

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 3
5614040

BETWEEN ADAM PLATT
Applicant

A N D MPA NEW ZEALAND
LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: R Parmenter, Counsel for Applicant
M O'Brien/H Cleaver, Counsel for Respondent

Investigation Meeting: 8 November 2016 at Auckland

Submissions Received: 8 November 2016 from both parties

Date of Determination: 9 January 2017

DETERMINATION OF THE AUTHORITY

- A. MPA New Zealand Limited is ordered to pay Adam Platt wage arrears pursuant to s.131 of the Employment Relations Act 2000 comprising:**
- (a) any unpaid salary owed for 23 April - 21 May 2015 less PAYE;**
 - (b) commission on MPA gross profit earned from sales of GT products and delivered services in April 2015 less PAYE; and**
 - (c) holiday pay of 8% on the above sums.**
- B. There is an order for interest at 5% upon the above judgment sums calculated from 1 June 2015 until payment pursuant to clause 11, Schedule 2, Employment Relations Act 2000.**

- C. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

Employment relationship problem

[1] Adam Platt resigned on or about 21 April 2015. He seeks recovery of unpaid salary for commission, his last month notice period, holiday pay to be calculated upon that salary and interest.

Relevant facts

[2] Mr Platt was employed as a Good Technology Sales Consultant for MPA New Zealand Limited (MPA) in New Zealand on 2 September 2014. His role was to generate sales of Good Technology (GT), a worldwide mobility management provider now part of Blackberry based in the USA.

Deal 1

[3] In December 2014, a GT sale was completed totalling \$988,000 (Deal 1). The alleged GP was \$99,756 of which Mr Platt received 5% Mr Platt queried the amounts he was paid.

Notice Period

[4] In April 2015, MPA advised of structural changes to the sales team. Mr Platt was unhappy with that and the amounts of commission he had been receiving. As a result he resigned on or about 21 April 2015. His letter of resignation noted his last day of work was 21 May 2015.

[5] On 23 April 2015, Mr Platt met with Steve McMillan, a director of MPA. At this meeting Mr Platt alleged Mr MacMillan was a bully. He sought an “off the record” meeting to discuss issues. Mr Platt did not attend work again.

[6] Between 23 April and 11 May 2015, the parties exchanged correspondence. On 11 May 2016, Mr McMillan wrote to Mr Platt advising amongst other things:

On the basis you have refused to attend the office and work out your notice period (which MPA required) the company has ceased to pay you as at the end of April.

[7] No salary was paid to Mr Platt from the end of April to 21 May 2015.

Deal 2

[8] On 29 May 2015 a purchase order was raised for a GT sale for \$201,600 GST exclusive (Deal 2). Mr Platt did not receive any commission upon this sale.

[9] On 23 September 2015, Mr Platt amongst other things sought to recover wage arrears in the form of commission, unpaid salary for his notice period, unpaid expenses and holiday pay. The parties were unable to resolve the matter between them and it has now come before me for determination.

Issues

[10] The issues for hearing were discussed at an earlier teleconference.¹ Some of these have now been resolved.² The remaining issues for determination are:

- (a) Whether there was a breach of the express and implied terms of employment by a failure to pay commission on the sales completed on 24 December 2014 (Deal 1) and 29 May 2015 (Deal 2)?
- (b) What wage arrears are owed including payment for his notice period and holiday pay?
- (c) Should interest be awarded?

How was commission earned?

[11] The basis for payment and calculation of commission is set out in the individual employment agreement and two emails dated 15 and 18 August 2014.

[12] His individual employment agreement recorded his remuneration of a \$75,000 base salary plus \$60,000 commission with a minimum monthly GP (gross profit) required to achieve commission of \$8,500.³

¹ Minute dated 18 August 2016.

² The applicant has now been paid his expenses owed and has withdrawn an application for penalty.

³ Attachment 4.1 Statement of Problem (SOP) Schedule A Individual Employment Agreement.

[13] On 15 August 2014, Mark Micklefield, previous MPA manager of Sales Consultants, emailed Mr Platt advising the “*commission component [was] calculated against the previous months gross profit.*”⁴

[14] On 18 August 2014 Mr Micklefield emailed a spreadsheet detailing MPA expected revenue, GP and commission rates. For GT product sales including renewals he could expect to receive 5% commission on GP. For MPA generated sales he could expect to receive 20% commission on GP. For either GT or MPA delivered services, he could expect to receive 20% commission on GP.⁵ This was intended to form part of the agreement about how commission was calculated.

[15] All GT product or services sales were completed by a team comprising both MPA and GT sales representatives. The team comprised Jon Spragg, previous strategic account manager for GT, Wendy Hamson (whom replaced Mr Spragg in 2015) Mr Micklefield and Mr Platt.

Was there any commission owed for Deal 1?

[16] It was agreed Deal 1 involved two components – purchase of licences to use GT products and delivered services in the form of ongoing support for the GT product. Mr Platt alleges he was entitled to receive 20% of the MPA gross profit from the GT delivered services component. He further alleges the MPA gross profit earned was higher than stated because MPA would have received an 85% profit margin from the invoiced \$177,840 NZD. I understand he does not take issue with the commission received for the GT product sale.

[17] An applicant witness disagreed with Mr Platt about his role in Deal 1. Jon Spragg’s evidence was that he was primarily responsible for Deal 1 not Mr Platt. Mr Platt’s involvement was “valuable but not instrumental in finalising the deal.”

[18] Mr Spragg confirmed GT did not provide support services directly to Asia Pacific based clients. It was reliant upon its subcontracting partner MPA to provide those services. MPA in turn was negotiating support services by Vodafone. Although the profit margin on delivered services would increase overtime as the client became more familiar with the product, Mr Spragg believed initially the profit would be less.

⁴ Attachment 4.2 Statement of Problem (SOP) Email M Mickelson to A Platt dated 15 August 2014.

⁵ Tab 1 Bundle of Documents (BOD) and Attachment 4.3 Statement of Problem (SOP) Email M Mickelson to A Platt dated 18 August 2014.

[19] Stephen MacMillan, MPA Managing Director stated the overall gross profit for December 2014 was only \$99,756.00 including two smaller unrelated sales. MPA was required to invoice GT \$120,000 USD (\$177,840 NZD) for delivered services but had to retain the funds until an agreement about the delivered services had been concluded. Under cross-examination he stated the invoicing did not reflect the amount actually paid to MPA or the gross profit margin. There was no guarantee MPA would deliver the services. At best there would have been a 40-60% profit margin but MPA “did not see anything out of the pot of money – that went to GT”.

[20] His evidence was consistent with Mr Spragg’s. He had emailed MPA on 28 January 2015 about putting together a support services agreement. Mr Spragg was not surprised there were no delivered services detailed at the time the licences were purchased in December 2014. Often clients would purchase licences then not use them for a period of time.

[21] Reflecting upon the above I am not convinced on the balance of probabilities Mr Platt was entitled to receive more than 5% commission on the gross profit of \$99,756.00. As at December 2014 there was no certainty about the delivered services component other than the price. It was uncertain whether MPA would even deliver the contract. I have no reason to reject Mr MacMillan’s evidence MPA did not receive any GP from the delivered services component for Deal 1 in December 2014. This claim is dismissed.

Was there any commission owed for Deal 2?

[22] The evidence of Deal 2 showed it also involved two components – purchase of licences to use GT products and delivered services in the form of ongoing support for the GT product.

[23] Mr MacMillan stated it was not until after 29 May MPA reached an agreement with GT for delivered services at a daily rate of \$1,100 plus GST. Mr Platt cannot have any commission claim for the GT delivered services component because he was no longer working at MPA when this agreement was secured.

[24] Mr MacMillan stated MPA received gross profit for the GT product licences of \$20,160 after 29 May. . I have no reason to reject Mr MacMillan’s evidence.

[25] Mr Platt's work towards the GT product sale had been completed by 21 April. However the agreed terms of employment were commission was not earned until the month following and paid as part of the current month salary.⁶ There was evidence this was the method for payment of commission throughout his employment.

[26] He would have had to have been working in the month following the signing of Deal 2 to receive the commission for a GT product sale or delivered service in May 2015. He was not. Therefore he has not earned any commission on Deal 2. This claim is dismissed.

Was he owed salary for his notice period?

[27] Mr Platt's letter of resignation states his employment ended on 21 May 2015. MPA submits he refused to work out his notice period at a meeting on 23 April 2015.

[28] MPA produced minutes from the 23 April 2015 meeting. Mr Platt had raised a concern about alleged bullying by Mr MacMillan. He had complained to the Police. The 23 April meeting and subsequent text messaging evidenced the parties were trying to resolve this dispute by a further meeting.

[29] The Minutes also recorded the following:

Steve stated that we would expect Adam to work out his notice to which Adam stated that he was not prepared to do that. "I do not want to be in the same room as you Steve."

Steve said that Adam would remain on the payroll until the resignation matter was resolved.[emphasis added].

[30] This is consistent with Mr Platt being allowed to work from home while the dispute was being resolved. If MPA wished to have him attend work, it should have instructed him to do so after 23 April. There is no evidence it did.

[31] Subsequent text messages were exchanged between the parties after 23 April evidenced attempts to resolve the dispute by a further meeting. This evidence does not support the conclusion Mr Platt refused to work out his notice.

[32] The email on 11 May 2015 stating MPA was ceasing to pay him from the end of April on the basis of his refusal to attend work is inconsistent with this prior

⁶ See paragraph [13] above.

agreement. It could have been taken as a dismissal. However that application is not before me for determination.

[33] Mr Platt is entitled to receive the unpaid portion of his salary from 23 April to 21 May 2015. He is also entitled to receive any GP earned for the month of April 2015. He is owed holiday pay at the rate of 8% on those sums.

[34] MPA New Zealand Limited is ordered to pay Adam Platt wage arrears pursuant to s.131 of the Employment Relations Act 2000 comprising:

- a) any unpaid salary owed for 23 April - 21 May 2015 less PAYE;
- b) commission on MPA gross profit earned from sales of GT products and delivered services in April 2015; and
- c) holiday pay of 8% on the above sums.

Interest

[35] Mr Platt is entitled to receive interest upon his salary owed given he lost the use of the money while awaiting a determination of his claims. It shall start from the month following 21 May 2015 given his employment agreement states he is paid monthly in arrears.

[36] There is an order for interest at 5% upon the judgment sum calculated from 1 June 2015 until payment pursuant to clause 11, Schedule 2, Employment Relations Act 2000.

[37] Costs are reserved. If the parties are unable to agree about costs, the matter may be referred to me and dealt with on the papers. The applicant has 14 days from the date of this determination to make an application. The respondent has 14 days thereafter to reply.

T G Tetitaha
Member of the Employment Relations Authority