

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 412
5552685

BETWEEN KEVIN LEITH TERREY-
O'COCK
Applicant

A N D UCS LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Mark Nutsford, Advocate for Applicant
Nigel Rayneau, Advocate for Respondent

Investigation Meeting: 14 November 2016 at Auckland

15 November 2016 from Respondent
18 November 2016 from Applicant

Additional Information:

Date of Determination: 21 December 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Mr Terrey-O'Cock and UCS Limited (UCS) were in an employment relationship that ended in March of 2014. Mr Terrey-O'Cock initially claimed that he is owed \$17,455.75 in commission arrears.

[2] UCS disputes that and further says that it has overpaid Mr Terrey-O'Cock commission. UCS's overpayment counterclaim has been determined under AEA 5632011.¹

The issues

[3] The following issues are to be determined:

¹ [2016] NZERA Auckland 146.

- (a) What commission structure is to be applied?
- (b) What does “*new business*” in Schedule 1 of the second IEA mean?
- (c) Is Mr Terrey-O’Cock owed commission arrears?
- (d) What if any costs should be awarded?

What commission structure is to be applied?

[4] The parties entered into a written employment agreement on 10 or 11 May 2013. UCS sent Mr Terrey-O’Cock an unsigned proposed individual employment agreement (IEA) which he signed and says he returned without retaining a copy of it. I refer to this document as the “first IEA”.

[5] UCS claims it never received a signed version of the first IEA back from Mr Terrey-O’Cock. UCS found a copy of the first IEA he had signed (which it says he never returned to it) in his office after his employment had ended.

[6] Because UCS had not received a signed copy of the first IEA back from Mr Terrey-O’Cock it asked him to sign another IEA because it wanted all of its employment documentation kept up to date. Mr Terrey-O’Cock used that as an opportunity to negotiate more favourable terms and conditions for himself.

[7] The parties entered into a further IEA (“the second IEA”) which is incorrectly dated on the agreement as having signed by the parties on 21 November 2013. The parties agree that date is incorrect and that the correct date of signing was 20 December 2013. Both parties signed the second IEA.

[8] I note that the first and second IEAs each contained different commission structures. During the course of the Authority’s investigation meeting, the parties agreed that it is the commission structure set out in the second IEA that applies.

[9] I specifically record this agreement because each party had a different view of the contractual commission arrangements that applied but as a result of investigating and testing the evidence, both parties ultimately agreed that the applicable commission arrangements are those recorded in the second IEA signed in December 2013.

[10] Clause 5.2 of Mr Terrey-O’Cock’s second IEA states:

There will be a minimum sales target set out in Schedule 1 which will specify the minimum sales required before commissions are applicable. The sales total used to calculate commission will be the total new monthly business generated in a given month minus the minimum sales target.

[11] Clause 5.3 of the second IEA also deals with commission and it states:

Your performance will be regularly reviewed and assessed in relation to your sales target. Your monthly commission will be based on ((OTE minus salary)/12) times a percentage of the monthly target achieved and subject to clause 5.2 above.

[12] Clause 7.3 of the second IEA states that Mr Terrey-O’Cock’s commission will be paid “*as outlined in Schedule 1*”.

[13] The material parts of Schedule 1 in the second IEA are:

- 9/. **Sales target:** \$10,000 new business monthly sales.
- 10/. **Minimum sales target:** \$5,417 new business monthly sales.
- 11/. **Initial three months minimum sales target:** \$10,833 new business sales total
- 12/. **Three year contracts:** An additional payment of 50% of the normal commission is payable for a customer who signs a three year contract. This is payable at the beginning of the third year of the contract and is conditional on the customer maintaining their spend and margin and the sales agent successfully maintaining their sales position within UCS.
- 13/. **High margin bonus applicable:** This bonus is applicable if the agent’s customers are yielding margins over 25%. Quantum and timing of this bonus are at the discretion of the Managing Director.

[14] The minimum sales total of new sales Mr Terrey-O’Cock had to meet each month before he became entitled to commission was at least \$5,417. That threshold was reduced to \$10,833 total sales in new business for the first three months of his employment. The minimum threshold therefore increased to \$5,417 per month in new business sales after Mr Terrey-O’Cock had worked for UCS for three months.

[15] The terms “*sales*” and “*new business*” are defined in Schedule 1 of the second IEA as follows:

“Sales” in the context of applicable commissions is defined as and measured by actual invoiced amounts, minus client purchase, installation services and equipment and one-off charges.

“New business” means a billed service which has not been billed previously by UCS excluding one-off charges. Billed service is any service billed on the account this means internet, voice, data, fixed monthly recurring and equipment are included.

What does “new business” in Schedule 1 of the second IEA mean?

[16] UCS says that the reference to “*new business*” in the commission structure means that Mr Terrey-O’Cock is only entitled to commission if he brings in new sales for services that have not previously been billed to a client.

[17] Mr Terrey-O’Cock disputes that interpretation. Mr Terrey-O’Cock says “*new business*” means any business that a client is billed for if he was responsible for introducing the client to UCS.

[18] Mr Terrey-O’Cock’s interpretation means he is entitled to commission on all sales whether the sales involve new services or services that have previously been billed to clients, and therefore includes ongoing services for which clients are invoiced arising from previous contracts that Mr Terrey-O’Cock has negotiated.

[19] UCS agrees that Mr Terrey-O’Cock is entitled to commission on sales that involve a current or existing client upgrading to a new service they have not previously been billed for (provided he has met the minimum monthly commission threshold).

[20] USC says “*new business*” requires a client to be invoiced for services which that client has not previously been billed for. It therefore cannot include sales to clients which consist of ongoing or renewed services if a client has already been billed for such services.

[21] UCS therefore says that commission is payable only on the first month of a new sale or an upgrade to a new service because that is the only period in which a client will not have been previously billed for the service being sold.

[22] UCS says Mr Terrey-O’Cock is not entitled to commission for a second or subsequent months’ sale because once the first sale has occurred the client has already been billed for the service so it is not “*new business*” as defined in the second IEA.

[23] In determining the meaning of “*new business*” I take into account all relevant evidence that objectively establishes the meaning of the words. Each party says that their pre-contractual intention supports their view of the meaning of “new business”.

[24] I objectively consider the plain meaning of the words “new business” are as expressly stated in Schedule 1 of the second IEA, namely a service that has not been billed previously.

[25] I consider that the parties specifically turned their minds to what sales were to attract commission and mutually agreed that commission would be payable only for services that had not previously been billed.

[26] I consider this interpretation makes sense because I accept UCS’s evidence that the purpose of commission was to incentivise Mr Terry-O’Cock to continually generate new business by selling new services.

[27] UCS says that if Mr Terrey-O’Cock was to be paid ongoing commission on all future billings to any client he introduced to UCS, for the duration the client continued to purchase services from UCS, then there would be no incentive for him to actively seek new business.

[28] UCS says that would be contrary to the reason Mr Terrey-O’Cock was employed as UCS’s Business Development Manager because the reason for his engagement was specifically to have him focused on generating new business for UCS.

[29] UCS says that the scenario suggested by Mr Terrey-O’Cock would undermine the entire purpose of his employment because it meant he would be able to bring in one big new client (or expend minimal effort to reach the commission threshold) and then receive ongoing commission (assuming he met the minimum sales threshold) without exerting any more personal effort.

[30] UCS says that scenario would therefore act as a disincentive to him generating new business because he would already have a regular recurring commission merely by a client continuing to purchase a service that he had previously sold it which UCS says doesn’t make sense because he was selling ongoing services to clients.

[31] Mr Terrey-O’Cock says that any previous or existing business that results in the client being billed in any particular month counts towards his minimum sales target. Mr Terrey-O’Cock is therefore of the view that “new business” involves any monthly sales and only excludes sales from clients which Mr Terrey-O’Cock did not bring into the business, for example those clients who were pre-existing clients of UCS before Mr Terrey-O’Cock was employed by UCS.

[32] I do not agree with Mr Terrey-O’Cock’s interpretation because I consider would require me to ignore the words “*total new monthly business*” in clause 5.2 of the second IEA and the words “*new business*” in points 9, 10 and 13 of Schedule 1 of the second IEA.

[33] I consider on the balance of probabilities that the reference to “*new business*” means new business that Mr Terrey-O’Cock had personally generated which had not been billed to the client previously.

[34] I consider that clients who are ongoing or existing clients on a membership that Mr Terrey-O’Cock has previously sold do not fall within the category of “*new business*” unless that pre-existing or continuing client signed up for a new service for which it was not previously billed.

[35] I have therefore preferred UCS’s interpretation which means Mr Terrey-O’Cock was entitled to be paid commission based on what a new client was first billed but not for subsequent months billings when the client continued to purchase the services it had already been billed once for.

[36] I consider this accords with the parties’ mutual intention that Mr Terrey-O’Cock’s position was intended to continually generate new business by selling new services to current clients and by engaging new clients to purchase UCS’s services.

Is Mr Terrey-O’Cock owed commission arrears?

[37] Mr Terrey-O’Cock accepted during the Authority’s investigation meeting that if I upheld UCS’s interpretation of his commission entitlements then he is not owed commission arrears.

[38] Accordingly, Mr Terrey-O’Cock’s claim of commission arrears does not succeed because it is based on him receiving commission on every billing to a client

he has introduced, not just on the first time a new client is billed or the first time an existing client is billed for an upgraded service.

What if any costs should be awarded?

[39] UCS as the successful party is entitled to a contribution towards its actual legal costs. Although UCS was not legally represented at the Authority's investigation meeting I am aware (due to the production of GST receipts and from previous communications with the parties) that UCS was represented by a firm of solicitors and has incurred actual legal costs.

[40] I consider it appropriate for Mr Terrey-O'Cock to contribute to UCS's actual legal costs.

[41] I accept Mr Nutsford's analysis of the legal invoices UCS submitted where he says \$3207.12 of the total legal fees billed appear to relate to these Authority proceedings.

[42] Mr Nutsford submits that costs should lie where they fall. I do not agree with that submission. It is a longstanding practice in the Authority that costs normally follow the event (in that a successful party is usually entitled to some contribution towards its legal costs). I find that there is no good reason to depart from that practice in this matter.

[43] I therefore use \$3,200 as a notional starting point for assessing costs instead of the current notional daily tariff of \$3,500 (which was the applicable tariff at the time these proceedings were filed – it subsequently increased to \$4,500 for the first day of an investigation meeting).

[44] I am not aware of any factors which would warrant the notional daily tariff being increased. The parties advise that there have not been any *Calderbank* offers exchanged.

[45] The notional daily tariff has to be halved to reflect that two related matters were investigated during the investigation meeting. That reduces the notional starting tariff to \$1,600.

[46] I consider the fact that UCS was not legally represented at the Authority's investigation meeting is a factor which should reduce the notional starting tariff by half.

[47] Mr Terrey-O'Cock is therefore ordered to pay UCS \$800 towards its actual legal costs within 28 days of the date of this determination.

Rachel Larmer
Member of the Employment Relations Authority