

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 103
3020072

BETWEEN STEVEN ELLIS
Applicant

AND W CRIGHTON & SON LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Phil Mitchell, counsel for Applicant
Darren Mitchell, advocate for Respondent

Investigation Meeting: 26 July 2018 at Wellington

Submissions Received: On the day from Applicant and Respondent

Determination: 12 November 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Steven Ellis was employed by W Crighton & Son Limited (Crightons) as Regional Sales Manager from 22 February 2016 until 14 July 2017. He claims his employer failed to fulfil its contractual obligations in respect of the commission payable to him throughout his employment.

[2] Mr Ellis says the failure to pay commission was a fundamental breach by his employer which led to his resignation, and for which he claims constructive dismissal. He seeks financial remedies comprising unpaid commission, costs, and compensation for humiliation, loss of dignity and injury to feelings. Mr Ellis also seeks the imposition of a penalty on Crightons for the breaches of his employment agreement.

[3] Crightons denies Mr Ellis' claims with respect to his commission and says it has paid all the commission that was due to him.

[4] Crightons also rejects Mr Ellis' claim to have been constructively dismissed. It says Mr Ellis raised a personal grievance for constructive dismissal outside the statutory 90 day period and it does not consent to the grievance being raised out of time.¹

[5] The parties attended mediation through the Mediation Service of the Ministry of Business, Innovation and Employment but were unable to resolve their differences.

Relevant background

[6] Crightons operates a building supplies business under the ITM brand in Levin and other locations in the wider Wellington region. Mr Ellis was based in its Levin outlet and had regional responsibilities.

[7] The individual employment agreement (IEA) signed by Mr Ellis and Euan Crighton, Managing Director of Crightons, on 22 February 2016 contained a number of attached schedules. Schedule 2 related to remuneration and contained details of Mr Ellis' annual salary and the commission structure applicable to him. The latter was described in the following terms:

Commission structure

Commission potential to earn is \$50,000 capped based on 1.00% of sales increase, on transactions meeting a minimum margin of 20%. Please note the sales figures used will exclude the following:

- Freight and pallets
- National group house builders
- Trade club discounts
- Bad debts
- Rebates

Commission is to be paid quarterly in advance of the annual computation and will be calculated less any credits issued.

[8] Mr Ellis received no commission payments during his employment. He gave written notice of his resignation by letter dated 6 July, citing 3 August 2017 as his last day of work. He did not work out the whole notice period and left work on 14 July 2017. Prior to resigning he had obtained alternative employment with a competitor of Crightons on the same remuneration and commission arrangements.

¹ Section 114 (1) of the Employment Relations Act 2000.

[9] After Mr Ellis resigned Mr Crighton offered to pay him \$12,052.26 which, in the employer's view, was the amount of commission owing to him. Mr Ellis declined the offer and informed Mr Crighton he was seeking \$62,768.26 in commission to be paid within 21 days or he would commence proceedings in the Authority.

[10] Crightons paid Mr Ellis \$12,052.26 in, or after, December 2017. It said this was the amount of commission Mr Ellis had earned during his employment with the company.

[11] Mr Ellis acknowledges his original calculation of the commission owed to him was incorrect. In December 2017 he obtained advice from a Chartered Accountant (CA) who undertook an analysis of the commission owing. Mr Ellis provided a copy of the CA's report to the Authority. The CA, who did not attend the Authority's investigation meeting, noted in his report that the commission structure provision in Mr Ellis' IEA was *very poorly worded* and *difficult to interpret*.

[12] Under the CA's analysis of the sales data supplied to him by Mr Ellis, the amount of commission owed was either \$18,328.29 or \$20,226.44, depending on the methodology used. The CA commented that it would make commercial sense to agree on a compromise by taking the average of those two amounts, being \$19,277.37.

The Authority's investigation

[13] I have not set out a record of all the evidence heard or received nor recorded all submissions made by the parties but have set out the material facts and made findings on issues relevant to the determination of the applicant's claims in accordance with s 174E of the Employment Relations Act 2000 (the Act).

[14] This determination has been issued outside the timeframe set out at s 174C (3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C (4) to do, are exceptional.

Issues

[6] The issues for me to determine are:

- (a) whether Mr Ellis raised a personal grievance for unjustifiable, constructive, dismissal; and, if so,

- (b) whether he was unjustifiably dismissed;
- (c) whether Crightons breached Mr Ellis employment agreement by not paying commission during his employment; and, if so,
- (d) whether a penalty should be imposed for the breach;
- (e) whether Mr Ellis is owed commission and, if so,
- (f) in what amount.

Did Mr Ellis raise a personal grievance for constructive dismissal?

[15] Section 114 of the Act provides that a personal grievance must be raised within a period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of the period.

[16] The Act provides that:

...a personal grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.²

[17] The Authority has the discretion, under s 114(4) of the Act, after giving the employer an opportunity to be heard, to grant an employee leave to raise a personal grievance out of time. Mr Ellis made clear in his evidence that he does not accept his personal grievance was raised out of time as Crighton's alleges and he has not sought leave to raise it out of time.

[18] It was Mr Ellis' evidence in his written statement that he repeatedly raised the issue of the non-payment of his commission with his employer while working for Crightons and then formally by filing proceedings in the Authority. He acknowledged in oral evidence that he had not informed his employer he was resigning over the commission issue, and said he did not feel comfortable raising the matter with Mr Crighton.

[19] Mr Crighton acknowledges Mr Ellis raised the matter of commission payments with him during his employment, although he said it did not happen often. He says he did not pay commission because, in the course of a meeting he had with

² At s 114(2).

Mr Ellis on 13 July 2016, Mr Ellis told him not to bother paying him commission at that time because he was intending to put a new proposal for commission to him.

[20] Mr Crighton says Mr Ellis did put a proposal to him in July 2016 and then again in November 2016. However, he saw no need to change the commission structure he had agreed with Mr Ellis at the outset of his employment, as recorded in the IEA. In Mr Crighton's recollection, Mr Ellis had raised the issue of commission only a few times during his employment. Mr Crighton had not agreed to the new commission structure proposed by Mr Ellis and the matter did not progress.

[21] Mr Crighton confirmed that, when Mr Ellis resigned, he did not link his decision to dissatisfaction over unpaid commission. Mr Crighton said he was surprised at Mr Ellis' resignation. Mr Ellis's oral evidence to the Authority was that Mr Crighton was *shocked* to receive his resignation.

[22] Mr Ellis' letter of resignation, replicated below, gave no reason for his decision to leave his employment.

Hi Euan please accept this letter as acknowledgement of my 4 weeks resignation as required in my contract my last day of work being 3rd August 2017.

[23] The statement of problem Mr Ellis lodged on 4 October 2017 made no reference to a personal grievance. Mr Ellis' problem was stated to be his employer being in breach of contract for not having paid outstanding commission to him *in the sum of \$62,000* during his employment.

[24] The only sentence in the statement of problem that could be construed as claiming constructive dismissal appeared in the section setting out the facts that had given rise to the problem. Mr Ellis set out his understanding of the commission provisions of his IEA and the steps he had taken to discuss the matter, as well as his proposal for a new commission structure, with his employer. He then recorded:

I had no success in resolving my commission as I had no response from either Euan or Darren and as a consequence I resigned from my role on the 6th July 2017 and told Euan I was expecting what was owed to me in my final pay and that came to \$62,000.

[25] Mr Ellis then noted that Mr Crighton and the company's business consultant, Darren Wallbank, invited him to a meeting on 12 July in which they informed him the

amount of commission he was owed was \$12,052.26. The employer advised Mr Ellis it was willing to pay him that amount.

[26] Mr Ellis recorded in the statement of problem that he emailed Mr Crighton on 13 August 2017 declining his offer and asking for payment in full of \$62,000 within 21 days *or I would have no choice but to lodge a dispute with the Employment Relations Authority for wages owed...* (bolding added).

[27] Through counsel Mr Ellis submitted that the circumstances in which he left his employment with Crightons made it clear he was leaving because he had received no commission payments. In oral evidence, however, Mr Ellis acknowledged that when he had told Mr Crighton he was resigning, he advised him he had accepted the offer of another job and he had made no reference to resigning over unpaid commission issue.

[28] I am not satisfied that the one sentence referred to above in Mr Ellis' 4 October 2017 statement of problem was sufficient to raise a personal grievance for unjustifiable constructive dismissal. Those proceedings were for wages owed in respect of unpaid commission. The only remedy he sought at that time was payment of commission. This was consistent with the advice he had given Crightons of his intentions by his email of 13 August 2017. I find Mr Ellis did not raise a personal grievance either during his employment or after he resigned.

[29] Mr Ellis lodged an amended statement of problem in the Authority on 8 February 2018 in which he claimed to have been constructively dismissed. That was several months after the termination of his employment and well outside the statutory 90 day period under s 114 of the Act. He has not sought leave to raise the personal grievance out of time and, in any event, there do not appear to be any exceptional circumstances that would allow leave to be granted. I conclude I have no jurisdiction to consider Mr Ellis' claim to have been constructively dismissed.

[30] I note that, even if I had found Mr Ellis raised a personal grievance in time, which he did not, any financial remedies awarded to him if he had succeeded would have been minimal. He would not have been eligible for compensation for lost wages as he suffered no loss, having left employment with Crightons and commenced alternative employment with the same remuneration.

[31] He would have been eligible for consideration for compensation for the humiliation, loss of dignity and injury to feelings he suffered. However, when I questioned Mr Ellis on this aspect of his claim, he replied that it arose from particular assertions in Crightons' original statement in reply.

[32] Mr Ellis had not claimed compensation in his original statement of problem and the source of his humiliation arose more than three months after his employment had ended from assertions to which he took offence.³ As those assertions had not been made before, or at the time of his resignation, they would have been given scant consideration if he had been found to have been constructively dismissed.

Did Crightons breach Mr Ellis' IEA by not paying him commission?

[33] The commission provisions of Mr Ellis' IEA state that commission *is to be paid quarterly in advance of the annual computation...* . Mr Crighton acknowledged under cross examination that Mr Ellis was eligible for his first quarterly payment on 22 May 2016. He also accepted there was no dispute between the parties over the interpretation of the commission clause at that time. Mr Crighton could not give a reason for non-payment other than that the system was new and the company was coming to grips with it. He accepted Crightons had an obligation to pay wages when they fell due.

[34] In oral evidence Mr Crighton said the commission was not paid because Mr Ellis had told him on 13 July 2016 not to bother paying it as he intended putting forward a proposal for a revised commission structure. I do not accept that evidence because the first quarterly commission payment was already overdue for payment by 13 July. Mr Crighton put forward no persuasive reason for the failure to pay the commission within that timeframe.

[35] Mr Ellis acknowledged talking to Mr Crighton in July 2016 about an idea for revising the commission structure but denied having told his employer not to bother paying him commission. His evidence, which I accept, is that he did not, and would not, have made such a statement, given that he wanted his employer to honour its contractual obligation to pay him commission.

³ The statement in reply was lodged on 24 October 2017.

[36] Mr Crichton's rationale for continuing not to pay commission throughout Mr Ellis' employment was that Mr Ellis had proposed changes to the commission structure. However, Mr Crichton also made very clear that he saw no reason to change the commission provisions as written in Mr Ellis' IEA. That being so, there was no valid reason for Crichtons to withhold from Mr Ellis commission payments made in accordance with the IEA commission provisions.

[37] Crichtons made no commission payments to Mr Ellis during his employment. Mr Crichton's evidence was that it had paid him all commission due to him when it paid him \$12,052.26 in December 2017. I accept that Crichtons did make that payment to him but I note this occurred five months after Mr Ellis' employment with Crichtons had ended.

[38] I find Crichtons breached its obligations under its employment agreement with Mr Ellis by its failure to pay him commission when such payments fell due from the end of the first quarter of his employment and throughout the rest of his time with the company.

Should a penalty be imposed for the breach?

[39] Crichtons is liable to a penalty for breaching Mr Ellis' IEA.⁴ Not all breaches will result in the imposition of a penalty and it is relevant to ascertain how much harm the breach has occasioned and how important it is to bring home to the party in default that such behaviour is unacceptable or to deter others from it.⁵

[40] A Full Court of the Employment Court in *Borsboom (Labour Inspector) v Preet PVT Limited* has said:

Penalties are essentially punitive in that they are intended to mark the community's disapproval of the conduct that amounts to a breach of a minimum employment standard. Although the focus of a penalty is on the conduct in the circumstances of the wrongdoer, the effect on, and material circumstances of, the 'victim' are also relevant in the overall assessment exercise.⁶

⁴ At s 134 of the Act.

⁵ *Xu v McIntosh* [2004] 2ERNZ 448 at 464.

⁶ [2016] NZEmpC Christchurch 143 at [51].

[41] Section 133A of the Act sets out factors the Authority and Court are to take into account when considering penalties⁷ and the Court in *Preet* provided guidance over the application and weighting of those factors.⁸ The Court made it clear that, although *Preet* concerned breaches of minimum standards, the principles were to *apply equally to the Authority or the Court when considering whether to penalise for breach of an employment agreement or a collective agreement.*⁹

[42] I consider a penalty is warranted in this situation where there was a failure to pay commission over the 17 months of Mr Ellis' employment. The first payment was overdue before the employer became aware there was a difference in interpretation of the commission provisions of Mr Ellis' IEA and it cannot rely on that as a reason for non-payment. When Mr Crighton became aware that Mr Ellis interpreted the provision differently he took no immediate steps to resolve the situation but used it as a reason for paying no commission at all.

[43] I accept counsel for Mr Ellis' submission that, even if Crightons perceived Mr Ellis' interpretation of the commission provisions to be wrong, it should have paid him the commission it calculated as correct according to its interpretation.

[44] Applying the first step of the *Preet* principles, which entails identifying the nature and number of the breaches and the maximum penalty available for each, I find Crightons breached Mr Ellis' IEA each time it failed to pay him commission when it fell due. The commission was payable quarterly in advance, with Mr Crighton acknowledging that Mr Ellis became eligible for the first commission on 22 May 2016.

[45] By my calculation Mr Ellis worked for five complete quarters, and was part way through the sixth quarter before his resignation became effective. That could be considered as five separate breaches, each attracting a penalty of up to \$20,000, totalling \$100,000.¹⁰

[46] The second step entails assessing the severity of the breaches to establish a provisional penalties starting point. While the first breach was arguably more serious,

⁷ At s 133A.

⁸ n5 at [137] to [151].

⁹ n5 at [76].

¹⁰ Section 135(2)(b).

because the employer had not become aware at that time of any differences between its interpretation of the commission provisions and Mr Ellis' interpretation, I am inclined to find all the breaches to be of equal seriousness. All indicated a disinclination by the employer to honour the agreement it had made with Mr Ellis to pay him commission.

[47] I take into account, however, that Mr Ellis derived his main income from salary, which was never in jeopardy, and the commission was dependent on a number of variables. Mr Ellis was not guaranteed to receive commission in any of the five quarters. I find this mitigates the severity of the breaches to some extent, as does the employer's eventual payment in December 2017.

[48] There was no evidence provided to me that Crightons had previously been involved in proceedings for similar breaches and taking that, the relative seriousness of the breaches, and the December 2017 payment made by Crightons to Mr Ellis into account, I find an adjustment of 75% to the potential penalties to be appropriate. This establishes a provisional starting point of \$5,000 per penalty. Given the similarity of the breaches I consider a global penalty to be more appropriate than individual penalties for each breach. Accordingly I consider a global penalty of \$25,000 to be appropriate at this point.

[49] Crightons is a well-established business and I received no evidence to suggest it would not have the means and ability to pay the provisional penalty.

[50] The last step in the process is to apply the proportionality or totality test to ensure that the amount of the penalty is proportionate to the breaches and just in all the circumstances. Mr Ellis acknowledged he had miscalculated the commission owing to him as \$62,000.00 and, relying on the analysis of the CA he engaged, sought \$19,277.37 in commission payments, less the \$12,052.26 paid in December 2017 by Crightons.

[51] I have already adjusted the potential penalty to take account of the payment already made and will not consider it a second time in applying proportionality. Therefore I must consider whether a penalty of \$25,000 is proportionate to breaches of Mr Ellis' IEA and the harm caused by those breaches. The breaches represented either \$12,052.26, which the employer asserts is what Mr Ellis was owed in

commission, or \$19,277.37 as Mr Ellis claims, or possibly somewhere between those sums. I find a penalty of \$25,000 would be out of proportion and I find a further adjustment to \$6,000 necessary.

[52] Mr Ellis asks that part or all of any penalty be awarded to him. I find that request reasonable and award 75% of the penalty to him.

Is commission owed to Mr Ellis?

[53] Mr Ellis asks the Authority to follow the analysis and advice provided to him by the CA he engaged. This would entail awarding Mr Ellis the difference between the amount of commission paid to him by Crightons in December 2017, which was \$12,052.26, and the average of the possible two commission amounts calculated by the CA, based on the information Mr Ellis provided to him.

[54] That average, which the CA viewed as being a commercially sensible compromise, was \$19,277.37. On that basis the amount of outstanding commission owed to Mr Ellis would be \$7,225.11 after allowance is made for the commission already paid to him.

[55] Crightons rejects Mr Ellis' claim to be owed commission. It says it has applied the commission provisions in the manner that was intended from the outset. Mr Crighton says the way in which the commission was to operate had been thoroughly discussed with Mr Ellis in January 2016 before he commenced his employment with the company. Mr Crighton's evidence is that the commission was to reward Mr Ellis for increased sales achieved. It was not payable on base business that existed but on the increase that was brought to the business.

[56] Mr Crighton's evidence is also that:

The sales increase for the bonus would be based on our individual sales reps total sales for the year, based on the annual computation of group sales figures. The individual rep was required to reach the 20% margin in total for the year. This bonus and how it would work in practice was explained to Steve before he agreed to be employed.

[57] I am not persuaded that Mr Crighton made the detail of the calculation clear to Mr Ellis in their discussions in January 2016. I prefer Mr Ellis' evidence that there was no detailed discussion about the commission at that time. Nor is there evidence

that Mr Crighton clarified his interpretation of the commission provisions in the meeting of 13 July 2016 with Mr Ellis when Mr Crighton said he became aware Mr Ellis had a different view of that matter.

[58] Mr Crighton said he had asked Mr Wallbank to talk with Mr Ellis about the commission when Mr Ellis proposed changes to the structure in November 2016. The ensuing email exchange between Mr Wallbank and Mr Ellis in January 2017 demonstrates that Mr Ellis was not clear over how the commission provisions of his IEA were intended to operate.

[59] Mr Wallbank had emailed Mr Ellis on 18 January 2017, noting the following:

My action point from our last meeting was that you and I were going to try and tie down your numbers.

To let me move forward on this can you forward me your view and position and facts and then I can digest these and talk to you from there.

[60] Mr Ellis responded the same day asking if Mr Crighton had given Mr Wallbank his proposal for the commission and stating:

My original understanding was that when we discussed the structure was that any sale over 20% for the sales reps was 1% capped at 50K. I asked Euan a couple of times for clarification but did say that this would be achieved rather quickly and suggested that we look at it later. After reading the contract more thoroughly it looks like 1% of new business which if that is the case I am happy with that but would be hard to monitor.

[61] Mr Wallbank's evidence is that Mr Ellis' reply did not provide him with the numbers he had requested and he did not follow up the matter. He did not recall having any further direct contact with Mr Ellis over the commission before Mr Ellis resigned.

[62] As of 18 January 2017 Mr Ellis accepted his commission would be based on new business. He did not know until July 2017 that his employer intended the commission to apply on the basis of the achievements of individual sales representatives and he rejects that interpretation of his IEA. He became aware of that after his resignation when Mr Crighton offered to pay him \$12,052.26 and provided him with a document setting out statistics relating to the sales achievements of each

sales representative. The document stated whether the increases achieved had been at a minimum 20% margin.

[63] How then is how the commission structure provision of the IEA to be interpreted? The Supreme Court in *Affco New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Incorporated*¹¹ confirmed that the essential approach to the interpretation of employment contracts is that it described in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*¹² where, at [60] the court stated:

... the proper approach is an objective one, the aim being to ascertain “the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”. This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as “background”, it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.

[64] I have attempted to apply that approach to the commission structure provisions of Mr Ellis' employment agreement. As Mr Ellis became aware in January 2017, it is clear from the wording of the provisions that his commission would be based on *1% of sales increase* rather than on 1% of all sales, on transactions meeting the specified minimum margin.

[65] The commission structure provisions of Mr Ellis' IEA do not specify that his commission is to be calculated on the basis of the performance of individual sales representatives. However, the commission is specified to be based on *1% of sales increase, on transactions meeting a minimum margin of 20%*. It is not unreasonable that there would need to be a consideration of the sales performance of the individual sales representatives to assess whether transactions had met the minimum margin.

[66] I am not satisfied that the report of the CA engaged by Mr Ellis to provide an analysis of his IEA commission provisions provides an appropriate basis for the calculation of the commission he was entitled to receive during his employment. Both the calculations in the report, of \$18,328.29 and \$20,226.44, are based on the sales increases of all six sales representatives, regardless of whether they had achieved 20% margin or not. That is not in accordance with the IEA commission provisions. I

¹¹ [2017] NZSC 135.

¹² [2014] NZSC 147.

am satisfied Crightons was correct in basing the commission on the sales increases of only those sales persons who achieved 20% margin.

[67] However, the CA's report did identify an issue that may impact on the accuracy of the commission that Mr Ellis was entitled to receive. This relates to the exclusions portion of the commission structure provision. It provides that the sales figures to be used are to exclude five specified items. The CA's report noted those items were not excluded from the figures used in sales reports that formed the basis for calculation of Mr Ellis' commission.

[68] The CA noted he had been advised those sales would have substantially lower margins, and their inclusion had the impact of reducing the actual sales margin reported. In the CA's opinion this was particularly significant in relation to the Greytown sales representative's performance in the year ending 31 March 2017.

[69] Crightons did not deny the sales figures it had taken into account had included some or all of the five excluded items. Mr Wallbank's evidence was that their inclusion would have had minimal impact on an individual's sales margin. I do not find that response satisfactory but have insufficient information on which to assess what the impact would have been.

[70] Accordingly I find Crightons should recalculate the commission to which Mr Ellis was entitled during his employment by excluding those sales figures referred to in the commission structure provisions of his IEA. No other changes are to be made to the basis for its calculations and Crightons is to provide all information relevant to the recalculation to Mr Ellis.

[71] The recalculation must be completed within 28 days of the date of this determination and, if the revised calculation results in an increased amount of commission, that amount is to be paid to Mr Ellis immediately.

Summary of findings and orders

[72] Mr Ellis did not raise a personal grievance within the statutory timeframe.

[73] Crightons breached the commission provisions of Mr Ellis' IEA throughout his employment.

[74] Crightons is ordered to pay a global penalty of \$6,000 in respect of the breaches of Mr Ellis' IEA. One quarter of the penalty (\$1,500) is to be paid to the Employment Relations Authority for payment into a Crown Bank Account and three quarters (\$4,500) is to be paid directly to Mr Ellis. Both payments are to be made within 28 days of the date of this determination.

[75] Crightons is ordered, within 28 days of this determination, to recalculate the commission payable to Mr Ellis in accordance with paragraph 70 of this determination. If that recalculation results in an increase to the amount of commission to which Mr Ellis was entitled during his employment, Crightons is to pay that amount to him immediately. Leave is given to the parties to return to the Authority in the event of disagreement over the sales figures to be excluded from the recalculation.

Costs

[76] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority