per his responsibilities pursuant to the IEA. Although there is an annotation on the invoice indicating that a credit note applies, no detail has been provided and in the absence of any evidence that Mr Vlug was excluded (with his agreement) I find that this sale falls within the ambit of the original IEA and ceased on 24 April 2008. This is effectively one quarter.

[57] Mr Vlug is entitled to commission under the clause "*existing and renewals will be commissioned at 1%.*" *equating to 1% of \$192,653.48 or \$1,926.53.* I find that under this claim heading an amount of \$1,926.53 is payable to Mr Vlug.

Summary Determination

[58] For the sake of clarity I detail below the following summary:

[59] Asnet is to pay Mr Vlug a total amount of \$4,856.35 in respect of the following outstanding commission payments:

- a. Commission Claim No. 1: Withdrawn – nil payment.
- b. Commission Claim No. 2: - nil payment
- c. Commission Claim No. 3:– nil payment
- d. Commission Claim No. 4: \$312.67
- e. Commission Claim No. 5: \$2,617.15.
- f. Commission Claim No.7:: \$1,926.53

[60] There is no payment owing in respect of claim No. 6 for 0.5 day's absence.

Costs

[61] In respect of this supplementary determination, costs are reserved. Given the extent to which both parties have been successful, I am of a mind that costs should lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, submissions may be filed by the parties within 28 days of the date of this determination

Eleanor Robinson
Member of the Employment Relations Authority