

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 90  
5419979

BETWEEN                      GREGORY ALLOTT  
   Applicant  
  
AND                                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, 29 May, 5 June and 20 June 2014

Determination:              25 June 2014

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**DETERMINATION OF THE AUTHORITY**

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- A. Gregory Allott was disadvantaged in his employment by two unjustified actions of Telecom which reduced his remuneration in 2012.**
- B. Telecom New Zealand Limited is to reimburse Gregory Allott the sum of \$41,260.52 for lost remuneration and holiday pay on that sum of \$3,300.85.**
- C. Interest is payable on lost remuneration and holiday pay from 21 December 2012 until the date of payment at the rate of 5%.**
- D. Telecom New Zealand Limited is to pay to Gregory Allott compensation in the sum of \$8, 000 without deduction under s.123 (1) (c)(i) of the Employment Relations Act 2000.**
- E. Costs are reserved and failing agreement a timetable has been set.**

**Employment relationship problem**

[1] Gregory Allott was employed by Telecom New Zealand Limited (Telecom) in 2004. He was promoted to the role of Key Client Manager on 1 April 2010 and remained in that position until he was made redundant on 30 June 2013.

[2] Mr Allott was party to an individual employment agreement (the employment agreement) with Telecom. It provided at the material time his remuneration would be a base salary, additional benefits and an on target incentive component (OTP) payable in accordance with achievement under the Telecom Retail Medium Enterprises Sales Incentive Plan referred to from hereon as the SIP.

[3] Mr Allott 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 (FYE 12); and
- (b) Retrospectively imposing a change to the claiming rules for one of the targets FYE 12.

[4] Mr Allott 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 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 Allott's employment. Telecom says Mr Allott has not suffered disadvantage and that its actions were justifiable. It does not accept that it made any deductions from the applicant's wages in breach of the Wages Protection Act 1983 and does not accept that it created a belief or expectation that estopped it from taking the steps that it did. Telecom says that it has not engaged in any misleading or deceptive conduct.

[6] Mr Allott seeks \$41,260.52 for lost remuneration, holiday pay on that sum, compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) of \$15,000, interest and costs.

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

### **The issues**

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

- (a) What were the contractual arrangements between Mr Allott and Telecom?
- (b) Was Mr Allott disadvantaged by Telecom when it amended sales targets retrospectively?
- (c) Was Mr Allott disadvantaged by Telecom discounting some of his claims after year end?
- (d) If Mr Allott was disadvantaged were Telecom's actions were unjustified? and/or
- (e) Did Telecom, by the above actions, make deductions from Mr Allott's wages in breach of the Wages Protection Act 1983?
- (f) Was Telecom estopped from taking the actions that it did?
- (g) Was Telecom in breach of the Fair Trading Act 1986 in acting in the way it did?
- (h) If Mr Allott's claims are made out what remedies is he entitled to?

## **What are the contractual arrangements between Mr Allott and Telecom?**

### ***Individual terms of employment***

[9] Mr Allott signed an individual terms of employment when he was promoted to the role of Key Client Manager on 1 April 2010 with such agreement becoming effective from 6 April 2010.

[10] In the individual terms for Mr Allott remuneration 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***

[11] Mr Allott 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)***

[12] 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.

[13] 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 Allott 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.

[14] In order to qualify for OTP commission payments Mr Allott had to achieve sales targets across three categories which were 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 (rewin) 30%.

[15] 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 Allott'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.

[16] A rewin 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.

[17] Mr Allott 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.

[18] Mr Allott achieved over 100% of his sales targets in all three categories. Mr Allott achieved on Telecom figures, 103.23% for client billed revenue, 102.79% for contracted sales and 468.72% for Rewin.

[19] 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.

[20] Mr Allott 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.

[21] 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.

[22] Clause 5 of the SIP states that where monthly achievement is over 200% a target review occurring *to ensure that 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*.

[23] 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.*

[24] 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***

[25] 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).

[26] 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.

[27] The above documents provide the basis for the payment of remuneration to Mr Allott by Telecom FYE 12.

**Was Mr Allott disadvantaged by Telecom?**

[28] The test of justification under s.103A of the Act applies to Telecom's actions in retrospectively increasing sales targets and discounting claims. The Authority is required to objectively consider whether Telecom's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

[29] I turn firstly to whether Mr Allott's employment conditions were affected to his disadvantage.

[30] I am satisfied that retrospectively adjusting the sales target after it had been met and exceeded caused disadvantage to Mr Allott. Mr Allot says that the effect of the retrospectively applied target increase was that his rewin sales target went from \$480,000 to \$638,400 FYE 12. Putting the adjustment made to claims for mobile rewins to one side Mr Allott achieved sales of \$2,132,243.00. His total commission on the basis of the increased target paid to him was \$78,047.15. If he had been paid on the original target without retrospective adjustment he would have received

\$111,804.02. Mr Allott lost \$33,756.87 being the difference between \$111,804.02 and \$78,047.15 when the target increased by 33%.

[31] When some of his mobile sales rewin claims were discounted from his final commission payment this reduced his rewin sales from \$2,249,843.00 to \$2,132,243.00; a difference of \$119,307.67. Mr Allott has taken from \$119,307.67 the sum of \$111,804.02 and says he lost commission of \$7,503.65. In total Mr Allott says that FYE 12 he should have been paid an additional \$41,260.52, \$33,756.87 plus \$7,503.65.

[32] There are two different types of disadvantage that may arise in respect of the discounting of rewin claims after year end. If Mr Allott was not under the rules set out in the SIP and MEC entitled to make the claims then his disadvantage is that he was not told before the year for sales had ended that his claims were not in accordance with the rules. He lost an opportunity to put his energies for sales elsewhere FYE 12. If the discounting of rewin claims was because of a change to the claiming rules under the MEC and SIP without notice and agreement then Mr Allott was disadvantaged. He was entitled to rely on his agreement with Telecom about his remuneration and not have that agreement changed unilaterally. I do not find it relevant to disadvantage that Mr Allott still received a high payment for commission even with the adjustments.

### ***Justification***

[33] I turn now to whether there was justification for Telecom's actions and whether it was done with procedural fairness. An action will be unjustifiable if it cannot be shown to be in accord with justice or fairness – *Auckland City Council v Hennessey* (1982) ERNZ Sel Cas 4 (CA) at 9.

[34] Telecom relies on its contractual arrangements with Mr Allott and in particular the SIP and MEC to justify its actions.

[35] The Authority heard evidence from two witnesses who were employees of Telecom at the material time. Richard 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.

[36] It is helpful to set out briefly what led to the actions that Telecom took.

[37] 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% rewin 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.

[38] Mr Brown said in his evidence that if it looked that 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.

[39] 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%.

[40] A detailed target review was commenced in early May 2012. Ms MacDonnell said that she was told by the Commercial Analyst who completed a 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.

[41] 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.

[42] Mr Allott recalled Mr Sharp advising him in May that there may be an increase to the rewin sales target for the financial year end 2012. Mr Allott said that Mr Sharp advised him this was because Telecom may not have the money to pay out

all commission earned on the original target for all of its sales employees. Further that the sales team *blew out* the expected performance levels and that Telecom was concerned about the impact in the forecasted budget so targets may be adjusted to compensate. Mr Allott said this was something that was *couched in an unconfirmed way*. He was disappointed and upset if this was to occur, as were other members of the team, particularly given there was only a month before the end of the financial year.

[43] Mr Brown did not accept that was the message he gave the regional sales managers including Mr Sharp about the reasons for a target adjustment. He said that after Mr Allott had raised his claim he checked with Mr Sharp who confirmed that he had conveyed the message he was asked to that achievement was likely to exceed 200% threshold. The Authority did not hear from Mr Sharp.

[44] 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.

[45] 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.

[46] 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.

[47] Mr Allott 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.

[48] 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 Allott/Mr White.

[49] 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 rewin 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.

[50] 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%.

[51] 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 Incentive Governance Group 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.

[52] 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 rewin have been adjusted to include only the connections that are eligible for upgrades at 15 months to allow for any early upgrades approved.

[53] 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.

[54] On 12 September 2012 Mr Brown went to Christchurch with Ms MacDonnell to meet with Mr Allott and other affected client managers to discuss questions about the target adjustment and the claiming changes.

[55] Mr Allott and Mr Brown had an audio conference in or about November or December 2012 and Mr Brown made it clear that Telecom would not be revisiting its decision on the financial year end 2012 SIP payments although Mr Allott was reimbursed for some claims.

***Conclusion on the retrospective adjustment of the Rewin target***

[56] 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.

[57] 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.

[58] 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.

[59] 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 may have been 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 Allott.

[60] 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 Allott 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.

[61] It may have taken a long time to finalise the year end results for a variety of reasons but that is not I find justification for Telecom's action. Mr Allott did not agree to any change to the sale target. It was an unjustified action to retrospectively amend targets after the end of the life of the material SIP. It is not what a fair and reasonable employer could have done in all the circumstances at the time.

[62] I do not find that I have to additionally reach any view about the lawfulness or the limits of clause 6.2.5 of the SIP FYE12 but I agree with Mr Henderson about the need for good faith behaviour by Telecom in the exercise of its discretion. The SIP and the base employment agreement support notice and consultation about changes to targets.

[63] I find that Mr Allott has a personal grievance that he was unjustifiably disadvantaged by the retrospective adjustment to the Rewin sale target. I do not need to consider the other claims made in the alternative in respect of the retrospective amendment of targets.

***Conclusion on the discounting of Rewin claims***

[64] I now turn to the discounting of rewin claims. 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.

[65] Mr Allott 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. Mr Allott in his written evidence set out each of the claiming requirements for rewin contracted sales and explained that each requirement was met by him.

[66] 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 are 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)*
- *Contracts 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*

[67] Telecom and Mr Allott agree that a rewin claim can be supported with a TBA or a MSA (known as mobile service agreements). A TBA is the contract Mr Allott 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.

[68] Telecom says that Mr Allott did not taken into account in supporting his claims by way of a TBA connections/upgrade contracts for MSA that fell within the

18 month period required by the rules in the MEC. For example out of 12 mobiles connections supported by a TBA one of them may have been the subject of an upgrade MSA contract within the 18 month period and Telecom says that Mr Allott should not have claimed for that one mobile. Telecom says that Mr Allott was simply claiming for all the customer's revenue each time when a TBA was signed.

[69] Mr Allott said he did not claim for a TBA unless there had been a previous contract usually a TBA at least 18 months old. Mr Allott said that he never knew that there would be focus by Telecom on dates individual mobile handsets were connected or upgraded and that he had never experienced this before in making claims.

[70] Mr Brown in response to that says 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 re-signed during the relevant financial year and that was not accurately captured by claiming in a TBA for all predicted revenue for the customer.

[71] Mr Allott maintains that he was resigning the actual line of business for fixed line and mobile services when the customer entered into a TBA. He said that once the TBA was signed then the customers revenue for fixed line and mobile services was secured for Telecom for a term up to 24 months. The TBA was then usually passed to a Telecom Mobile Dealer who was an agent of Telecom responsible for implementing mobile upgrades. If specific mobile handsets were upgraded then these would be processed in a MSA. Mr Allott said that in the TBA the mobile component included a list of pricing and plan as options for the client which he had prepared and presented. The rates in the TBA for mobile supplies were the same as those later used in the MSA.

[72] The evidence satisfies me that the claiming process was a detailed one. Mr Allott said he submitted details of every contract signed or resigned by each client. He entered the details of the contracts into the CRM system which was Telecom's database and this was required under the SIP and MEC. He 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. 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 satisfy this rule as it is written.

[73] I find that Mr Allott's claims for rewins appear to satisfy the requirements of the MEC. I have considered whether Mr Allott 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.

[74] Telecom had the ability to assess if claims were made correctly during the relevant financial year and if not to consult with Mr Allott 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 Allott, as stated earlier was aware that some of his claims had been audited because he was 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 the contracts for mobile device connections or upgrades.

[75] 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.

[76] 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 Allott's claims. The resourcing issues were unfortunate and out of Ms MacDonnell's control but as well as the audit process all of Mr Allott's claims were required to be signed off by his supervisor Mr Sharp. I find it more likely from an email Mr Sharp sent to Mr Brown dated 6 September 2012 that he considered Mr Allott was claiming correctly for rewins. 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.*

[77] I then considered whether it was simply Mr Allott 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 rewin in the same way as Mr Allott 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 rewin 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 Allott. That is supported by the recommendation document which refers to some in Auckland for example claiming in the same way as Mr Allott. I conclude that some other client managers in regions other than Christchurch must also have considered that the way Mr Allott was claiming for rewin supported by a TBA was in line with the rules in the MEC and SIP.

[78] 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.

[79] 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.

[80] In discounting the mobile rewins 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 rewin 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 within which a claim could be made would be shorter.

[81] 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 changed to deal with the omission.

[82] I am not satisfied for the reasons set out above that Mr Allott should otherwise have known that any claim for a mobile rewin 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 contract.

[83] Telecom discounted some of Mr Allott's mobile rewin claims retrospectively because of a change to the claiming rules rather than an application of them. I accept Mr Henderson's submission that it is unclear what contractual provision enabled Telecom to do this. It was not the sort of situation envisaged by clause 4.2.3 of the SIP where claw backs would apply if actual usage was lower than claimed against the current month's achievement and if billing revenue was higher there would be a top up.

[84] Relying on a change to the claiming rules which formed part of the terms of Mr Allott's remuneration to discount his mobile rewin claims retrospectively was unjustified. Mr Allott did not agree to a change to the rules or the discounting. I do not find it was what a fair and reasonable employer could have done in all the circumstances. I do not find I need to consider the alternative causes of action.

[85] Mr Allott has a personal grievance that he was disadvantaged in his employment by unjustifiable actions of Telecom in retrospectively adjusting his sales target after year end and changing the claiming rules and then discounting claims. He is entitled to remedies.

### **Remedies**

[86] Ms Butcher clarified in her submission that should the Authority get to the point of remedies then Telecom does not have any real dispute with the figures referred to by Mr Allott.

**Lost remuneration**

[87] Mr Allott should be put into the position he would have been in had Telecom not retrospectively adjusted the sales target and discounted his mobile rewin claims. The sum that Mr Allott lost by way of unpaid commission for both actions found to be unjustified is \$41,260.52

[88] I order Telecom New Zealand Limited to pay to Gregory Allott the sum of \$41,260.52 being unpaid commission.

**Holiday pay**

[89] There is also a claim for holiday pay on that sum. 8% of \$41,260.52 is \$3,300.85 gross.

[90] I order Telecom New Zealand Limited to pay to Gregory Allott the sum of \$3,300.85 gross being Holiday Pay.

**Interest**

[91] There is a claim for interest on the lost remuneration. The Authority has the power in a matter involving the recovery of money to order interest be payable if it considers it is appropriate to do so under clause 11 of the second schedule to the Act. The evidence supported meetings with Mr Allott, Mr Brown and Ms MacDonnell took place in September and November 2012 to explain why the changes had been made. Mr Allott did have an adjustment made for some claims which obviously have not been included in the award made during that period. It was clear though by mid-November 2012 Telecom was not going to revisit its position further. Mr Allott raised a personal grievance in an email dated 21 December 2012.

[92] I find that interest should be payable on the combined sums of lost remuneration and holiday pay of \$44,561.37 at the rate prescribed under s. 87(3) of the Judicature Act 1908 of 5% from 21 December 2012 until the date of payment and I so order.

**Compensation**

[93] Mr Allott gave evidence about the stress the matter had on him and the time it had taken for him to work on his claims. He said he became discontent with the

industry and did not want to continue to be employed by Telecom. He used words in his written evidence that it felt like a betrayal of trust and he was very angry. He also felt it was quite offensive for Telecom to accuse him of fraud in the way he had claimed for rewins. Mr Brown, in a letter responding to the personal grievance dated 12 April 2013, said that Mr Allott's claims had been reduced *due to behaviour outside of the SIP that could have been considered as fraudulent*.

[94] Mr Allott said that his personal life suffered because of the stress he was under and his relationship with his partner Skye Broberg broke down as a result. The Authority heard from Ms Broberg. She said that Mr Allott was a very happy positive person before the situation with his remuneration occurred but she observed a general change where he became quite troubled about Telecom and lost faith in the organisation. Ms Broberg said that the way in which Telecom had treated him became a constant topic of conversation and Mr Allott's sleep became erratic. She felt that the situation placed stress on the relationship and Mr Allott became irritable and not as positive. He started smoking and changed.

[95] Ms Butcher said that Mr Allott's evidence sounded more like anger, frustration and stress rather than humiliation, loss of dignity and injury to feelings. I accept that the time spent working on the claim should not be reflect in an award. There was though evidence I find to support an award under this head. The effect on Mr Allott was clear from the evidence of Ms Broberg. His personality changed from being generally positive to being quite troubled. He clearly felt that his relationship with Telecom had been damaged and a deep sense of unfairness. The awards made will go some way towards reducing a sense of anger and unfairness including any suggestion that his behaviour was fraudulent but I find that a compensatory award that reflects the effect on Mr Allott is called for. An appropriate award is the sum of \$8,000.

[96] I order Telecom New Zealand Limited to pay to Gregory Allott under s. 123 (1)(c)(i) of the Act the sum of \$8,000 without deduction being compensation.

### **Contribution**

[97] I do not find Mr Allott contributed to the situation that gave rise to his personal grievance and the awards are not reduced.

**Costs**

[98] I reserve the issue of costs. If they 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 submission in response.

Helen Doyle

Member of the Employment Relations Authority