

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 104
3042151

BETWEEN

TRACY COUSINS
Applicant

AND

MATRIX SECURITY
GROUP LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Peter Hodge, advocate for the Respondent

Investigation Meeting: 26 February 2019

Determination: 27 February 2019

DETERMINATION OF THE AUTHORITY

A. Within 28 days of the date of this determination Matrix Security Group Limited must pay Tracy Cousins \$19,747 as arrears due as commission and the further sum of \$1,579.76 as holiday pay due on those earnings.

B. Costs are reserved.

Employment Relationship Problem

[1] Tracy Cousins was employed as Sales and Marketing Manager of Matrix Security Group Limited (MSGSL) from 31 October 2016 until 30 March 2018. Her employment ended after she gave notice in early February 2018.

[2] In the last month of her employment Ms Cousins raised a claim for arrears of monthly commission she said she should have been paid throughout her employment.

She said she was owed \$22,414. She also claimed holiday pay and interest on those amounts.

[3] MSGL denied Ms Cousins was owed any commission. It said she had proposed an alternative annual bonus system soon after her employment began. The bonus was to be based on certain sales targets being met but they were not, so MSGL said no payments were due to her.

The Authority's investigation

[4] For the Authority's investigation Ms Cousins, MSGL's chief executive officer Scott Carter and chief finance officer Jeff Curley each lodged a written witness statement. The parties also lodged relevant background documents including the employment agreement of Ms Cousins, some correspondence and various internal company budgets and reports. All three witnesses attended the investigation meeting and, under oath or affirmation, answered questions. The parties also had the opportunity to ask additional questions and to make closing oral submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues for determination as they developed in the investigation meeting were:

- (i) Were the terms of Ms Cousins' written employment agreement about payment of commission varied in an effective and enforceable way during her employment?
- (ii) If no effective variation was made, what commission payments was Ms Cousins' owed?
- (iii) What holiday pay was due on any commission owed to her?
- (iv) Should interest be awarded?
- (v) Should either party contribute to the costs of representation of the other party?

The applicable terms of employment – commission or annual bonus?

[7] In determining whether a monthly commission applied or whether it was replaced by an annual bonus system only, the Authority had to consider:

- (i) the terms of Ms Cousins' written employment agreement, including the term on how those terms could change; and
- (ii) whether changes she proposed were accepted by MSGL so that her terms were actually varied; and
- (iii) whether Ms Cousins' conduct from January 2018 showed she had agreed to a change in how she would be paid.

The written terms of employment

[8] MSGL's employment agreement with Ms Cousins was in a standard form prepared by the company. Although there was some negotiation about her salary level, all other terms were essentially as proposed by the company and then agreed to by her.

[9] That agreement came into effect from 31 October 2016 and was stated (clause 1.0) to "remain in force until renegotiated or terminated". Remuneration was stated (clause 8.0) to be "set out in Schedule 2". A variation term (clause 44.0) said "the agreement may only be amended or varied by written consent signed by both parties".

[10] Schedule Two, headed Remuneration, provided for an annual salary of \$110,000 and the benefits of a car, phone and tablet. It set rules on where selling commission applied, the earning rates and when payments were expected to be made. Renewal of existing services to existing customers was excluded, except where an existing customer moved premises and required revised services.

[11] Commissions were to be approved by the Sales and Marketing Manager (the position held by Ms Cousins) and the Chief Financial Officer jointly after the sales period each month and paid in the payroll for the 15th day of the following month.

[12] Ms Cousins' arrears claim for commission related only to sales she had made, for installations of alarms and for company services (such as commercial patrols, residential security, and guards).

Was a variation agreed?

[13] Soon after she started working for MGSL Ms Cousins began developing an alternative system to incentivise the sales team. It included a proposal for her remuneration to include an annual bonus for reaching sales targets rather than the monthly commission provided in her employment agreement.

[14] In an email on 12 December 2016 she referred to having “verbalised my intent to the team to move to a target model only ... before any bonuses can be achieved”. Mr Carter responded with an email that included this comment: “I like and approve of your intent to move the sales team to a target model only”.

