

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 91
5435392

BETWEEN ROBERT AARON WHITE
 Applicant

A N D TELECOM NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Mark Henderson (Counsel) and Geraldine Biggs
 (Advocate) for Applicant
 Emma Butcher, Counsel for Respondent

Investigation Meeting: 1 and 2 April 2014 at Christchurch

Further information: 28 April, 9 May, 5 June and 20 June 2014

Date of Determination: 25 June 2014

DETERMINATION OF THE AUTHORITY

- A. Aaron White did not raise his personal grievance alleging unjustified actions causing disadvantage within the 90 day period provided for in s. 114(1) of the Employment Relations Act 2000.**
- B. There are no grounds on which to grant leave to Aaron White to raise his personal grievance out of time and his application is dismissed.**
- C. Aaron White is entitled to reimbursement of commission lost as a result of the retrospective adjustment of the sales target after year end 2012 and as a result of the discounting of his mobile rewin claims after year end 2012.**

- D. Aaron White is also entitled to holiday pay and interest on the sum of lost commission.**
- E. Before orders are made the Authority has given Mr Henderson seven days to respond. That is because the amount of lost commission arrived at by the Authority of \$30,985.10 is inconsistent with the amount in Mr White's written evidence and Mr Henderson's final submission. If there is a disagreement about what the final figure should be Ms Butcher will have an opportunity to respond.**
- F. Costs are reserved and failing agreement a timetable has been set for an exchange of submissions.**

Employment relationship problem

[1] Robert White known as Aaron was employed by Telecom New Zealand Limited (Telecom) from 1995. He worked his way up various roles in Telecom and in November 2011 was moved to the position of Client Manager where he remained until 30 June 2013 when he was made redundant.

[2] Mr White was party to an individual employment agreement with Telecom. The agreement was signed on 1 November 2011. The agreement provided that Mr White would be remunerated by way of a fixed salary, additional benefits and an on-target incentive potential component (OTP). The OTP was payable depending on Mr White's achievement under the Telecom Retail Medium Enterprises Sales Incentive Plan (SIP).

[3] Mr White says that Telecom acted wrongly by:

- (a) Retrospectively increasing one of his sales targets in the SIP by 33% for the year ending 30 June 2012 (FY12); and
- (b) Retrospectively imposing a change to the claiming rules for one of the targets (FY12).

[4] Mr White says that these actions amount to:

- (a) Disadvantage by unjustified actions;
- (b) A breach of the Wages Protection Act 1983;
- (c) Unconscionable conduct that gives rise to estoppel; and
- (d) A breach of the Fair Trading Act 1986.

[5] Telecom does not accept that Mr White raised a personal grievance within the statutory period of 90 days beginning with the date on which the actions alleged to amount to a personal grievance occurred or came to the notice of Mr White. It says that the delay was not occasioned by exceptional circumstances and that the Authority should not grant leave to raise the personal grievance after the expiry of 90 days.

[6] Telecom says that it adjusted sales targets and otherwise acted lawfully in accordance with the terms of the contractual arrangements between the parties at all times during Mr White's employment. Telecom does not accept it made any deductions from Mr White's wages and does not accept that it created a belief or expectation that estopped it from taking the steps that it did. Telecom does not accept it engaged in misleading or deceptive conduct.

[7] In his written evidence and final submissions Mr White seeks lost remuneration of \$38,095.70. There is an alternative claim for approximately \$9,000 if part of his claim about discounted mobile rewins is not established, holiday pay on the sum of lost remuneration, compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) of \$15,000, interest and costs.

[8] Mr White also said in his evidence that he thought Telecom had actually wrongly reduced his overall achievement figure by calculating this over 4.25 months instead of over 12 months. After evidence had been given on behalf of Telecom about that Mr Henderson confirmed that matter had been explained and would not be pursued.

[9] By agreement, and because of very similar facts and overlap in evidence, Mr White's employment relationship problem was investigated by the Authority together with that of another Telecom employee, Gregory Allott. There will be different determinations.

The issues

[10] The Authority needs to determine the following issues:

- (a) What were the contractual arrangements between Mr White and Telecom?
- (b) Did Mr White raise his personal grievance within 90 days as required in s.114(1) of the Act?
- (c) If Mr White did not raise his personal grievance within the required timeframe, then should there be an order granting leave to raise the grievance outside of this time under ss.114 and 115 of the Act?
- (d) If Mr White did raise his personal grievance was he disadvantaged by Telecom when it amended sales targets retrospectively and discounted some of his claims after the year had ended?
- (e) Were Telecom's actions unjustified? and/or;
- (f) If there was no grievance raised within the statutory timeframe and no order granting leave to raise outside of that period then this matter should initially be treated as an application for recovery of wages or other money;
- (g) The additional causes of action are whether Telecom made deductions from Mr White's wages in breach of the Wages Protection Act 1983;
- (h) Was Telecom estopped from taking the actions that it did?
- (i) Was Telecom in breach of the Fair Trading Act 1986 in acting in the way it did?
- (j) If Mr White's claims were made out what remedies is he entitled to?

What were the contractual arrangements between Mr White and Telecom?

Individual terms of employment

[11] Mr White signed individual terms of employment when he became a Client Manager on 1 November 2011. He did not spend a full year on sales so his targets were adjusted proportionately.

[12] Remuneration in the individual terms for Mr White was referred to as follows:

Your on target earnings includes a fixed remuneration component and an on target incentive potential component. The value of each of these components is set out in your remuneration statement.

We will determine any on target incentive potential payable in accordance with your achievement under the Sales Incentive Plan that applies to your position. We may amend the terms of the Plan or substitute the Plan itself at any time. If we do we will give you one month's written notice.

Base Agreement

[13] Mr White had a base agreement with Telecom which contained general terms and conditions of employment. The second page of the base agreement provided amongst other matters changes to incentive targets. In that regard the clause provided:

To enable us to make a positive difference for our customers and to the future success of the Telecom Group our business needs may change. Consequently, your capabilities and career goals may also change due to your experience and/or new opportunities that may arise.

We may make any of the changes below if our business needs or your capabilities change, or to give you development opportunities.

Change your performance or incentive targets or our performance targets including, for example, your individual or team targets, targets for your business unit and targets for the Telecom Group or any part of it...

The Telecom Retail Medium Enterprises Sales Incentive Plan (SIP)

[14] The SIP is approved for implementation each year by the medium enterprise incentive governance group (the IGG) which is made up of the General Manager of

Sales, Head of Business Sales and Services, Head of Finance, Sales and Service and HR Business Partner.

[15] The SIP relevant to this matter commenced on 1 July 2011. This is confirmed in clause 6.1.2 of the SIP which provides that all individuals on an OTE contract such as Mr White's would be aligned to the SIP from this date. Clause 6.1.3 is headed duration of the plan but only provides that it will be reviewed on a regular basis and any amendment will be communicated as appropriate. I am satisfied that the SIP had a life of one year from 1 July 2011 until 30 June 2012 before it was replaced. The Authority was provided in the bundle of documents with a copy of the SIP that commenced for the next year commencing on 1 July 2012.

[16] In order to qualify for OTP commission payments Mr White had to achieve sales targets across three categories which are set out in the SIP. The three categories and percentage weightings for FYE 12 were client billed revenue 40%, new business acquisitions 30 %, and retention of customers (rewins) 30%.

[17] Each of these categories and what they measure are described in the SIP. Client billed revenue is a year to date measure on actual billed revenue from Mr White's portfolio of clients against a target. Contract sales measures cumulative contract sales against a full year target. The two contract types under this component are acquisition contracts, which are defined as any customers business, that is currently provided by a different provider, which has been contracted to transition to Telecom, and new business contracts which are a brand new contracted solution for a customer's business.

[18] A rewin contract is defined in the SIP as a solution where Telecom *is the incumbent provider and therefore resigning the business or replacing a current service with a new offering, or both*. This last component was a new component and replaced the previous year's individual stretch objective incentive component.

[19] Mr White spent a total of 7.25 months in the role of Client Manager during the year end 2012. The SIP provided at clause 6.1.4 that the first three months of the time he spent in the role was treated as a training period and a three month guaranteed 65% payment replaced the commission payments.

[20] Mr White was able to earn commission for the remaining 4.25 months until the end of the financial year. He was required to achieve 85% in all three categories

in order to qualify for a payment for commission. If he achieved 100% of his targets or more in all of the categories, then the commission payments increased. The detail for calculating commission payments is set out in the SIP at clause 5.

[21] Mr White achieved over 100% of his sales targets in all three categories. On Telecom figures he achieved for the targets set; 105.32% for client billed revenue, 108.03% for contracted sales, and 714.45% for rewin.

[22] Although targets were set annually, employees were obliged under the SIP to calculate and submit claims for incentive payments as they went. Telecom reviewed progress against the plan and employees received a monthly payment calculated by using the measure of the year to date actual achievement against year to date target.

[23] Mr White had all of his claims signed off by his supervisor Jason Sharp and Telecom's senior Sales Support person Andy Garwood. He was aware that from time to time his claims were audited because he would sometimes have one returned with an issue which he would fix up.

[24] Clause 3.3 of the SIP provided that targets for an incentive payment would be allocated annually at the start of the applicable period and reviewed quarterly.

[25] Clause 5 of the SIP states that where monthly achievement is over 200% a target review occurring *to ensure we are recognising high achievement prior to finalising results for payment*. Clause 6.2.5 also refers to achievement against target and provides that sales manager may not adjust targets once they have been set at the start of the month. Further that *where achievement is greater than 200% (prior to acceleration) a target review will occur to ensure appropriate achievement prior to finalising results for payment*.

[26] Clause 6.5 of the SIP FYE 12 is headed *Targets* and provides under sub-clause 6.5.2 for target adjustments as follows:

Changes to the targets will be communicated usually at least one week in advance of the effective date of the change.

Telecom Retail reserves the right to retrospectively amend targets at its discretion where:

- *Forecasting has been done incorrectly;*
- *Business change occurs;*

- *Changes are made to Telecom's products or services;*
- *Ready made sales occur;*
- *Targets have been set incorrectly; and/or*
- *Achievement falls below 85% or above 200%.*

No target changes are to be made without the written approval from the Head of Business Sales and/or the Incentive Governance Group.

[27] Telecom relies on clause 6.5.2 as giving it the ability to retrospectively adjust sales targets FYE12.

Telecom Retail Medium Enterprise Sales 2011-12 Full Year Targets document

[28] The details of the targets and rules for claiming were contained in a document called Telecom Retail Medium Enterprise Sales 2011-12 Full Year Targets (the MEC).

[29] The MEC document is described on its first page as one that details the targets, by role, for the 2011/2012 year per component as detailed in the SIP. It provides that the MEC document should be read in conjunction with the SIP.

[30] The above documents provided the basis for the payment of remuneration to Mr White by Telecom for the year ending 2012.

Did Mr White raise a personal grievance within 90 days

[31] The statutory timeframe of 90 days for raising a personal grievance is provided for in s. 114 (1) of the Act. Section 114 (2) of the Act provides that a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer is aware that the employee alleges a personal grievance that the employee want the employer to address.

[32] Mr Henderson submits that Mr White raised his personal grievance that he was unjustifiably disadvantaged in his employment within the required 90 day time period by virtue of a series of emails he sent to his employer between 6 September 2012 and 16 November 2012. Mr White also says that he continued to complain to

Mr Sharp about his dispute verbally between September 2012 and May 2013. The Authority did not hear from Mr Sharp.

[33] Mr Henderson was instructed by Mr White in May 2013 and on 27 May 2013 he wrote a letter to Mr Brown in which he said he formally confirmed Mr White's grievance which he then summarised. Ms Butcher replied on behalf of Telecom by letter dated 11 June 2013 in which she said amongst other matters that Mr White has failed to raise any personal grievances and Telecom did not consent to the grievance being raised after the expiration of that period.

[34] The appropriate date to calculate the commencement of the 90 day timeframe for the retrospective adjustment to the sales target is 24 August 2012 which is when Mr White received a copy of the email from the Head of Sales Business (SME), Richard Brown. It was probably not until a week or so after that when it became clear there had also been adjustment of mobile rewin claims. That is in early September 2012.

[35] On 6 September 2012 Mr White sent an email to Mr Sharp seeking an extension of time for lodging adjustment applications or to lodge an official protest and seek legal advice. Mr Sharp responded to Mr White by email advising that an extension had been sought.

[36] From there on Mr White says that he raised his grievance in a series of emails commencing on 12 September 2012 and concluding on 16 November 2012 and in verbal discussions with Mr Sharp.

[37] I have carefully considered the emails. I agree with Ms Butcher's submission that Telecom was aware of though the email communications and at meetings held that Mr White did not agree with the retrospective adjustment to the sales target or the discounting of his mobile rewin claims. After the final email on 16 November 2012 there was nothing in writing about the matter until Mr Henderson's letter on 27 May 2013. The issue for the Authority to decide is whether the emails sent during September and November 2012 either individually or together raised a personal grievance within the statutory timeframe.

[38] Mr White by virtue of his email correspondence acknowledged that after discussion with Mr Brown and Ms MacDonnell some claims had been agreed to be adjusted back into his 2012 rewin figure. He asked for a reply. He acknowledged

some other adjustments had been made but referred to his primary dispute being that there was a change in the claiming procedure apparently made after the year end. He said that under the changed process he had identified 128 mobile devices that he would have claimed under the changed process and asked for them to be added back. Mr White then referred to the MEC rewin claim rules and said that he believed that all his claims complied with the rules and he asked for documentation to support Telecoms' approach to discounting his mobile rewin claims. He made it clear that he thought Telecom had changed its claiming rules unfairly after the 2012 year for sales had ended.

[39] I have carefully considered the emails. I find viewed separately and together the emails raise a dispute with Telecom about the discounting of Mr White's mobile rewins, whether that was a change to the claiming process in the MEC or not and whether other claims should be accepted in line with the new process but they do not go so far as to raise a personal grievance.

[40] I find the facts of this matter are distinguishable from those in the Employment Court judgment in *Miriam Clark v Nelson Marlborough Institute of Technology* (2008) 8 NZELC 99. In *Clark* it was found that there was no doubt that the plaintiff alleged in her letter which was found to have raised her personal grievance, that her employment had been affected to her disadvantage by the unjustifiable action of the defendant as her employer. The nature of the complaint therefore fell as Judge Couch stated at [35] squarely within the definition of s.103 of the Act.

[41] I do not find a personal grievance was raised with Telecom by Mr White until 27 May 2013 which was well outside of the 90 day statutory timeframe.

[42] Mr White says that if a grievance was not raised within 90 days then the Authority should allow the grievance to be raised outside of that period on the basis that the delay raising the personal grievance was occasioned by exceptional circumstances and it is just to do so. The process of whether leave should be granted is provided in subsections (3) and (4) of s.114 and s.115 of the Act.

[43] The first ground relied on is that Mr White went to considerable length to resolve his claim upon becoming aware of the issue with his remuneration. Telecom was aware that Mr White was unhappy with the adjustment of the target and discounting of his claims but I accept Ms Butcher's submission that as there was a

failure to raise a grievance Telecom did not therefore consider the issue as a personal grievance against the potential legal consequences that could flow from that.

[44] The second ground relied on is that Mr White's individual terms of employment from 1 November 2011 do not refer to raising a grievance within 90 days. He accepted that his employment agreement earlier referred to as the base agreement dated 27 May 2005 containing general terms and conditions did contain reference to raising a grievance within 90 days and did not know that this still applied when he signed his individual terms.

[45] The individual terms signed by Mr White on 1 November 2011 do not refer to the base agreement signed by Mr White on 27 May 2005. The base agreement though does refer to remuneration being paid as specified in *your individual terms* and a situation where if there is a promotion or transfer then the individual terms are to be updated. I find that the base agreement continued with the individual terms and conditions to govern the employment relationship. The requirements of s. 65 of the Act were met and I do not find an exceptional circumstance made out in that regard.

[46] The third ground is that Mr White spoke with a lawyer on 21 November 2012 from a different law firm to his current lawyer. There was reference to the fact that Mr White could raise a personal grievance but that there was no advice that this needed to be done within 90 days. The evidence did not support that Mr White instructed that solicitor to raise a personal grievance on his behalf to conclude an exceptional circumstances on that basis. The solicitor clearly discussed that an option for Mr White was to raise a personal grievance. It was still within the 90 day period. Ignorance of the law does not constitute an exceptional circumstance.

[47] I am not satisfied in this case that the delay in raising the personal grievance was occasioned by exceptional circumstances. I decline the application for leave to raise the personal grievance out of time.

[48] I will consider the claim initially before turning if required to the alternative causes of action as an action for recovery of wages or other money from Telecom.

Retrospective adjustment of sales target and deduction of mobile sales for year end 2012

[49] Mr White says that the effect of the retrospectively applied target increase of 33% was that he lost commission of \$9,437.79 being the difference between his original rewin before adjustment figure of \$30,646.80 and the adjusted target figure of \$21,547.30.

[50] Mr White says that Telecom also deducted incorrectly \$524,951.00 worth of mobile rewin revenue from his achievement figures and his commission was wrongly reduced by \$21,547.30.

[51] Mr White claims alternatively that had he known about the change in the process for claiming then he would have claimed for approximately \$9,000 for 128 unclaimed mobile services agreements which Telecom did not accept because they had not been submitted within 30 days of closing the deal.

[52] Telecom says that it was entitled to retrospectively adjust the sale target after year end 2012 and discount the claims on the basis of its contractual arrangements with Mr White and in particular the SIP and MEC.

[53] The Authority heard evidence from two witnesses who were employees of Telecom at the material time. Mr Brown commenced in the role of Head of Sales Business (SME) in May 2012. He was employed by Telecom since 2007. Mr Brown is now self-employed but has been authorised by Telecom to provide evidence to the Authority. Natalie MacDonnell was employed in the role of Finance Manager supporting the Telecom Retail Sales Division between 15 July 2011 and 28 February 2013.

[54] Ms MacDonnell said that it was not until the fourth quarter in April 2012 that it appeared the targets were rising above the 150% (230% rewins and 73% acquisition). She described this as the point where Finance must raise alarm bells with management about the over achievement against target and she raised the issues with management including Mr Brown.

[55] Mr Brown said in his evidence that if achievement was going to exceed the targets by more than 200% this was significant because Telecom did not budget to pay out on achievement by the Sales team of greater than 200% of target. In those

circumstances Telecom relies on the provision in the SIP that a target adjustment could take place and that it could be done retrospectively. Mr Brown said that it was important Telecom retained the right and discretion to do that because targets were set at the beginning of a 12 month period and it was impossible to know across the country what the final result was going to be.

[56] It was decided that the finance team should undertake a full review and provide findings and recommendations to the IGG as to whether a target adjustment would need to be made and, if so, by what percentage. The initial indication at that point in relation to the rewin component was that there would need to be an increase of around 40%.

[57] A detailed target review was commenced in early May 2012. Ms MacDonnell said that she was told by the Commercial Analyst who completed the detailed target review that the area of most concern was the rewin component and that it looked like there would be an adjustment to the target in that area.

[58] Aware of the potential impact to the client managers employed at that time Mr Brown held a meeting with all regional sales managers in May 2012 to discuss the approach to managing the situation. Mr Sharp was present at the meeting.

[59] Mr White recalled Mr Sharp advising him in May 2012 that there may be an increase to the rewin sales target for the financial year end 2012. Mr Sharp said that there was still a lot of uncertainty about the target change.

[60] Not long after the review commenced Finance brought up another issue with the IGG and said that they had found inconsistencies with the way that members of the sales teams in different regions had claimed for rewin sales. Ms MacDonnell said that it appeared the rewin claims were exceptionally high and that the only documents being used in support of the claims were Telecom Business Agreement (TBA's). It was decided to look more deeply into this issue to see whether the claims had been made correctly and in accordance with the criteria in the SIP and the MEC.

[61] Mr Brown said that he hoped that the exercise would have a positive result for the purposes of the target adjustment so that either the target would not have to be adjusted or adjusted as much.

[62] Shortly before the end of the financial year on 12 June 2012, Mr Brown sent an email to Mr Sharp and other sales managers which confirmed that the rewin target would be adjusted and the figure was 40% with a very slim chance that this may go up or down depending on the year end results and claims adjustments. Mr Brown asked that this message be communicated to the team and he requested Mr Sharp to come back to him with any questions. The reason for adjustment given in that email was that it was due to significant over achievement of rewin target and severe impact on the budget.

[63] Mr White recalls being advised of the possibility of a 40% increase although said that nothing was confirmed or provided to him in writing at that point.

[64] When Ms MacDonnell gave her evidence she referred to a document containing recommendations in writing from the finance team to the IGG about the rewin claims and the mobile rewin target adjustment. The document had not been previously provided to counsel although Ms MacDonnell thought it had been. It was not included in the agreed bundle of documents but it was briefly shown to the Authority and Mr Henderson. There was some concern about other individuals not involved in the Authority's investigation being named in the document and it was understood that copies would be provided after the meeting to the Authority and Mr Henderson. Ms Butcher attended to this. The copy provided to Mr Henderson had the names of other individuals redacted. The Authority was also provided with some supplementary evidence by way of statements about the document from Ms MacDonnell, Mr Brown and Mr White/Mr Allott.

[65] Ms MacDonnell confirmed that the recommendation document was presented by her and Kayne Munro, the Head of Finance, to the IGG on 20 August 2012 after the review was completed. The document summarised the background to the audit of rewin contract claims, the potential issues or problems in relation to the claims assessment under the SIP, the work carried out, the SIP/MEC claiming details for rewins and options and recommendations. Mr Brown in his supplementary statement said that the IGG discussed the options and any risk and accepted the recommendation of the finance team as set out.

[66] The recommendation was for option one to *adjust non-optimize mobile Rewin claim values to values per the Phoenix report data* but to include rewin contracts 15 months or older to capture the majority of early upgrades approved by special deals.

After the adjustment was made then to the claims the rewin target adjustment was to be finalised at an increase of 33%.

[67] On 24 August 2012 Mr Brown sent an email to sales managers confirming the final rewin target adjustment was to be 33%. Mr Brown asked for any questions from the teams to be sent through to him, Ms MacDonnell or her assistant Colleen Davies. He indicated that all payments would be made in the next pay run. The contents of that email are quite important because reliance is placed both on the email and the previous email of 12 July 2012 as the required written approval from the Head of Business Sales and/or the IGG before target changes are made. This was confirmed after the Authority investigation meeting in an email from Ms Butcher dated 28 April 2014 when the Authority requested the document containing approval to the target adjustment as required under the SIP.

[68] In his email of 24 August 2012 Mr Brown confirms that rewin targets have been adjusted up 33% and not 40% as first indicated. He says that this is due to significant over achievement of OTE, not forecast. Further he writes that as per SIP *where achievement is over 150%, targets are subject to review* and that mobile rewins have been adjusted to include only the connections that are eligible for upgrades at 15 months to allow for any early upgrades approved.

[69] On 6 September 2012 Mr Brown received a communication from Mr Sharp about disengagement from his team due to the various decisions being made at the higher level.

[70] Mr Brown went to Christchurch with Ms MacDonnell in September 2012 to meet with Mr White and other affected client managers to discuss questions about the target adjustment and the claiming changes. In or about November or December 2012 Mr Brown made it clear that Telecom would not be revisiting its decision on the financial year end 2012 SIP .

Was Telecom entitled to retrospectively adjust the rewin target by increasing it by 33% after the end of the sale year 2012?

[71] Ms Butcher submits that the Authority should have little difficulty in finding that the SIP permitted retrospective adjustment under clause 6.5.2 and that increasing the rewin target by 33% was justified.

[72] Mr Brown and Ms MacDonnell in their evidence say that the reason for amendment was achievement of the target beyond 200% which was not forecast.

[73] As at 12 June 2012 the audit had not been completed and the final adjustment to target had not been finalised to be approved. I do not find that the email of 12 June could amount to written approval under clause 6.5.2 of the SIP to retrospectively adjust targets. The email foreshadowed an amendment to the rewin target but at that time the actual amendment had not been finalised and therefore could not have been approved.

[74] The email of 24 August from Mr Brown to his sales managers provides the reason for the amendment is that there had been significant achievement of OTE not forecast and that as per the SIP where achievement is over 150% targets are subject to review. Forecasting undertaken incorrectly is a situation where Telecom reserves the right to retrospectively amend targets at its discretion under clause 6.5.2. There has to be some basis to support that forecasting has been done incorrectly and in this case the email suggests it that of significant achievement. That links in then to the situation provided in the SIP for retrospective amendment when the achievement falls above 200%. It is not expressed in the SIP to be in circumstances where achievement falls above 150% as Mr Brown has put in his email of 24 August 2012. I accept that this was probably an error on Mr Brown's part but it was an unfortunate one considering that the email was the only written approval for a retrospective change to the target and was read by those affected including Mr White.

[75] The timing of the retrospective amendment is a fundamental difficulty for Telecom. The SIP FYE 12 had come to the end of its life on 30 June 2012 and had been replaced by a new SIP. Mr White therefore had no opportunity to meet any increased rewin target FYE 12 retrospectively imposed. There is no basis I find to imply a term into the SIP beyond 30 June 2012 that Telecom was entitled to retrospectively amend targets for that year. Telecom was not entitled under its remuneration agreement with Mr White to retrospectively adjust its sales target after the end of the life of the SIP FYE 12. Mr White did not agree to any change to the sale target.

[76] I find that Mr White is entitled to be reimbursed for his lost commission as a result of the retrospective increase to this rewin sales target.

[77] I do not need to consider the other claims made in the alternative in respect of the retrospective amendment of targets.

Was Telecom entitled to discount Mr White's mobile sales?

[78] Telecom says that the claims were discounted because they were not made in the way the SIP anticipated rather than a change to the claiming criteria in the rules and that the discounting was lawful.

[79] The MEC provided claiming details for rewin contracted sales on p.3 as follows:

The target is 40K per month, 480K for the full year

- *Contract Signed for resigned contracts for any LOB*
- *Value claimed is for 12 months of expected future billing of the product resigned*
- *Only rewin contracts older than 18 months can be re-signed (ie: start date of replacement (current) contract must be 18 months or more than the start date of the previous (old) contract)*
- *The opportunity must be logged as a Rewin and logged separately to any Acquisition or New Business elements for that customer*
- *Opportunity Close/Win date must be in current financial year;*
- *Contract type must be TBA or MSA*
- *Contract status = Activate (not Draft)*
- *Contract Start date must be in current financial year*
- *Contract number must be logged in the claim*
- *Claims must be made within 30 days of closing the opportunity*
- *Client managers must actively lead the sales process & personally be involved in the signing of the customer contract*
- *Items detailed in Appendix I = excluded products are excluded from Contracted Sales revenue*

[80] Mr White says that he supported his claims in accordance with each of the criteria in the MEC and the SIP but Telecom changed its rules after the year had ended and then retrospectively applied them discounting his claims.

[81] Telecom and Mr White agree that a rewin claim can be supported with a TBA. A TBA is the contract Mr White used to support his rewin claims. He said that he used a TBA to get existing customers to commit to Telecom as their primary fixed – line and mobile service provider. Mr White said that he submitted each claim by inputting the detail of the contract into Telecom's CRM system. This included a calculation of the value of each individual service which the customer had agreed to

purchase from Telecom. He said that he claimed in the way he had been told to do by Mr Sharp and other members of the sales team.

[82] Telecom says that Mr White did not taken into account in supporting his claims by way of a TBA connections/upgrade contracts for individual mobile connections that fell within the 18 month period required by the rules in the MEC. For example, out of 12 mobiles supported by a TBA one of them may have been the subject of an upgrade Mobile Service Connection contract within the 18 month period and Telecom says that Mr White should not have claimed for that one mobile. Telecom says that Mr White was simply claiming for all the customer's revenue each time when a TBA was signed.

[83] Mr White said he did not claim for a TBA unless there had been a previous contract at least 18 months old. He checked that the mobile device had not previously been claimed by any other client managers within the last 18 months at the time of connection or upgrade.

[84] Mr Brown in his evidence said that it is clear from the way the SIP and MEC are written that the rewin incentive was clearly intended to be for the actual line of business that was resigned during the relevant financial year and that was not accurately captured by claiming in a TBA for all predicted revenue for the customer.

[85] Mr White maintains mobile upgrades and mobile rewins are two different things. Mobile rewins relate to the customer's historical and projected business mobile spend overall and are managed by the client manager in the TBA process. Mobile upgrades relate to a customer's new plan and hardware subsidy for each individual mobile handset and line number, and are usually managed by a Telecom Mobile Dealer at a Telecom retail shop by a mobile service agreement (MSA).

[86] The evidence satisfies me that the claiming process was a detailed one. Mr White included the value of each solution and provided documentary evidence of each contract. Each claim was signed off by his supervisor Mr Sharp and the senior sales support person.

[87] If the contract is supported by a TBA then the rules do not refer specifically to individual mobile device connections or upgrade contracts being taken into account for claiming. A TBA replacing an earlier TBA older than 18 months could

objectively assessed satisfy this rule as it is written. I find that Mr White's claims for rewins appear to satisfy the express requirements of the MEC.

[88] I have then considered whether Mr White should have known even if not expressly stated in the rules to take the dates of mobile upgrade and connection contracts into account when supporting his mobile rewin claims with a TBA. When Mr White asked for supporting documentation about this in an email dated 6 November 2012, Ms MacDonnell in an email dated 8 November 2012 responded that there is no additional documentation. She wrote in that same email, *...However as explained at our meeting in Christchurch (and at the time Rich communicated the target adjustment to the team) it is the commercial intent of the criteria "Only rewin contracts older than 18 months can be resigned" that has been clarified. For mobile; the contract term applies at the line number (connection) level and therefore we only included revenue for mobile connections upgraded at 15 months of their contract term.*

[89] Telecom had the ability to assess if claims were made correctly during the relevant financial year and if not to consult with Mr White about that and require him to claim differently. The SIP provided for an audit of claims made throughout the year. This was designed amongst other matters to confirm to Telecom that the value of the contracted sales claimed equated to actual billing revenue. It ensured that claims were not inflated. At a simpler level the audit picked up when claims did not contain all the right information and detail or were incorrectly made. Mr White had been asked to fix relatively minor matters but there was no suggestion that his rewin claims were incorrect because he had not taken into account in the last 18 months contracts for mobile device connections or upgrades.

[90] Ms MacDonnell explained in her evidence that as the result of a restructuring and a subsequent delay in recruiting and replacing a person for the Commercial Analyst position it was not as simple to audit the claims to the level of detail she understood Finance had in the past.

[91] Ms MacDonnell said that with fewer resources available it was more a case of having to trust the claims were made correctly and that sale manager approving the claims were doing so correctly. Whilst high level checks were done Ms MacDonnell said that she did not check at any level of detail and did not pick up the issues with Mr White's claims.

[92] The resourcing issues were unfortunate and out of Ms MacDonnell's control, but as well as the audit process all of Mr White's claims were required to be signed off by his supervisor. I find it likely from an email Mr Sharp sent to Mr Brown dated 6 September 2012 that he felt his team were adhering to the claim process. In that email Mr Sharp amongst other matters said; *Clawback on rewin results when my team had followed the claim process to the letter-as advised by finance, however post results the business deem it acceptable to change the claiming criteria.*

[93] I then considered whether it was simply Mr White and other Christchurch team members who were claiming this way. There was some inconsistency between the written evidence and the oral evidence about whether different regions had claimed for rewins in the same way as Mr White or whether it was just the Christchurch team. Ms MacDonnell in her written evidence said that it was only the Christchurch team that had not claimed rewins in the way anticipated by the SIP. In her oral evidence though she accepted that others from different regions had claimed in the same way as Mr White. That is supported by the recommendation document which refers to some in Auckland for example claiming in the same way as Mr White. I conclude that some clients and key managers in regions other than Christchurch must have considered that the way Mr White was claiming for rewins supported by a TBA was in line with the rules in the MEC and SIP.

[94] One of the matters for the IGG to consider in the recommendation document was value of the contracted sales. Reference was made to clause 4.2 of the SIP FYE 12 which provides amongst other matters the value of the first twelve month of the contracted solution is less any untargeted exclusions as outlined in section 6.4.2. Individual mobile device connection or upgrade contracts are not outlined in section 6.4.2 as untargeted exclusions. The value of the contracted sales was not really the focus of evidence at the investigation meeting. It does however become more important in considering whether there can be discounting of claims by way of claw back under the SIP.

[95] Mr Brown in his additional statement said that the IGG discussed a possible risk that the recommended option may not be in line with the SIP. He said that the IGG concluded from reading the SIP as a whole that the option recommended would not only be the fairest and most consistent to all employees but did not breach the SIP and were lawful.

[96] The IGG concluded that there should be a change to the time in the rules before a rewin contract can be resigned to 15 months or older from 18 months on the basis that it would capture the majority of early upgrades approved by special deals. I accept that this change was because Finance and IGG considered it to be fair but it does not sit particularly comfortably alongside a conclusion that the claims for mobile rewins were not made in a manner anticipated by the SIP and MEC. If the claiming was not in line with the rules then it is difficult to see why the time to make a claim would be shorter.

[97] I find the above matters considered together support it was more likely than not that Telecom after having a review undertaken realised that there was an omission in their rewin rules for claims supported by a TBA that created some inconsistency in claiming. The rules were essentially changed to deal with the omission.

[98] I am not satisfied for the reasons set out above that Mr White should otherwise have known that any claim for mobile rewins supported by a TBA should be calculated or worked out under the rules by reference to the date of individual mobile handset connections or upgrade contracts as well as the date of the earlier TBA or other contracts.

[99] It is not clear what clause Telecom relied on in the SIP to discount over half a million dollars' worth of Mr White's claims. I am not satisfied that it is the sort of situation envisaged by clause 4.2.3 of the SIP where claw backs could apply to achievement. Claw backs could apply under that clause if actual billing revenue against the contract claim value was lower but that was not suggested to be the situation here.

[100] Mr White was entitled to rely on the claiming rules in his remuneration agreement with Telecom. They formed part of the agreement he had with Telecom as to his remuneration. It was not otherwise drawn to his attention that he was claiming incorrectly and his claims were signed off by his supervisor.

[101] I find that Mr White is entitled to be reimbursed for the reduction in his commission due to the retrospective discounting of his mobile rewin claims in the sum of \$21,547.30.

[102] The two sums by which Mr White's commission has been reduced are \$9,437.79 and \$21,547.30. These amounts add up to the sum of \$30,985.10. The

amount though referred to in the statement of evidence and final submissions from Mr Henderson is \$38,095.70.

[103] I will delay making any final orders as to the amount of any reimbursement, holiday pay and interest for seven days from the date of this determination to enable Mr Henderson to obtain instructions from Mr White who is now living in Australia.

[104] If there is a disagreement about what the final figure should be Ms Butcher will have an opportunity to respond.

Costs

[105] I reserve the issue of costs. If costs cannot be resolved by agreement then Mr Henderson has until 11 July 2014 to lodge and serve submission as to costs and Ms Butcher has until 25 July 2014 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority