

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 109/08
5089701

BETWEEN CHRISTIAAN JOHANNES
BURGER
Applicant

AND MOTORPOL AUSTRALASIA
LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Johannes Burger in person
Don Blyth, advocate for Respondent

Investigation Meeting: 13 December 2007

Determination: 27 March 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Christiaan Burger commenced employment in May 2005 as a sales engineer for Motorpol Australasia Limited, selling electrical switchgear and associated products.

[2] Mr Burger's written employment agreement provided for a salary of \$60,000 per annum to be paid to him and also for a bonus incentive. This latter component of his remuneration was expressed to be payable:

*... quarterly in arrears based on sales of products controlled by the Employee at a rate of 2.0% of the sale value collected excluding GST
... within budgeted cost ...*

[3] Mr Burger applied to the Authority to have an investigation of his claim to recover \$8,183.17 in bonuses or commission which he claims had become due and should have been paid to him on 27 February 2007. In his application he claims that

Motorpol his employer kept on promising to pay but had not done so as at June 2007 when he filed his statement of problem.

[4] A second part of Mr Burger's claim is in respect of payments he received while on ACC for six weeks from 7 March 2007. He states in his application that ACC paid him 80% of his earnings at the level those had been before his accident but that those earnings had not taken into account the unpaid commissions of \$8,183.17 due when he went on ACC. In effect, Mr Burger claimed that because his employer had not paid the commission when it was due, this caused a reduction in the earnings-related compensation he had received from ACC. He seeks compensation for that reduction.

[5] Mr Burger and Motorpol engaged in mediation but were unable to resolve the claims.

[6] Mr Don Blyth, who is a director of Motorpol, in a letter to the Authority dated 10 December 2007 and also orally at the investigation meeting held a few days later, acknowledged that in July 2007 after Mr Burger had applied to the Authority, he was paid by Motorpol gross commission of \$6,512.39.

[7] If those bonuses or commissions had been paid when they were due in February 2007 before Mr Burger had had the accident, his earnings-related compensation would have taken the additional money into account and been greater than the amounts Mr Burger received.

[8] Motorpol I find has acknowledged that Mr Burger was underpaid his bonuses or commissions, or was not paid them on time as required, although the amount finally paid remains lower than the \$8,183.17 claimed by Mr Burger. Also Motorpol has acknowledged that in principle it should compensate Mr Burger for any shortfall in his earnings-related ACC payments he may have incurred as a result. However, on the calculations carried out by Mr Blyth, Motorpol has concluded that Mr Burger was overpaid. This is because:

- (a) Motorpol had paid the difference between 80% and full earnings during the relevant ACC payment period, when Mr Burger was not legally entitled to that additional 20%; and

- (b) Mr Burger had received ACC payments for three days when he was also paid sick pay by Motorpol.

[9] Turning first to the correct amount of commissions due to Mr Burger, he produced an email sent by him on 27 April 2007 to Ms Rachel Goodyer of Motorpol, asking her to confirm the commission amount he was entitled to as at 27 February 2007. Ms Goodyer's reply was:

Total owing as per the spreadsheet I emailed you was \$8,183.17 less \$217.66, which Rita overpaid you last year. She paid you for one commission twice. Early next year I will update the spreadsheet. I will then email for you to check against your own records that it is correct. I have told Don [Blyth] that I will be doing this. I hope that I will be able to pay you right up to date in the next pay.

[10] Mr Burger produced a spreadsheet showing his sales and recording "Commission Owing" as \$8,183.17. It appears from the spreadsheet, although it is not entirely clear, that the amount of \$217.66 had been deducted from this figure to take into account the overpayment of it referred to by Ms Goodyer.

[11] Mr Blyth's rejection of this as the full amount due was based on office practice or a requirement for quotations to be approved by the General Manager before being sent to the customer. No further evidence has been offered by Motorpol to show why the figure confirmed by Ms Goodyer to Mr Burger of \$8,183.17 is incorrect as Mr Blyth claims. There has been ample opportunity provided by the Authority for Motorpol to collect this information and any relevant invoices, from Gisborne or any other location, and supply it to the Authority.

[12] I therefore accept that \$8,183.17 is the correct amount of bonuses or commissions that were due to Mr Burger as at 27 February 2007. After deducting \$6,512.39 paid by Motorpol in July, there remains a shortfall owed of \$1,670.78 which Mr Burger is entitled to recover.

[13] It follows that he is entitled to be compensated for the reduction in the earnings-related ACC payments he received during the period of his accident.

[14] I do not accept that Motorpol should set off from the amount due the additional 20% it made up to enable Mr Burger to receive 100% of earnings instead of only 80%. Those earnings did not include the bonuses due to Mr Burger from 27 February, which Motorpol has acknowledged it failed to pay when they were due.

From this failure directly stemmed the problem Mr Burger had with the ACC payments he received not being the full amount he should have received based on his actual earnings.

[15] In any event the calculations provided by Mr Burger to reach the figure of \$4,640.10 he seeks as compensation, are at only 80% of earnings rather than 100%. I therefore do not consider there should be a further adjustment to set off the top up the employer made but which was not based on full commission due at that time.

[16] I find that Mr Burger is entitled to recover \$4,640.11 under this part of his claim but I am also satisfied that he was paid both by ACC and Motorpol for three days on 7, 8 and 9 March. Therefore, the ACC payment of \$555.11 is to be deducted from \$4,640.11, leaving a balance of \$4,085 owing to Mr Burger under this head of his claim.

[17] Mr Burger has claimed interest. I consider he is entitled to recover this, as he should have been paid his commission in February 07 and not July 07 and because he has been successful in recovering a greater sum than was paid to him in July. He also should have been paid a higher amount by ACC, which additional money he has been prevented from using. Interest is therefore an appropriate remedy for such loss.

[18] The calculations made by Mr Burger in his Appendix 1 at a rate of interest of 10% is not precisely what is due because the ACC claim component (\$4,640) is not the amount I have awarded and also the underpayments in relation to ACC compensation did not occur 10 months prior to the investigation meeting held in December 2007. Some of those underpayments at the end of the accident period were made in mid-April which is only eight months before the investigation meeting.

[19] However, I do not propose to recalculate the interest due because I will leave that claim as running until the investigation meeting date rather than taking the alternative course of having interest paid up to the date of this determination, which may have attracted another three months of interest.

[20] I accept 10% as an appropriate rate of interest for the Authority to award in this case. The amount due was originally given as \$797.25 but Mr Burger's final claim was \$637.79, which amount I award to him.

[21] Mr Burger is also entitled to recover the \$70 fee he paid to commence this investigation.

[22] I note that in recent correspondence Mr Burger has drawn the Authority's attention to a claim he has made for expenses but which have not been paid by Motorpol. This claim was for parts he purchased with his own money against a Motorpol order in September 2007.

[23] As this was not part of the original claims I do not therefore make any findings or determination about it.

[24] It now appears that within the last fortnight unfortunately Mr Burger has been dismissed by Motorpol from his employment, purportedly on the grounds of redundancy. As it seems Mr Burger may be contemplating raising a grievance about that dismissal, he may if he wishes join with it any claim to recover the expenses he has sought payment of from Motorpol.

Summary of amounts due

[25] Motorpol Australasia Limited (now renamed Advantage Power Systems Limited) is ordered by the Authority to pay the following amounts to Mr Christiaan Burger;

\$1,670.78 - outstanding bonuses or commissions due,

\$4,085.00 - compensation for ACC payments made at lower figure than amount supported by actual earnings,

\$637.79 – interest,

\$70 - fee for making application to the Authority.