IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 328
3250319

	BETWEEN	KERRY WEBB Applicant
	AND	KEITH ANDREWS TRUCKS LIMITED Respondent

Member of Authority:	Peter Fuiava
Representatives:	David Fleming, counsel for the Applicant Charlotte Parkhill and Laura Quinn, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	26 January and 7 March 2024 from the Applicant 16 February 2024 from Respondent
Determination:	6 June 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

What is the preliminary issue?

[1] This is an application for removal to the Employment Court under s 178 of the Employment Relations Act 2000 (the Act).

How did the Authority investigate?

[2] By minute of the Authority dated 15 December 2023, timetabling directions by consent were made for the filing of written submissions which have been received and considered. It was subsequently agreed that this preliminary issue could be determined on the papers.

[3] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

What are the relevant facts?

[4] Kerry Webb worked as a sales representative for Keith Andrews Trucks Limited (KAT or the company) from 19 June 2019 to 20 April 2023. His individual employment agreement with the company (signed 15 May 2019) contained the following clauses:

(i) a Policies and work rules clause (cl 32.1) which required Mr Webb to know and comply with the company's policies, work rules or procedures. KAT could introduce new policies, or amend or delete existing policies, at its sole discretion. When that occurred, he would be advised of any changes;

(ii) a "Completeness" clause (cl 34.1) that said the agreement together with any attached Schedules or letters of appointment represented the entire agreement between the parties and superseded any prior agreements or arrangements, whether verbal or in writing, between them;

(iii) a "Variation" clause (cl 35.1) that said the parties could agree to vary the agreement by mutual agreement in writing;

(iv) an employee obligations clause notably cl 28.5 which required Mr Webb to use his best endeavours to promote, develop and extend KAT's business interests and reputation and not do anything to its detriment; and

(v) Schedule 3 which stated that commissions would be paid in the last week of the month following the invoice date. In the event of dismissal, the employee however would forfeit and not be paid any commissions or bonus that may be owing at the time of the dismissal.

[5] As a KAT sales representative, Mr Webb sold trucks manufactured by Mercedes-Benz, Freightliner and FUSO commercial vehicles. For his efforts, he was paid a base salary plus commission which was the main part of his remuneration. As noted above, the commission was provided for at Schedule 3 to the employment agreement where a scale commission of 10 to 15 percent would apply on the gross margin of the number of trucks Mr Webb sold.

[6] However, the commission would only become payable in the month after an invoice was raised with the customer and there were a number of factors as to why there could be a lengthy delay between when a vehicle was sold and when a sales representative was paid their commission for their work on that sale.

[7] On 2 December 2021, KAT amended its commission structure which was signed by all sales representatives including Mr Webb. The new commission structure stated that in the event that a salesperson ceased employment, any unsettled commissions would be reviewed on a case-by-case basis prior to the last day of employment to determine the basis for settlement. In addition, the new commission structure reduced the volume of sales required to move up to a higher percentage category and increased the percentage amount payable in the second and third percentage categories.

[8] In February 2023, Mr Webb and other staff attended a Freightliner sales conference.

[9] On 7 February 2023 KAT Sales Manager Central, Damien O'Hara, emailed Kathy Schluter, KAT's General Manager for Sales & Customer Experience, and alleged that at the sales conference, Mr Webb had asked him how he was finding his new boss (Ms Schluter). When Mr O'Hara answered positively, it appeared to him that this was not the answer Mr Webb was looking for and the conversation changed to 'small talk'.

[10] Mr O'Hara further stated that he felt uncomfortable with the conversation and struggled to discuss business with Mr Webb who did not seem to be 'engaged'. Mr O'Hara found this disappointing given they were at a conference and that he was enjoying the opportunity meeting the New Zealand and Australian teams while also expanding his knowledge on Freightliner.

[11] On 14 February 2023, Mark Pitham, National Fleet Sales Manager for Freightliner, emailed Ms Schluter a written complaint about Mr Webb arising from the same sales conference. Mr Pitham stated that Mr Webb had made him very aware that he was not overly happy with the Freightliner brand and in particular with the lack of options surrounding an exhaust discharge design he had seen on the display model in the car park. However, Mr Pitham stated that had Mr Webb 'bothered to check his

facts' which he had not, he would have realised that his understanding of the 'specs' was in fact wrong.

[12] Mr Pitham went on to say that Mr Webb continued this point of contention 'ad nausea through dinner' and had made 'some rather snide digs' at the Freightliner brand along the way. It also appeared that he had a very negative attitude and seemed to be coercing another member of staff to join him in his 'negativity'. This was a 'huge disappointment' for Mr Pitham who described Mr Webb as a 'toxic force' who could drag down his colleagues and the company with him.

[13] On 27 February 2023, Mr Webb was called into a meeting with Ms Schluter, who took notes. Also attending the meeting with Ms Schluter was Wes Gielink, Mr Webb's direct manager. During that meeting, Mr Webb was provided a copy of Mr Pitham's email and was asked for his comment.

[14] A second meeting was held on 1 March 2023 in which Ms Schluter and Mr Gielink met with Mr Webb to talk further about what had happened. On that occasion Mr Webb provided Ms Schluter and Mr Gielink with a written response to Mr Pitham's complaint. It is not clear whether at this meeting Mr Webb was also provided with a copy of Mr O'Hara's email for comment.

[15] In his undated written response, Mr Webb denied that he was not interested in the Freightliner brand or that he was a toxic force on his colleagues. He further stated that his discussion with Mr Pitham was in private and not on public display and that he had since spoken with the two other KAT sales staff that were also present and said that they had not heard anything coercive or negative from him.

[16] Following the second meeting, KAT decided to commence a formal investigation process into Mr Pitham's complaint and Mr Webb was invited in writing (20 March 2023) to attend a formal meeting to discuss its concerns. However, on 24 March, Mr Webb tendered his resignation before any investigation could take place.

[17] Mr Webb's last day of employment was 20 April 2023.

[18] Mr Webb states that at the time his resignation took effect, he was owed commission on 64 vehicles sold by him but not yet invoiced. The total commission owing on these vehicles is said to amount to $286,952.35. KAT denies that it is liable to Mr Webb on the basis that a sales representative's responsibilities in respect of a truck sale do not end at the time a customer signs the vehicle offer and sale agreement, which is the first step in a long process. With Mr Webb's departure, it will be the responsibility of another sales representative to complete the sales process to final invoice and handover.

[19] KAT paid Mr Webb commission on vehicles that were invoiced, paid and delivered by May 2023 which amounted to $31,803.82. The company says that the calculation of the commission payment was discussed with Mr Webb. However, Mr Webb says that he is owed commission on other trucks sold by him, as and when those trucks are delivered.

[20] On 17 May 2023, Mr Webb raised a dispute with his now former employer about his commission earnings. He also raised personal grievances of unjustified disadvantage regarding KAT's disciplinary process and the lack of consultation around his last commission payment and alleged inconsistent treatment with other departing staff.

[21] On 22 June 2023, KAT responded to Mr Webb's concerns denying his personal grievance claims and stating that it did not accept that he was entitled to any further commission payments.

[22] On 11 September 2023, Mr Webb's statement of problem and application for removal to the Employment Court were lodged with the Authority.

[23] KAT's statement in reply was lodged on 6 October and a notice of opposition for removal was subsequently filed on 17 October 2023.

What is the relevant law?

[24] Under s 178 of the Act, the Authority may on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the Employment Court to hear and determine without the Authority investigating it.[1]

[25] Removal may be granted if the Authority considers that any or all the following grounds in s 178(2) of the Act are satisfied:

> (a) an important question of law is likely to arise in the matter other than incidentally; or
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> (b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or
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> (c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or
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> (d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

[26] Removal is sought by Mr Webb upon the grounds that important questions of law arise other than incidentally (s 178(2)(a)) and that the Authority is of the opinion that in all the circumstances the court should determine the matter (s 178(2)(d)).

[27] While s 178 of the Act confers on the Authority a discretion to remove matters to the court on certain grounds, the following observation was made by the Court of Appeal:[2]

> … removal under s 178 is contemplated in relatively limited circumstances, with particular caution expected in cases that have not been fully investigated by the Authority.

[28] While the observation holds true, it is also true that in assessing the s 178 criteria there is no expressed presumption either way for or against removal. This was observed recently by Judge Corkill in *Danske Mobler Limited v A Labour Inspector*,[3] in which his Honour referred to an earlier decision by Chief Judge Inglis in *Johnston v Fletcher Construction Co Ltd*. In that case, her Honour made clear that to read into the Act such a presumption would undermine Parliament's intent that, while some matters ought to

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[1] Employment Relations Act 2000, s 178(1).
[2] *A Labour Inspector v Gill Pizza Ltd and Others* [2020] NZCA 192 at [48].
[3] *Danske Mobler Limited v A Labour Inspector* [2023] NZEmpC 233 at [19].

be dealt with in the Authority, others would be dealt with at the first instance in the Court.[4]

[29] All this serves to underscore the point that the Authority must exercise its removal discretion in a principled manner taking into consideration, among other things, what is the most appropriate approach to resolving the particular case at hand. For the most part, the Authority's speedy, low-level, investigatory approach will more than suffice . However, from time to time, the employment problem may be of such a nature that the interests of justice requires the Court's more formal and adversarial approach to resolving matters at the first instance.

Are there important questions of law likely to arise other than incidentally?

[30] *Danske Mobler* recently summarised the test of what constitutes an important question of law which does not need to be complex, tricky or novel to be important. A question may be important if the answer is likely to have broad effect or could assume significance in employment law generally. However, the learned judge made clear that it was not necessary for the issue to have an impact beyond the particular parties. A question may be regarded as important if it is decisive of the case, or some important aspect of it, or is strongly influential in bringing about a decision in the case or a material part of it.[5]

[31] Mr Webb says that there are two important questions of law that arise in his case namely:

(a) whether a term of an employment agreement that purports to deem forfeit commission owing to an employee because the employment relationship has terminated, is an unlawful or unreasonable deduction from wages in terms of ss 4, 5, 5A of the Wages Protection Act 1983 (the WPA); and

(b) whether a policy that purports to allow an employer not to pay commission owing to former employees in respect of sales made by them while they were in employment would be consistent with ss 4, 5, and 5A of the WPA.

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[4] *Johnston v Fletcher Construction Co Ltd* [2017] ERNZ 894 at [21].
[5] n 3 at [18].

[32] It was submitted that the above questions involve issues of general public importance because the answer to them will be relevant to other employees who receive commission as part of their remuneration and where payment may not fall due until a sale is made. However, much will depend on the individual's employment agreement with their respective employer which limits the applicability of this case to others.

[33] Even so, this is not determinative. What will be, is whether the question of law is likely to be decisive of the case or an important aspect of it and while no threshold is required, at the very least the question of law must contribute to resolving the employment problem in some way. Put differently, the question and its answer must matter.

[34] Much will again depend on Mr Webb's employment agreement with KAT and the company's new commission structure (see [7] above) and whether this became a part of his terms of employment. However, this is a question of fact and not law and while I accept that it is difficult to predict with certainty how things may play out at the investigation meeting, it is speculative that the WPA will be decisive of the controversy. Rather, the case appears to rise or fall on an objective assessment of what the parties agreed their bargain to be and this is a matter the Authority can deal with at the first instance.

[35] I am not satisfied that the above sections of the WPA are questions that will be decisive of this employment problem or be strongly influential in bringing about a decision in the case or a material part of it. For this reason, the first ground relied upon by Mr Webb in his application for removal is not made out.

Whether removal is appropriate in the circumstances

[36] Mr Webb's second ground for removal is s 178(2)(d) where the Authority is of the opinion that in all the circumstances the Court should determine the matter . It was submitted that the present case involves hundreds of thousands of dollars in commission earnings and a proper hearing of the matter will require disclosure and scrutiny of large volumes of documents and third-party disclosure may prove necessary. It was further submitted that the Court's disclosure regime is more appropriate over more informal processes in the Authority.

[37] It is not uncommon for third-party disclosure requests to be granted in the Authority which under s 160 of the Act provides it with broad powers to call for evidence and information from the parties or from any other person. It is also not out of the ordinary for financial reports and other accounting information to be forensically and routinely considered by Authority Members and for non-publication orders to be granted in order to protect commercially sensitive and confidential evidence.[6]

[38] