IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 64/10
5162954

	BETWEEN	MELINDA VAN MEYGAARDEN Applicant
	AND	RAVE RADIO LIMITED formerly First Mobile Browns Bay Limited Respondent

Member of Authority:	R A Monaghan
Representatives:	M van Meygaarden in person J Weavers, advocate for respondent
Investigation meeting:	10 November 2009 and 28 January 2010
Determination:	12 February 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Melinda van Meygaarden says her former employer, Rave Radio Limited (RRL) (formerly First Mobile Browns Bay Limited) owes her unpaid commissions and holiday pay.

[2] RRL denies Ms van Meygaarden had any entitlement to commissions, and that she was owed holiday pay.

[3] RRL has counterclaimed, saying Ms van Meygaarden should repay three weeks' wages to it because of her failure to provide the required notice of resignation contained in her employment agreement, and that she owes it a specified sum in respect of clawbacks from sales.

Background

[4] In or about February 2009 RRL purchased a Vodafone/First Mobile outlet in Browns Bay. At or about that time Keith Archer and Sean Lyne were appointed to the positions of store or sales manager and sales consultant respectively.

[5] Mr Archer and Ms van Meygaarden knew each other, having worked together before. Jack Weavers, RRL's director and shareholder, was recruiting staff for the newly-purchased business, and Mr Archer introduced Ms van Meygaarden to him. Although a position of Vodafone Business Consultant (VBC) had been advertised, Mr Archer and Mr Weavers interviewed Ms van Meygaarden for a position as service delivery manager. The position involved providing administrative and clerical support to the VBCs, who were responsible for sales to business customers.

The claim for payment of commission

1. Relevant terms of employment

[6] According to Ms van Meygaarden there was an agreement that the business was not ready to support a service delivery manager and that Ms van Meygaarden would be employed in the retail store in the meantime. Commission would be payable on sales she achieved. This payment was in part because the remuneration for the service delivery manager's position was to be linked with KPIs and include an incentive arrangement, both of which were yet to be finalised.

[7] Mr Weavers said Ms van Meygaarden was to work in the retail store for training purposes, although he also acknowledged that there were few VBCs employed at the time. He denied this meant Ms van Meygaarden was in effect a sales employee on a temporary basis, and that there was any agreement that she was entitled to commission payments while she carried out sales duties.

[8] The written employment agreement provided that remuneration was as specified in the employee's letter of appointment. Ms van Meygaarden's letter of appointment, which she signed and dated 12 February 2009, specified that the position offered to her was service delivery manager. The letter was silent on the

alleged arrangement regarding work in the retail store. It further provided for a base salary of $35,000 pa, and added:

> "You will also be entitled to product/service benefits as outlined below:
> Commission based on attached plan."

[9] Mr Weavers said there was an attachment which set out the following commission structure:

> "Monthly gross profit targets (GST exclusive)
> 1st tier – between $0,000 and $7,000 – 0% commissions payable
> 2nd tier – between $7001 – and over GP – 0% commission payable."

[10] Obviously, under this provision Ms van Meygaarden could never qualify for a commission payment. However it appears this was the commission document made available to VBCs. The incentive component of the remuneration, also set out in the attachment, took the form of a bonus calculated on a quarterly basis and incorporating the achievement of KPIs. As I have said, in Ms van Meygaarden's case the KPIs had yet to be set.

[11] Ms van Meygaarden said no attachment was included in the letter of appointment she received and signed.

[12] Mr Weavers hotly disputed that evidence, but it was common ground that he had left the documentation of Ms van Meygaarden's employment arrangements to Mr Archer. I accept that Mr Archer worked on his computer on draft letters of appointment for Ms van Meygaarden, one of which included the attachment detailing the commission structure for VBCs. I am prepared to accept the draft of the letter containing the attachment was created on or about 10 February 2009. The other draft did not contain an attachment.

[13] However the presence of these two draft documents on the hard drive of the computer Mr Archer had used was not on its own evidence that either of them was the electronic form of the document provided to Ms van Meygaarden.

[14] According to evidence which I accept, Ms van Meygaarden pressed Mr Archer to provide her with a commission document, and he worked on preparing one for her. I also accept Mr Archer's evidence that the complexity of the existing commission documents made him decide to create a plan for Ms van Meygaarden.

[15] Overall I consider it likely that the letter of appointment originally provided to Ms van Meygaarden did not contain an attachment.

[16] Both Mr Archer and Ms van Meygaarden said Mr Archer gave her a separate written commission document after her employment began. In the circumstances I consider that likely and I accept that evidence. However both denied that the document was the one on which Mr Weavers relies. In the course of the preparation of the evidence for this matter, Ms van Meygaarden filed a further letter of offer with an attachment dated 12 February 2009 setting out a commission structure.

[17] According to that attachment, the structure was:

> "Commission
> Monthly Gross Profit Targets (GST exclusive)
> 1st tier – between $0 - $ 2,000 GP - 10% commission payable
> 2nd tier – between $2,001 - $ 3,500 GP - 15% commission payable
> 3rd tier – above $3,501 - 20% commission payable
>
> GP is calculated as follows:
> Invoicing plus rebates receipted from Vodafone less marketing fee ($15 per connection) less 20% first mobile fee equals gross profit.

[18] Mr Weavers alleged the attachment was a forgery. He believes the true attachment is the one attached to the document created on 10 February 2009 which he found on Mr Archer's computer, being also the one on which he relies. However there was no forensic IT evidence to support his view.

[19] I am not persuaded that the document on which Mr Weavers relies is the applicable document for the purposes of Ms van Meygaarden's entitlement to commission. I accept Mr Archer's and Ms van Meygaarden's account of the preparation of a document to fit her circumstances, and that the relevant document is the one on which Ms van Meygaarden relies.

[20] Regarding the calculation of her commission Ms van Meygaarden recognised, correctly, that the appropriate way to address any clawbacks was to deduct them from the calculation of commissions owed. She produced a sales record for the month of March 2009, from which she made a reduction in respect of a particular clawback, and calculated she was owed commission of $890.58.

[21] RRL is therefore ordered to pay to Ms van Meygaarden the sum of $890.58 by way of commission.

Holiday pay

[22] Ms van Meygaarden seeks holiday pay of 8% of her total gross earnings, quantified as:

> 8% x [$4,726.56 + $890.58] = $449.37.

[23] RRL withheld Ms van Meygaarden's holiday pay on the ground that she had not provided the period of notice required under the employment agreement, and in reliance on a further provision in that agreement. I now turn to those provisions.

Notice of termination of employment

[24] The employment agreement provided:

> "Trial period
> If your letter of appointment states that you are initially employed on a trial period basis …
> (i) …
> (ii) …
> (iii) The employer will offer one week's retainer income in lieu of notice together with holiday pay …
>
> TERMINATION
>
> If either party decides to terminate the employment relationship they are required to provide no less than the notice period specified in your letter of appointment …

> If you do not give us the required notice we will deduct the un-worked period of notice from your final pay including any outstanding leave entitlements. …"

[25] The letter of appointment stated that Ms van Meygaarden was employed on a 'probationary period' (rather than a 'trial period') for the first three months. No issue was taken with that difference in wording. The letter also provided that:

> "The notice period that applies to your employment with us will be 1 month."

[26] By letter dated 21 April 2009 Ms van Meygaarden offered her resignation. She said in the letter that, with reference to the provision for a trial period in the employment agreement, she was giving one week's notice. Her final day of work was to be 28 April 2009. Her evidence was that by agreement with Denise Alenaddaf, Mr Weavers' wife, her final day of work was 24 April 2009.

[27] In general it appears that each party was obliged to give the other one month's notice of termination of employment. If matters ended there Mr Weavers would be correct in saying Ms van Meygaarden had not provided the requisite notice.

[28] However Ms van Meygaarden focussed first on the trial period provision in the employment agreement, and assumed that (iii) meant she was obliged to offer only one week's notice of the termination of her employment. The difficulty is that the provision applies to the employer, not the employee. In the absence of reference to a one-week notice period on the part of the employee, one month's notice was required.

[29] Ms van Meygaarden also relied on Ms Alenaddaf's acceptance of the notice she gave. There the difficulty is that Ms Alenaddaf was not an employee, director or shareholder of RRL and did not work in the business. She had no authority to act on its behalf on matters such as compliance with the terms of the employment agreement, and Ms van Meygaarden was not entitled to consider herself released from her obligations.

[30] In general the Wages Protection Act 1983 obliges an employer, when any wages become payable to a worker, to pay the entire amount of those wages to that

worker without deduction.[1] However deductions are permitted for any lawful purpose, with the written consent of a worker or on the written request of a worker.[2]

[31] Here the written consent took the form of the clause in the parties' signed employment agreement. There was nothing to suggest there was any unlawful purpose.

[32] I therefore conclude that a deduction from Ms van Meygaarden's wages of $2,019.23 in respect of the shortfall in notice was permissible. In effect the withholding of commission and holiday pay amounted to a deduction of $890.58 + $449.47, being $1,340.05. There is no balance to be remitted to Ms van Meygaarden.

The clawbacks

[33] Mr Weavers did not identify the legal ground on which he seeks payment in respect of clawbacks from Ms van Meygaarden, although he referred to provisions in the 'Vodafone Code of Conduct for Representing Vodafone'. The most relevant provision read:

> "Clawbacks 22.22
> Breaches of the Code of Conduct may result in the clawback of any commissions, rebates, credits or any other payments (eg incentive payments) made in relation to the transaction, …"

[34] Ms van Meygaarden's letter of appointment provided for clawbacks in part as follows:

> "Commission payable under the following terms:
>
> First Mobile also reserves the right to not pay commissions & Vodafone subsidies and to claw back (withdraw money in the following months) monies for the following reasons:
>
> Points to note
>
> 1 …

[1] s 4.
[2] s 5(1).

2. The Vodafone Code of Conduct and Vodafone's Policies and process Manual is breached in anyway where First Mobile does not receive any payments from Vodafone or First Mobile are clawed back from Vodafone (sic)."

[35] No-one attempted to construe the clawback provisions, a task which would in any event have been difficult. For my part I conclude that, to the extent that it was binding as between Ms van Meygaarden and RRL, the clawback regime was intended to apply to payments of commission. If particular sales were included in the calculation of gross profit on which commissions were calculated, but were later subject to clawbacks from Vodafone in terms of its agreement with RRL, then those clawbacks could be recovered from the employee. Indeed Ms van Meygaarden recognised this in applying a clawback to her claim for the payment of commission.

[36] There was nothing to identify any legal basis for seeking to recover clawbacks from the employee responsible for a sale independently of any commission arrangement. Mr Weavers has proceeded as if such a claim had some basis. There was none and I dismiss the claim.

Summary of orders

[37] Ms van Meygaarden owes RRL $2,019.23 less the withheld payments to her of $890.58 in commission and $449.37 in holiday pay. The remaining sum is $679.18. Ms van Meygaarden is ordered to make that payment to RRL accordingly.

Costs

[38] Costs are reserved. If either party seeks an order for costs there shall be 28 days from the date of this determination in which to file and exchange written statements on the amount to be awarded and why. The other party shall have a further 14 days in which to file and copy a reply to the other party. Both are reminded of the indication I have given of what items can be claimed as costs in the Authority.

R A Monaghan
Member of the Employment Relations Authority