

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 86
5449737

BETWEEN DARRAN ASHLEY KEELING
Applicant

AND MEXTED MOTORS LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Mr Keeling in person
Rod Lingard, Advocate for Respondent

Investigation Meeting: 30 July 2014 at Wellington

Determination: 29 August 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem is about a claim for the recovery of final pay and the payment of commission during notice. The matter centres on the interpretation of the notice entitlement and the eligibility for commission during the notice, which was not worked out, and where a deduction was made by Mexted Motors Limited (Mexted Motors) for a starter engine on account to Mr Keeling that he bought.

[2] Mr Keeling is claiming a shortfall in wages amounting to \$4,702.05 and commission in the amount of \$200.

[3] Mexted Motors denies all Mr Keeling's claims.

Issues

[4] Is there a shortfall of wages based on the interpretation of the notice entitlement in the individual employment agreement?

[5] Is there any outstanding commission due to Mr Keeling?

[6] During the Authority's investigation meeting the parties indicated that they could settle the matter of the outstanding commission and the debt on account.

The law

[7] The general principles applying to the interpretation of employment agreements have been listed in *Chief Executive Officer of the Department of Corrections v. Corrections Association of New Zealand Inc* [2005] ERNZ 984 (EmpC) at [15] by His Honour Chief Judge Colgan as follows:

- *Agreements are interpreted with reference to their factual matrix or surrounding circumstances. This includes matters such as the background to the transaction and the practice of the industry or sector in question.*
- *One considers, first, the words used – they must obviously be a starting point – and then the surrounding circumstances to make sure that the first impression of the meaning is correct and nothing in the circumstances requires modification of that most natural meaning of the words.*
- *The Court is required to adopt an objective approach to interpretation: what matters is not what the parties say they intended the words to mean but what a reasonable person in the field, knowing all the background, would take them to mean.*
- *Evidence is not admissible of what one party thought the words meant or of preliminary negotiations or earlier drafts.*
- *Evidence of relevant conduct of the parties after the contract came into existence may sometimes assist in interpreting it, at least in the case of employment agreements.*
- *Interpretation of the employment agreement should not be narrowly literal but should accord with business common sense: the: “business” in this case is that of employment relations in prisons. The interpretation should fulfil the purpose of the agreement and be based not simply on dictionary meanings or grammar. Even if the drafting is inept, the Court should attempt to give effect to the underlying intent. If a literal interpretation gives rise to nonsense in practice, the Court should endeavour to find an interpretation that satisfied business common sense and fulfils the parties’ purpose.*

- *Nevertheless, if the words are clear and can have only one possible meaning, that should generally determine the matter. The Court will need to be very sure of what business common sense requires when interpreting a contract if that does not accord with the clear words.*¹

[8] In *Sword v Telecom New Zealand Ltd* [1998] 3 ERNZ 1228 the appellant submitted that the fundamental principle is that plain words are to be given their plain meanings, even if the result seems inconvenient or unjust. The Court accepted the appellant's submission that the majority judgment in *Lowe Walker Paeroa Ltd v Bennett* [1998] 2 ERNZ 558 (CA) restricted the ability of the Employment Court or Tribunal, by the use of equity and good conscience, to contradict or vary the written agreement. Where the contractual intention is clear from the words used then the Court must give effect to it: ([1998] 3 ERNZ: Page 1233).

[9] In *Commissioner of Police v New Zealand Police Association* [2000] 1 ERNZ 18 applied the Court of Appeal decision in *Benjamin Developments Ltd v Robt Jones (Pacific) Ltd* [1994] 3 NZLR 189 (CA) that the Courts may depart from the plain meaning of contractual words if, in that meaning, "they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification": ([1994] 3 NZLR Page 199).

The facts

[10] Mr Keeling was employed by Mexted Motors. His employment ended after he gave Mexted Motors notice. He was allowed to work out the week that he was working and Mexted Motors decided that he was not required to work out the full notice period of 4 weeks. He was paid his final pay, including notice, which was calculated by Mexted Motors on Mr Keeling's retainer rate instead of his average earnings. He was not paid any commission in the notice period because he was not able to sell any vehicles when he was not working. Mexted Motors has accepted that Mr Keeling was entitled to the commission for two vehicles and Mr Keeling has accepted that he owes the debt for the starter motor.

[11] It is agreed that Mr Keeling's retainer rate was \$50,000 per annum. His terms and conditions of employment were contained in an individual employment

¹ Another case on the interpretation of contract is *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 for the principles that apply.

agreement. The first agreement was signed off in 2012, but the parties had not signed off a new version of the agreement. The terms that are in dispute here were the same.

[12] The relevant clauses are as follows:

7. **Remuneration**

7.1 **Hourly/weekly/monthly rate**

The Employee shall be paid according to the rate in Schedule 2 to this agreement. For hourly and weekly rates the Employee's wage shall be paid weekly on Wednesday evening into a bank account nominated by the Employee. The period covered by this pay is for the week ending the previous Tuesday.

7.2 **Bonus for achieving objectives**

The Employee may be eligible to receive a bonus or commission provided the Employee achieves in the reasonable opinion of the Employer the objectives agreed between the Employer and the Employee at the beginning of that period. These objectives are in Schedule 2 to this agreement along with the bonus or commission rate.

13. **Termination of employment**

13.1 **General Termination**

The Employer may terminate this agreement for cause, by providing 1 month notice in writing to the Employee. Likewise the Employee is required to give 1 month notice of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period.

[13] Schedule 2 of the agreement separately provided for the retainer, and commission on Mr Keeling's sales and incentives on monthly gross profit paid in arrears.

Determination

[14] In essence, Mr Keeling believes that he has been treated unfairly and been disadvantaged by Mexted Motors' decision for him not to work out his notice and lose the opportunity to sell vehicles for a commission. Unfortunately for Mr Keeling his claim is not about the matters he feels are unjustified and unfair. Instead, the matter has come before the Authority as an action for the recovery of money that he believes that he is entitled to for his notice, based on the terms of the parties' employment agreement.

[15] Mr Keeling's claims that the following should apply, and are relevant: (1) that he has been treated unfairly, (2) that the terms and conditions of employment were

unfavourable between different employees, (3) that the Holidays Act calculations apply, and (4) that his previous earnings included commission, and that they all should be taken into account.

[16] The definition of remuneration has a wide context that possibly could include a retainer, commission, bonus and any other emolument. However, in this instance the interpretation of the word “remuneration” can be construed in a narrower sense to mean a calculation on the “retainer”. I am supported in this conclusion by the following features of the parties’ arrangement:

- (a) That there is a separate schedule to the employment agreement that separately provides for the retainer and commissions on Mr Keeling’s sales for commission.
- (b) That there is no calculation provided in respect of what remuneration applies when calculating any notice.
- (c) That there is no method of calculation of remuneration in lieu of notice contained in the employment agreement.
- (d) That payslips recognise an hourly rate based on the retainer.
- (e) That whatever information that Mr Keeling may provide to his bank at year end in regard to his calculation of earnings is an entirely separate matter between him, his bank and any other agency.
- (f) That the pay is in arrears.
- (g) That there were no sales made in the notice period because Mr Keeling did not work (19 days).
- (h) That the commission relates to Mr Keeling’s sales and that the payment is conditional and on the basis of his actual sales. This is consistent with payments in arrears including the weekly payment of the commissions historically.

[17] I conclude on the basis of the above, that the definition of remuneration (that would ordinarily apply to include commission and bonus etc.) does apply in this case, and no commissions are payable because Mr Keeling did not earn them in the 19

days. Mr Keeling in referring to other positions and duties and much lower retainers, has a retainer of \$50,000 per annum and the matters that he has referred to are not relevant to his claim. Of course his income is supplemented by commissions and bonuses, but in the absence of any method of calculation and any definition and not earning any commissions in the time, the employer is entitled to calculate the hourly rate on the basis of the retainer for notice where there has been no work for such commission to accrue.

[18] Mr Keeling's claim must be dismissed. The parties have agreed that the matter of the final commission on the two vehicles and the debt on account for the starter motor bought by Mr Keeling can now be resolved between them.

Costs

[19] The employment relationship problem is a genuine dispute between both parties on the application of their terms of employment. Ordinarily the successful respondent could expect some contribution to its costs based on a daily tariff. However, if it was not for the applicant bringing the matter before the Authority there would not have been a definitive ruling in regard to the matter that the respondent can rely on for the future. Also the parties were able to get some resolution between them on the matter of the offsetting in regard to the invoice for the starter motor. The claim was a very narrow matter and by its nature avoided more costly litigation and was dealt with in half a day. Therefore it is appropriate that costs lie where they fall. However I grant leave for any application for a variation on costs since neither party had an opportunity to comment on the outcome I think should apply and should there be any other reasons for consideration that costs should follow the event.

P R Stapp
Member of the Employment Relations Authority