

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 103/10
5248276

BETWEEN

HEATHER MILLER
Applicant

A N D

MICHAEL PEARCY
INVESTMENTS LIMITED
Respondent

Member of Authority: Paul Montgomery
Representatives: Applicant in person
Mr Percy, Advocate for Respondent
Investigation Meeting: 29 October 2007 at Christchurch
Submissions Received: 19 November 2007 from Applicant
26 November 2007 from Respondent
Determination: 30 April 2010

DETERMINATION OF THE AUTHORITY

[1] This matter has had a long and tortuous passage, the details of which need not be aired again as they are thoroughly known to the parties.

[2] The applicant says she was unjustifiably dismissed by the respondent and further, she was not paid commissions due to her under the employment arrangements. Mrs Miller says she is owed the sum of \$23,627 in unpaid commissions. She seeks interest on this sum. The applicant also wants remedies in respect to her alleged personal grievance. They are reimbursement of remuneration lost as a result of the alleged personal grievance, four weeks unpaid annual leave, compensation for hurt and humiliation, a reasonable contribution to her costs and penalties of \$8,000, part of which are to be paid to her.

[3] For the respondent, Mr Percy denies the dismissal was unjustified and thus declines to meet Mrs Miller's remedies in respect of the personal grievance. Further, he denies owing the applicant the sum calculated as commission on sales because the agreement between the parties establishes commission is only payable after a sales threshold of \$350,000 was reached in a given year. As that threshold was not met, the respondent says no commission was, or is, payable.

[4] In respect of the alleged unjustified dismissal, the respondent accepts the decision of the Employment Court that Mrs Miller was an employee and that as a result *the method in which Heather was dismissed is no doubt in breach of the Employment Contracts (sic) Act.*

The grievance

[5] Given the respondent's acceptance it was at fault in the dismissal process, it follows the Authority needs to consider remedies in spite of the respondent's misapprehension over the applicant's status. Up until the time of the Court's ruling, the respondent maintained the applicant was in fact an independent contractor.

[6] However, the evidence before the Authority is that the respondent advanced the sum of \$6,000 to Mrs Miller on 22 November 2004 *on the proviso that we entered into a written employment contract.*

[7] The applicant had telephoned Mr Percy the previous day apologising for not attending an organised meeting which was to discuss remuneration issues and the signing of an agreement between the parties. Mrs Miller told Mr Percy that she now accepted the proposals and would sign an employment agreement. Mr Percy told the Authority in making his decision on the advance, that *I took Heather on her word.*

[8] The meeting finally took place on 29 November and developed into a thorough brouhaha with allegations of unfair dealing and manipulation being exchanged. Upon leaving, Mrs Miller handed Mr Percy the keys to her company vehicle. He says he took this as her resignation, she says she was too upset to drive home.

[9] The applicant arrived for work the following day, much to the surprise of Mr and Mrs Percy and the ill feeling erupted again.

[10] In January 2005 Mrs Miller and her husband travelled to the United States and Mexico for a holiday. In the course of that trip the respondent issued a letter of dismissal and reversed a salary payment made to the applicant, both of which caused considerable angst to Mrs Miller. For the respondent, Mr Percy told the Authority that respondent began considering severing the relationship with the applicant following the heated altercations in November 2004 and in the light of her interrupting her indent sales trips to the North Island which resulted in some significant customers of the business not being visited.

[11] Standing back and considering the fall out between the parties, in spite of the applicant's railing against Mr Percy's reluctance to commit matters to paper and his failure to meet the Authority deadlines for sales information, her behaviour in the late November altercations falls short of acceptable. I am of the view these were in part fuelled by Mr Miller. However, Mrs Miller certainly participated in the exchanges which undoubtedly led to a loss of confidence in her on the part of the respondent.

Commission

[12] The imbroglio in which the parties have found themselves immersed is a direct result of their failure to establish and record the terms of the agreed basis of the relationship.

[13] In respect of commission payments due to the applicant, the parties could not be further apart. The respondent says commission was payable to Mrs Miller only upon her reaching annual sales in excess of \$350,000. The applicant says she was to be paid on all company sales regardless of who completed the sale at a rate of 5% of sales net of GST and freight.

[14] Once she reached that threshold, says the respondent, commission on all her sales would be paid. As that threshold was never reached, no commission was payable according to the respondent.

[15] Mrs Miller's contention she was to receive commission on all sales regardless of who completed the sales is highly unusual. On the other hand, an annual salary of \$30,000 for a sales position with national responsibilities was comparatively low at the time of Mrs Miller's employment. On the facts, and in light of the intransigent stance of each party, I think it more probable than not that Mrs Miller was to be

remunerated by a base annual salary of \$30,000 plus a 5% commission on her personal sales both indent and stock.

[16] Mr Percy says the sales turnover for the business in the period of the applicant's employment was \$290,000, although Mrs Miller says *at a guess* this does not include her September and October 2004 indent sales due for delivery in March 2005.

[17] The Authority simply has no way of knowing the accuracy of the company's figures nor how they are arrived at.

[18] Faced with this situation, the approach is dictated by the Authority's equity and good conscience jurisdiction in order to achieve a fair outcome. I am in no doubt the applicant was entitled to commission on her sales. I am also not persuaded by the company's claim that commissions were payable only after a threshold of \$350,000 in sales was reached in the year. There is no hard evidence such an arrangement existed before the dispute between the parties erupted.

[19] The Authority takes the view, on the evidence before it, that Mr Percy himself secured some sales, but the majority were made by the applicant. I estimate Mrs Miller's sales to have been of the order of 75% of the company's sales that year. That is \$217,500. I find the applicant is entitled to commission at 5% on those sales, that is \$10,875 gross.

Determination

A Personal grievance

[20] I find the applicant, who was an employee of the respondent, was unjustifiably dismissed and is entitled to remedies relating to her personal grievance.

B. Commissions

[21] I find the respondent has failed to pay the applicant commission and the applicant is entitled to payment for her sales during the period of her employment.

Remedies*A. Personal grievance*

[22] In respect of the personal grievance, I order the respondent to pay the applicant lost remuneration under s.123(1)(b) of the Act:

- Four weeks unpaid annual leave \$2,179.48 gross
- Nine weeks @ \$544.87 per week \$4,903.85 gross
- Compensation for hurt and humiliation under s.123(1)(c)(i) of the Act
\$8,000 without deduction
- The application for a penalty is declined as the respondent is not in a position to pay such a sum.
- The application for interest is declined as the respondent is no longer trading and thus in a position to pay.

B. Commission

[23] The respondent is to pay the applicant the sum of \$10,875 gross in unpaid commissions. From this sum tax is to be deducted and from the resulting total, the sum of \$6,000 is to be deducted in acknowledgment of the advance made by the respondent to the applicant on 22 November 2004.

Costs

[24] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority