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Able Owl XL Limited v Gladden [2015] NZEmpC 166 (24 September 2015)

Last Updated: 30 September 2015

IN THE EMPLOYMENT COURT AUCKLAND

[\[2015\] NZEmpC 166](#)

EMPC 217/2014

IN THE MATTER OF challenge to determinations of
the
Employment Relations
Authority

BETWEEN ABLE OWL XL LIMITED
Plaintiff

AND NEIL GLADDEN Defendant

Hearing: 27 and 28 July 2015
(Heard at Hamilton)

Appearances: E Burke, counsel for plaintiff
N Gladden, defendant in
person

Judgment: 24 September 2015

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] These proceedings involve a challenge in this Court by Able Owl XL Ltd (Able Owl) to two determinations of the Employment Relations Authority (the Authority).¹ In the substantive determination the Authority awarded the defendant (Mr Gladden in the proceedings before the Court) arrears of commission, holiday pay and compensation. The second determination made an award of costs against Able Owl.

[2] Able Owl elected to challenge the whole of both determinations in this Court and a hearing de novo was sought. The pleadings are contained in an amended

statement of claim dated 17 September 2014 and a statement of defence to that

1. *Gladden v Able Owl XL Ltd* [2014] NZERA Auckland 329 (substantive); *Gladden v Able Owl XL Ltd* [2014] NZERA Auckland 358 (costs).

ABLE OWL XL LIMITED v NEIL GLADDEN NZEmpC AUCKLAND [\[2015\] NZEmpC 166](#) [24 September 2015]

amended statement of claim dated 28 October 2014. Able Owl seeks a reversal of the Authority determinations by way of the following orders:

- a. The defendant was not unjustifiably disadvantaged in his employment;

- b. The defendant is not owed any commissions;
- c. The defendant is not owed any holiday pay;
- d. The defendant was overpaid \$1,880.93 in commission;
- e. Any other relief the Court deems fit to grant;
- f. Costs

[3] In the amended statement of claim no specific claim is made for refund of the alleged overpayment. There was such a claim contained in the original statement of claim. Even though no specific claim is made in the amended document, it is stated that the defendant is alleged to have been overpaid in commission and it can be inferred that such a claim is being made. Such a claim was made in the proceedings before the Authority and was clearly covered in the evidence of Mr Paul Oulton given in Court on behalf of Able Owl as its sole director and shareholder.

[4] The statement of defence filed by Mr Gladden (representing himself) does not strictly comply with the requirements specified in the [Employment Court Regulations 2000](#) (the Regulations). Nevertheless, no objection has been taken to its form. It contained sufficient particulars to give Able Owl notice of the nature of the defences raised and to respond to the allegations contained in the amended statement of claim. Mr Gladden seeks to have the challenge dismissed as vexatious and trivial. He seeks orders upholding the determinations of the Authority.

Factual outline

[5] The parties were formerly in an employment relationship commencing on 9

August 2012 and concluding on 12 June 2013. Initially Mr Gladden's role was as a trainer/writer/consultant. He received a salary of \$60,000 per annum and reported to the managing director Mr Oulton. A written employment agreement was entered into between them. Mr Oulton came to the view that Mr Gladden did not have the

skill required to perform the role. Rather than terminate Mr Gladden's employment, it was agreed that he would take up an alternative role in telemarketing. The remuneration for the new role remained the same, but with the potential for Mr Gladden to earn commission. No variation was made to the written employment agreement which had been entered into at the commencement of employment. The variations in the employment were not disputed by Mr Gladden.

[6] By February 2013 the plaintiff suffered a decline financially. Following a meeting with staff, a restructuring took place. This was designed to avoid redundancy. Mr Gladden agreed to a further variation in his employment agreement, particularly his remuneration. His base salary was reduced to \$30,000 per annum. The remainder of his income was to be by way of commission earned on sales generated.

[7] A complicated system for Mr Gladden and other staff to earn commission was introduced. Mr Gladden's scheme was different from other staff. While Mr Oulton stated in evidence that Mr Gladden was not put in a supervisory role over other sales staff, the way that the employment relationship operated in practice might suggest otherwise.

[8] When the nature of Mr Gladden's employment agreement altered in the substantial way it did in February 2013, he had a discussion with Mr Oulton as to the way that the commission and performance bonus scheme being introduced was to operate. These discussions are confirmed by contemporary documents. Initially Mr Gladden put forward proposals in a document which was intended to be added to the employment agreement as an addendum beginning 25 February 2013. The document was prepared on the basis that it would come into effect for the wages period ending 25 March 2013. In a subsequent document, which may have been prepared by Mr Oulton or simply have been alteration to the previous document from Mr Gladden, variations were made to the previous proposal. One category of payment in this document was deleted following discussions between Mr Gladden and Mr Oulton. This latter document was to be added to the employment agreement as an addendum and was to come into effect on 25 March 2013. Mr Oulton also prepared a document, setting out the income Mr Gladden would be likely to receive

under the varied salary/commission scheme. The expected income was \$63,900 per annum with a possible high of \$77,400 per annum or a low of \$47,400.

[9] In the substantive determination of the Authority, the subsequent document was accepted as recording the arrangements to apply. As the Authority Member has stated in the determination, the proposal was that Mr Gladden would continue to receive a base salary at the reduced amount of \$2,500 per month together with commissions. The commissions would be earned in two ways under the scheme. First, commission would be calculated on points allocated for new sales; and secondly, there would be a fixed commission for renewal of what is referred to as the "Genie" product or service. The set commission rate for the Genie renewals would only apply when the renewal rate exceeded 50 per cent within any monthly salary period.

[10] At the hearing of the challenge there was some dispute in the evidence about the commission for the Genie renewals, with Mr Gladden claiming that the threshold for renewals to activate his commission applied not only to renewals that he generated, but also to those generated by other salespersons within the team. This assertion by Mr Gladden was firmly contested under cross-examination. Somewhat surprisingly, towards the end of his own evidence Mr Oulton made a concession which left the impression that the 50 per cent threshold for Mr Gladden's commission did in fact apply to renewals generated by all of the salespersons. This would be consistent also with Mr Oulton asking Mr Gladden to encourage the other salespersons to try and generate more business. This in turn, appeared to me to be inconsistent with Mr Oulton's assertions that Mr Gladden was not in some form of supervisory role over the other

salespersons.

[11] Mr Gladden stated that on 9 May 2013 Mr Oulton informed sales office staff that they were to discontinue talking to clients about consulting and development work. No explanation was given and staff were directed to transfer the calls to Mr Oulton immediately they were received. This was somewhat typical of the approach Mr Oulton had adopted previously with Mr Gladden, in changing the terms and conditions of his employment at short notice. Mr Gladden objected to this new direction as consulting and development clients formed a substantial source of

commission income for him. There was a further discussion between them about this disagreement. Mr Gladden felt there was a breach of trust in the employment relationship.

[12] Three days after this disagreement Mr Gladden had his employment terminated on the grounds of redundancy. This was after what Mr Oulton alleges was a further substantial decline in the turnover of the business. Other salespersons were also dismissed on the grounds of being redundant. Mr Gladden was the first: and was informed of his redundancy by Mr Oulton on 13 May 2013, with one month's notice, ending his employment on 12 June 2013. Other salespersons were made redundant at later dates, also with month's notice. On 30 May 2013 Mr Gladden was paid for the pay period ending on 25 May 2013. The net sum he received at this time was \$3,755. He was pleased with this as it meant his commissions were substantial enough to reinstate his gross annual salary to the level it had been when he had been a trainer/consultant. Mr Oulton, in his evidence, did not dispute any part of this narrative by Mr Gladden.

[13] Once Mr Gladden was given notice of his redundancy and during the period when he was working that notice out, he and other members of the sales team at Able Owl continued to market the business and generate the orders and renewals for which commission would be payable. Mr Gladden also stated in his evidence, and this was not disputed by Mr Oulton on behalf of Able Owl, that he prepared reports and carried out other handover duties to assist Mr Oulton following his departure. Mr Gladden also continued, as he had done previously, to provide information on sales and renewals generated to the administrator, who had the task of calculating commission to be paid to him in addition to the agreed salary.

[14] Mr Oulton, in his evidence, claimed that as a result of dealing with a payroll issue following Mr Gladden's departure, he became aware for the first time of the level of commission payments that were claimed by Mr Gladden in the period leading up to the termination of his employment. He stated that he became suspicious of the validity of such claims and carried out an investigation into the information upon which the commission had been calculated. As a result of this enquiry, he formed the view that Mr Gladden's commission claims were not valid

and had been overpaid. The final payslip setting out Mr Gladden's pay upon termination had been sent to Mr Gladden. Before it was paid, Mr Oulton deducted the final payment for commission and an amended pay slip was sent to Mr Gladden. Mr Gladden only received the standard salary payment that he was owed for the final period of employment.

[15] Mr Gladden then made inquiries into why the commission had been deleted from the final payment. Mr Oulton advised that Able Owl disputed the final claim for commission but advised Mr Gladden that he would review the matter if Mr Gladden came into Able Owl's premises to sort the matter out. Mr Gladden stated in his evidence that by this stage he was feeling somewhat humiliated by what had happened to him in being made redundant, and that if he was required to attend Able Owl's premises, this would add to his humiliation and distress. Accordingly, he refused to accept Mr Oulton's invitation. He maintained his opposition to the deduction of his commission claim and when the matter could not be resolved, he proposed mediation. This was refused by Able Owl. Mr Gladden then commenced proceedings in the Authority to recover the money he claimed was owing to him and he also claimed compensation. While Able Owl was not required to agree to mediation when first requested by Mr Gladden, it attended mediation as directed by the Authority.

The nature of Mr Gladden's commission

[16] During the course of cross-examination Ms Burke raised with Mr Gladden the issue of his income arising from the documented variation to his employment agreement. The exchanges which took place between Mr Gladden and Ms Burke over this matter exposed a misunderstanding which had arisen, in my view, between Mr Gladden and Mr Oulton; that is, over the way in which commission was to be earned and how it was to be calculated. It is probably helpful to set out two crucial parts of the cross-examination to demonstrate this:

Q. Yes, and then I specifically said to you so you had two types of commission, you had the renewal of the Genie commissions that were paid at \$100 a month over 50% and then you had all your other different commissions that weren't Genie renewals and I specifically put that question to you and you agreed?

A. The – there were two separate commissions payable. One was for the performance of the team which was reflected in the 50% threshold and the other was the, um, related to commissions payable on sales of all other products.

Q. Mr Gladden, that was not what you said previously.

...

A. One was a team performance commission which as was pointed out earlier I had no supervisory role over any of the other sales staff and in that commission, um it was – I got rewarded if I managed to cajole, nag the other sales staff to get their Genie renewals up above the 50 – well get it, get it higher. If it exceeded 50% then I would be rewarded \$100 for each Genie renewal that was above that level. For the other, other commissions, those were the – all the other products that I sold which included the Genie ones that I sold as well that were – I was directly responsible for myself and that's how I saw it. It's as simple as that.

[17] Even though Mr Gladden's assertions were tested under cross-examination in this way on the basis of contrary assertions by the plaintiff, Mr Oulton then inexplicably reversed his position during questions from the Bench at the conclusion of his evidence. Mr Oulton's vagueness in all of this is demonstrated by contradictions in his evidence.

[18] When asked about Mr Gladden's commission scheme he stated:

- (a) that Mr Gladden would get \$4 a point earned for new sales;
- (b) that would also apply to new Genie sales as opposed to renewals;
- (c) that the commission scheme for Genie renewals applied only to the renewals Mr Gladden himself generated;
- (d) that there was no commission scheme for Mr Gladden where he would get commission for Genie renewals generated by the team;
- (e) Mr Gladden had responsibility to get people in the team activated and for him to follow up with other sales team members and chase up renewals;
- (f) despite this, Mr Gladden was not in a supervisory role or acting as a senior overseer.

[19] Mr Gladden's assertion in his evidence that he would get \$4 a point earned for new Genie sales had been the subject of some disagreement between Mr Gladden and Ms Burke during the course of cross-examination. What was being put to Mr Gladden, which presumably was to be part of Mr Oulton's evidence, was that the separate Genie incentive commission applied to both new sales and renewals with Genie. Mr Gladden was not to receive reimbursement of points earned for new Genie sales. That was clearly not the state of Mr Oulton's evidence at its conclusion. During further questioning Mr Oulton then stated:

- (a) Mr Gladden did not actually have a responsibility over the other staff

to follow up these sales but it was something "he ought to do";

- (b) that the following up was only something that he (Mr Oulton) suggested to Mr Gladden;
- (c) that in following up in this way it would be contemplated that Mr Gladden would contact other sales staff 's allotted customers;
- (d) in doing that he would not be entitled to a separate commission.

[20] Having contested Mr Gladden on these issues through his counsel's cross-examination, the following exchange took place between Mr Oulton and me:

Q. So let's just look at that again. You said to get the renewals over 50% - A. Mhm.

Q. - that's the whole team you're talking about it, isn't it?

A. It's all renewals, that's right.

Q. All renewals, so what he's saying is right. The 50% increase wasn't just

him it was the whole team?

A. Oh, there was an element to that, but one of the major -

Q. No, no, you're getting vague again.

A. I'm not.

Q. Yes, you are.

A. I'm going on to explain -

Q. You - no, just stop there. You are getting vague. Mr Gladden has alleged in evidence that that item on the renewals of Genie was for the

whole team and your evidence has been that that is not correct, and now

you're watering that down? A. I'm not.

Q. Yes, you are.

A. His remuneration was purely to him. There was no remuneration for getting over 50% for the team. It was his project alone and one of the major issues, the number one issue we had was that he needed to get people to install the software and therefore he would have to call all those people and all that was to get them to install the software, but nevertheless -

Q. That answers the question.

[21] As there was considerable confusion as to how each side interpreted the written variation to Mr Gladden's employment, I wished to clarify exactly how Mr Oulton viewed it. It was for this reason that I had the exchanges with him which have been set out above.

[22] At the conclusion of Mr Oulton's evidence I formed the view that he was unfamiliar with how the commission scheme for Mr Gladden was to work. His evidence on the scheme, which incidentally had been confirmed in the contemporary documents referred to earlier in this judgment, was confusing and contradictory. His point-by-point analysis of the spreadsheets, to try and show that Mr Gladden was not entitled to the commissions he had claimed and that Mr Gladden owed Able Owl overpayments, became undermined. The Authority Member in her determination

had commented on Mr Oulton's evidence before her in the same way. 2

[23] There was one other exchange between Mr Gladden and Ms Burke which further undermined Mr Oulton's criticism of the commission calculations leading to his withholding payment from Mr Gladden's final salary and commission payment. There were instances where Mr Oulton's assessments of incorrect claims were contested by Mr Gladden. One such example having wider application arose from the following further cross-examination by Ms Burke of Mr Gladden:

Q. Now these are the Genie renewal statistics aren't they, it's a report about

Genie renewals? A. Correct.

Q. Right and if you turn to page 90 you'll see down the bottom where it

has the totals that it says –

A. Page 91.

2 See *Able Owl* (substantive determination) above n 1 at [21].

Q. 91, page 91, you'll see that it says, "Total, 26th of February 2013," this is about mid-way down, 25th of the 3rd 2013 and if you go down all the way along you'll see the number 24%. So for the month of February the Genie renewal rate was 24% wasn't it?

A. No.

Q. So why does it say it was 24%?

A. Because Pauls' done a calculation incorrectly. Q. What do you base that on?

A. I'll give you an example and it's actually in the first row of that page,

page 91, you'll see that Vincensio at Ray White first subscribed on the

12th of April 2012, product is number 1, which is the Genie product, as it was at the time, and that expired on the 30th of April 2013. And

according to the document there which says, as at the 25th of April 2013

the header of that particular column it says, "zero," which is not

renewed. Vincensio did renew and he did pay. If you look at, and I'm not sure which document that it is now –

Q. If you look back to tab 9 you'll be able to see the whole list of them.

A. In that list there somewhere, tab 9.

Q. Are you looking for the Ray White one? A. Yep.

Q. It's sales number 10.

...

Q. You said you were going to use that to demonstrate that it was renewed.

A. Right, so, um, in here you can see that, um, Ray White did renew and that, um, otherwise there would've been no commission paid, um, but in the document here from Paul, page 91, he claims that it, um, was not renewed. So if the, if the formula extracting the data is incorrect for one, it will be just as incorrect for all the others. In addition to that, the way that the performance commission was – oh, sorry, what you say, the way that the Genie renewal commission was calculated for the team, it would still be valid as a renewal if it is up to three months after the expiry date subscription.

[24] Mr Oulton did not dispute Mr Gladden's assertions as to this particular error in his percentage calculations for Genie renewals. Obviously in providing information to the administrators Mr Gladden had provided a sufficient basis for them to calculate the commission included in his pay slips. No evidence was given by any of the administrators, which may have provided some clarification on this point.

[25] As stated earlier in this judgment, Able Owl established a complicated commission scheme. It is clear from contemporary documents that a different scheme operated for Mr Gladden than that which operated for other sales staff. Attempts have been made to say Mr Gladden is bound by a document (which was attached to an email and circulated) that sets out requirements for provision of information to the administration calculating commission. It consists of an email sent by Natalie Hodgson, who was the Events and Administration Manager for Able Owl, to the sales staff including Mr Gladden. The email is dated 7 November 2012 and therefore well precedes the time when Mr Gladden had the final variation to his employment agreement and before he was substantially reliant on earning commissions. Attached to the email is the document and schedule which sets out information which was required to be provided to the administrator for calculation of commission for the sales staff. Even so, the document was not a direction to sales staff but a checklist for the administrators who receive information from sales staff as to how this was to be applied in calculating commission.

[26] This document was given to Mr Gladden at a time when he was not on the comprehensive commission scheme as later applied to him. Mr Gladden acknowledged that he received the document but having regard to his duties at that time it would not have been significant to him. The document was also superseded by the later document to be added to Mr Gladden's employment agreement as an addendum and coming into effect for the wages period ending 25 March 2013. I agree with the Authority's determination that it was this later document which provided the basis for the variations in Mr Gladden's employment.

[27] Mr Gladden maintained that when he was put on to the scheme involving earning commission, Mr Oulton would not sit down with him to discuss the requirements, instead directing Mr Gladden to work it out with the administrator. Mr Gladden did this and acted on the directions and agreement he had with the administrator as to supply of information for the calculation of his commission from that point. He stated in evidence that he simply supplied information on his activities and the administrator did the calculations from there. Mr Oulton, in his analysis of the activities, is now trying to contradict the calculations made by the Able Owl administrator and impose different rules on Mr Gladden's commissions than were agreed during the employment relationship. Examples of this are the assignment to sales staff of clients for commission-earning purposes on an alphabetical basis (to which Mr Gladden appears to have agreed), the allegation that the Genie renewals percentages increase applied only to those generated by Mr Gladden personally rather than the whole team; and the effect and difference of

inwards/outwards telephone calls on the validity of commission claims. There is confusion in Able Owl's own documents as to how such calls were described. This confusion was able to be elicited by Mr Gladden in his own evidence and his cross-examination of Mr Oulton. Mr Oulton, in answer to questions from me, had acknowledged there was an "element" in the arrangement that Mr Gladden's incentive commission was based on the sales of the whole team. He endeavoured to backtrack on that. Either Mr Gladden was to receive the commission on his own sales or on the team's sales. It has to be one or the other and not some middle position which might be inferred from the use of the word "element" by Mr Oulton.

Mr Gladden's cross-claims

[28] However, the problem Mr Gladden faces in defending the challenge and again proving his claims, for this is a de novo hearing, is that he has failed to have documents placed before the Court which may have been left with the Authority following its investigation. In addition he claimed to have other documents. However, he failed to properly co-operate with Able Owl's counsel in producing a common bundle where he had the opportunity to place any such documents before the Court. As was pointed out to Mr Gladden prior to the hearing in correspondence from the Court, the Authority documents are not automatically transferred to the Court when a challenge is lodged and the onus is on the parties to ensure that the documents are retrieved from the Authority if they are to be produced before the Court. In any event there are difficulties, just on the face of the documents actually produced, in Mr Gladden establishing claims amounting to \$4,694 for unpaid commission. The pay slips show that apart from the final deduction made by Mr Oulton amounting to \$1,732.75, Mr Gladden received all of the salary and commission certified by the administrator.

[29] Insofar as Mr Gladden's claim to compensation is concerned, this relates to the actions of Able Owl after the employment relationship had ended. The determination of the Authority includes an award to Mr Gladden of compensation of

\$2,000. This appears to be related to the stress Mr Gladden suffered as a result of the actions in deducting the commission from the final pay. However, this was done after the termination of his employment had occurred and it is difficult to see how

compensation under the [Employment Relations Act 2000](#) can be awarded for this. This would not, of course, preclude a claim for general damages for breach of the employment contract but no such claim has been made. In addition, if any disadvantage occurred during the relationship, no evidence from Mr Gladden was given at the hearing as to any humiliation or distress suffered by him. Accordingly, his present claim to an award of compensation cannot be granted.

[30] In the absence of the documentary evidence Mr Gladden referred to, some of which may have been before the Authority but not produced to the Court, the only basis of a claim which could be considered and allowed by the Court is the unwarranted and unjustified deduction of the \$1,732.75 from Mr Gladden's final pay. Able Owl's claim to be reimbursed for an alleged overpayment to Mr Gladden is simply rejected. Mr Oulton's attempts to retrace in minute detail the administrator's calculations following the information given to her by Mr Gladden is not acceptable. Mr Oulton has endeavoured retrospectively to impose conditions on Mr Gladden which were simply not negotiated or incorporated in the employment agreement and run counter to the documented arrangements. Mr Oulton chose to leave Mr Gladden to agree with the administrator as to what information she needed from him to calculate his commission. The conditions which he endeavours to apply to Mr Gladden may have applied to other staff. Mr Gladden was on a different basis of employment from them. In addition to that Mr Oulton clearly authorised Mr Gladden to oversee other staff even though he denied it in evidence. He asked Mr Gladden to speak to the other sales staff to encourage them to generate more business for the company. By inference this must have been an authorisation to Mr Gladden to contact all of the customers, not just

those allocated to him in the alphabetical divisions. His retrospective attempts to invalidate such contacts for commission calculation purposes are untenable.

[31] Unfortunately Mr Gladden chose not to obtain legal advice following the filing of the challenge. It is likely there were matters raised in the Authority by his then advocate who represented him, which led to the Member of the Authority justifying the compensation award, but again those matters are not before the Court. Some of Mr Oulton's actions in unilaterally varying Mr Gladden's terms of

employment would appear on their face to give rise to disadvantage grievances but no such claims have ever been made.

Evidence of Karen Tan

[32] Karen Tan was called by Able Owl in support of its claims. Ms Tan was employed by Able Owl at the same time as Mr Gladden and was one of the sales team. She alleged that Mr Gladden had contacted her to propose a scheme whereby they could pool their sales and thereby receive greater commission payments from Able Owl. Ms Tan's evidence is not corroborated by the evidence of any other employee at the time, although there is a suggestion that Mr Gladden contacted other sales staff to propose such a similar pooling scheme. Able Owl has included in the bundle of documents a statement from another employee. Without that employee giving evidence no weight can be given to that statement.

[33] Mr Gladden vehemently denies the allegation. I am sceptical of Ms Tan's evidence in any event. She was a reluctant witness. She gave evidence that Mr Oulton manipulated her and put pressure on her to give evidence against Mr Gladden. Certainly there is a suspicion of manipulation when Ms Tan, who was also made redundant, was pressured by Mr Oulton to provide a written statement to him before she left the employment. More significantly, however, I cannot be sure that Ms Tan was aware of the separate commission agreement with Mr Gladden whereby he received commission for the Genie renewals on the basis of the percentage increase for the whole team rather than simply on the basis of increase in renewals which he personally negotiated. The arrangement which Mr Gladden had in respect of the Genie renewals meant there would be no point in his trying such a scheme with other sales staff as it would be of no extra benefit to him. It is possible this may have led to some misunderstanding in conversations between Ms Tan and Mr Gladden on the issue of commissions. In any event, even though Mr Oulton alleges that a fraud was perpetrated by Mr Gladden's actions, the fact is that if such a proposal was put by Mr Gladden to the other sales staff, none of them agreed to go along with it. No fraud could have occurred. Nevertheless, I disregard Ms Tan's evidence. Its reliability and veracity is subject to serious doubt as a result of the circumstances surrounding her coming to Court and presenting the evidence she did.

Conclusion and disposition

[34] The position I reach at the conclusion of the evidence is that Mr Gladden's assertions as to the nature of the salary and commission arrangement is correct. His position is supported by contemporary documents created at the time that the new condition arrangement was instigated. In addition, Mr Oulton prepared a schedule setting out the likely income Mr Gladden would receive under the arrangement. This may have been somewhat optimistic of Mr Oulton in view of the financial deterioration which was occurring. However, the figures which he sets out in the schedule are consistent with the commission claims which Mr Gladden made once this commission scheme was bedded in. It was clear that at Mr Oulton's direction Mr Gladden was endeavouring to encourage the sales team members to increase their performance. That would be more consistent with Mr Gladden's assertion that he was to receive commissions based on the performance of the team as a whole and not simply as an incentive for his own individual sales. The assertion which Mr Oulton made that he formed the view that Mr Gladden's claims were too high is unsupported by the evidence and based on an erroneous view of the true nature of Mr Gladden's employment.

[35] As I have already indicated, I do not believe that Mr Oulton properly understood the manner in which the administrators were calculating commission based on information provided to them by the sales staff. In any event, as Mr Gladden was able to elicit, the information produced in the spreadsheets does not appear to be accurate. Quite apart from this, if Mr Gladden was in fact to receive an incentive commission based on the sales team as a whole, then Able Owl has not produced sufficient documentation to support its contention that Mr Gladden was overpaid. There are also curious mathematical inconsistencies between the pleaded overpayment of \$1,893 and the documentary evidence in the form of the spreadsheets which Mr Oulton relied upon and analysed during his evidence. Much of Mr Oulton's analysis centred on a sales record spreadsheet covering a period from

5 March 2013 until 11 June 2013 for Mr Gladden. The alleged invalid commission allocations totalled \$2,932. Mr Oulton, in his evidence, sought to amend the figure in the pleadings to \$2,932. However, from that figure of \$2,932, allowance needs to be made for the \$1,732.75 which Mr Oulton directed be deducted from Mr

Gladden's final payment. The difference between those two figures is \$1,199.25.

Accordingly there was never going to be sufficient evidence to justify a claim for

\$1,893 or \$2,931, even if a claim for overpayment were to be allowed.

[36] As I have indicated earlier in this judgment, I am of the view that there was a misunderstanding between Mr Oulton and Mr Gladden as to Able Owl's own scheme for commission for Mr Gladden, certainly as to what Mr Oulton now says was intended. I agree with the finding of the Authority Member that Able Owl is bound by the contemporary documents setting out the arrangement for Mr Gladden. It is also clear on Mr Oulton's own evidence that Mr Gladden was to receive the incentive commission based on a percentage increase for the entire team rather than his own individual sales. This would be consistent with Mr Oulton's direction to Mr Gladden, despite his assertion to the contrary, that Mr Gladden was indeed in a supervisory role. I prefer Mr Gladden's evidence on this point.

[37] As also indicated, I have found Mr Oulton's evidence confusing and contradictory. His later statements to me were inconsistent with the assertions that he made in his own earlier evidence and which provided the basis for the extensive cross-examination of Mr Gladden when he gave evidence. Mr Oulton was not prepared to clarify with Mr Gladden the way he perceived that the commission scheme would work. Instead he directed Mr Gladden to speak to the administrator to sort the matter out. That may have led to a consequence which Mr Oulton did not contemplate. However, from my assessment of the inputting, which is shown in the spreadsheets, the administrator calculated Mr Gladden's commission payments in the manner intended and as agreed to.

[38] Despite all of this, Mr Gladden's own claim to uphold the awards made in the Authority cannot be sustained either. On the evidence that has been presented at the challenge, he is clearly entitled to be paid \$1,732.75 which was deducted from his final pay and as evidenced by the payslips. However, those very payslips call into question his claim to commission now owed and totalling \$4,694 as set out in his evidence. That claim is inconsistent with the payments made to him in the period leading up to the termination of his employment. There may well have been documents and evidence produced before the Authority justifying such a claim as the

Authority allowed to that extent. However, no such documentation was presented to the Court. Mr Gladden also mentioned that he had other documents justifying his claim but they should have been included in the bundle of documents if he was intending to rely upon them.

[39] Mr Gladden's claim for compensation in both his proceedings before the Authority and his defence to Able Owl's challenge in the Court relate to actions taken by Able Owl following the termination of employment. Quite apart from the fact that Mr Gladden did not produce any evidence as to humiliation, loss of dignity or injury to feelings, any disadvantage he suffered occurred after the employment relationship had ended. It may well be that the actions of Able Owl entitled Mr Gladden to claim damages but he failed to make such a claim. Mr Gladden's claims involve a dispute over final salary and commission arising after the termination of his employment. In the circumstances he has not proved that he suffered unjustifiable disadvantage during the course of his employment. His claim to compensation therefore fails.

[40] Able Owl's claims that it does not owe Mr Gladden any commissions or holiday pay fail. Mr Gladden is clearly entitled to be reimbursed for the deduction of \$1732.75, which was made from his final payment for salary and commissions owing. In addition, Mr Gladden is entitled to holiday pay owing on that amount at eight per cent which is \$138.62. There was some suggestion in Mr Oulton's evidence that allowance was not made for five days leave taken by Mr Gladden during 2013. However, there is inadequate evidence in the form of wage records to corroborate that. Again, that is something which may have been better covered if one of the administration staff had been called to give evidence. In addition, Mr Gladden is entitled to interest at the rate of five per cent per annum on the sum of \$1,871.37 from the date of termination of his employment on 12 June 2013 until the date of payment.

[41] Insofar as costs are concerned, Mr Gladden, while having his remedies from the Authority reduced, is the successful party. However, he is not entitled to any costs in respect of the proceedings in the Court as he represented himself. He is entitled to some reimbursement for disbursements incurred by him for items such as

photocopying and expenses incurred in having to travel from Hamilton to Auckland for the interlocutory hearing dealing with Able Owl's application for prohibition on publication. Mr Gladden is to file a memorandum setting out such disbursements. This is to be filed within seven days and any disbursements then approved by the Court will form part of this judgment. In the Authority Mr Gladden received an award of \$5,000 as a contribution towards the costs of his advocate for those proceedings. There is no reason in view of the outcome of the challenge why there should be any variation in that award of costs by the Authority. That award is confirmed and is to be paid to Mr Gladden by Able Owl. In addition Able Owl is to pay Mr Gladden interest on that amount at the rate of five per cent per annum from

29 August 2014, being the date of the costs determination, until payment.

M E Perkins

Judge

Judgment signed at 12 noon on 24 September 2015