[15] On 22 December 2016 Ms Cousins sent Mr Carter an email, attaching an Excel spreadsheet setting out what she labelled “2017 Sales Target and Commission”. Her email included the following relevant statements in explanation of her proposal (emphasis in bold added):

... You will see that I have reintroduced the minimum target to provide a clear min standard however as your (sic) clarified **no bonus is paid unless the target is achieved.**

... In terms of my commission/bonus I believe the best way forward is to recognise my performance against results on an annualised basis. I would treat this period as getting fit and ready for the year ahead.

We discussed at my interview that I am keen to earning (sic) an additional \$40-50K of revenue. To do this I envisage it is a combination of what I bring on myself and what I contribute to the business and team in order for the business to achieve.

I have weighted it so that the team (including myself) achieving the financial target represents 80% of my annual bonus. I believe that if I am doing all the right things for the business in terms of my leadership/management and marketing then this will support the desired financial outcomes. **I would not claim a monthly commission, opting for an annualised payment only upon reaching a minimum of 95% of target, target and exceeding target.**

It is important to me to ensure that what I have **proposed** is fair, achievable and responsible.

...

We can discuss tomorrow when I am in to ensure that you are comfortable with my approach and thinking.

[16] On 26 January 2017, at the completion of what he called a 90 day probationary period, Mr Carter sent Ms Cousins an email confirming her permanent employment as

sales and marketing manager. His email included the following response to her budget proposal:

Your plan for reshaping of the sales team and marketing budget to achieve organic growth is realistic and aligned with the company goals, and we look forward very much to seeing this executed successfully.

[17] On the same day Mr Carter also arranged to meet later to “discuss the sales plan in more detail”. That meeting took place over lunch on 8 February 2017. Mr Carter’s evidence was that Ms Cousins’ “plan (for the sales team of three including her) and remuneration proposal was approved”. He said Ms Cousins later worked with the CFO Mr Curley on the 2017-18 budgets. He said she had developed a new bonus structure in conjunction with Mr Curley with a final edition of the sales targets being sent to her on 7 March 2017.

[18] Mr Curley’s evidence was that Ms Cousins’ proposal gave him “the understanding” that she (at her suggestion) “waived” any commission earnings due from her employment in October 2016 through to March 2017 and “thereafter an annual bonus based on team performance and other criteria was agreed and replaced any future commission earnings or claims”.

[19] The budget and strategy documents they prepared included detail on how Ms Cousins’ bonus would be weighted between sales – 80 per cent – and other management tasks associated with running her sales team – 20 per cent. That part of the documents included the note: “No commission – bonus paid only at year end”.

[20] On the basis of those emails and documents, and his discussions with Ms Cousins around the time, Mr Carter said the arrangement for an annual bonus, if targets were met, instead of monthly commission was “mutually agreed in writing”.

[21] Even accepting the account given by Mr Carter and Mr Curley about the proposal Ms Cousins made and how it was dealt with, the evidence overall fell well short of establishing that an offer was made for such a change and then accepted by MSGL in a way that met the terms of its variation clause. There was no written consent signed by both parties.

[22] Mr Carter, properly, conceded that he would normally expect a formal letter of variation to be prepared and signed for such a change. It was not done in this case

because he had relied on what he had understood Ms Cousins to have agreed in their discussions and the budget and sales strategy documents she prepared. Attending to formalising the arrangement in writing was overlooked in the hurly burly of the daily demands of running the business.

[23] However the obligation to prepare and record the variation lay with the company. It had chosen to include a variation term requiring signed written consent in its employment agreement. It was bound by its own rules. Its contractual position was consistent with the statutory obligations for an employment agreement and any variations to be in writing, with the opportunity to take advice beforehand.¹

[24] The technical obligation remained. MSGL had not extinguished its contractual obligation to pay Ms Cousins commission on sales made.

Did Ms Cousins' subsequent conduct nevertheless make the change effective?

[25] Ms Cousins accepted that she had carried out her work on the basis of the sales plans she initiated, and that included provision for a higher annual bonus for her if targets were met. Sales representatives claimed monthly commission but she did not, until she had given notice of her resignation in February 2018.

[26] She accepted that she had initiated the notion of a higher annual bonus, with the resulting risk of not meeting targets set for it. However she said the targets were predicated on some assumptions about the level of resources committed to achieving them. For a range of reasons, she said she did not have a sufficiently skilled sales team through the whole year capable of achieving the targets.

[27] The company denied that there were insufficient resources but the determination ultimately did not turn on whether or not Ms Cousins could have reached the targets set to achieve an annual bonus.

[28] MSGL submitted that, although not confirmed in writing, Mr Carter had agreed orally and in good faith with Ms Cousins that an annual bonus, for meeting targets, would replace its system of monthly commissions paid on sales alone.

[29] It said Ms Cousins' subsequent conduct in not claiming monthly commissions on her sales meant the arrangement for an annual bonus, if targets were met, had

¹ Employment Relations Act 2000, s 63A(e) and (2) and 65(1).

become “custom and practice”. However, even if that concept properly applied, an implied term incorporating such a change could not displace the express written provision of their employment agreement requiring variations to be in writing and signed. In the words of an old case, it would be repugnant to an expressed term.²

[30] Similarly Ms Cousins’ claim did not fall at the hurdle of her statutory good faith obligations or by application of the doctrine of estoppel.³ She had proposed and appeared to have accepted she could only get an annual bonus but she had not misled or deceived MSGL about the need to record such a variation in writing. MSGL had its own good faith obligation to complete the variation in writing, as required by the term of its own employment agreement, if it wanted to rely on the change.

[31] Because she had initiated the proposal for an annual bonus and worked on developing the plans and budget for the associated sales targets for her team, Ms Cousins had created an expectation by the company that, having agreed the plan, she accepted the change ended any entitlement to commissions if the plan did not work. MSGL did rely on that expectation but it was not reasonable to have done so when it overlooked completing the formalities of recording the variation in writing. Neither, ultimately, was it unconscionable for Ms Cousins to get some commission on the revenue her work generated, based on the formula MSGL was earlier happy to agree.

[32] Accordingly, Ms Cousins was entitled to a calculation of arrears due for commission under the express written terms of her employment agreement.

What commission was due?

[33] Ms Cousins had prepared a claim for commission comprising four elements – sales for installations from 1 November 2016 to 31 March 2017, sales for installations for the 2017-2018 financial year, sales for other services generating monthly recurring revenue from 1 November 2016 to 31 March 2017, and sales for other services generating monthly recurring revenue for the 2017-18 financial year.

[34] The company had prepared an adjusted analysis using the same sales figures which reached slightly lower figures than Ms Cousins. This difference was because some sales were identified as not reaching certain criteria for commission, such as

² *Whitcombe and Tombs Ltd v Taylor* (1907) 27 NZLR 237 (SC) at 240.

³ *Assure Quality Limited v NZ Public Service Association Inc* [2018] NZEmpC 70 at [25].

excluding existing clients or a purchased service not proceeding. I have accepted those adjusted figures, as calculated by Mr Curley and totalling \$19,747, as being the amounts that appropriately apply as the commission MSGL must pay Ms Cousins:

- (a) \$738 for installations from 1 November 2016 to 31 March 2017;
- (b) \$9,733 for installations in the 2017-2018 financial year;
- (c) \$1,965 for other services generating monthly recurring revenue from 1 November 2016 to 31 March 2017;
- (d) \$7,311 for other services generating monthly recurring revenue for the 2017-18 financial year.

Holiday pay

[35] As part of Ms Cousins gross earnings MSGL is also obliged to pay her holiday pay of \$1,579.76 on the commission payment.⁴

Interest

[36] The discretion to award interest on the sum now found due has not been exercised in the particular circumstances. Ms Cousins lost the use of the monthly commission money during her employment but this arose from her own actions rather than the company.

Costs

[37] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[38] If they are not able to do so and an Authority determination on costs is needed Ms Cousins may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum MGSL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[39] If asked to determine costs the Authority usually applies a notional daily rate unless particular circumstances or factors required an upward or downward

⁴ Holiday Act 2003, s 25.

adjustment of that tariff.⁵ Ms Cousins represented herself at the investigation meeting which took less than half a day but had incurred some costs of representation before doing so. As a preliminary indication, and dependent on the application of any other factors referred to, she could expect a contribution of \$1,500 to those costs.

Robin Arthur
Member of the Employment Relations Authority

⁵ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].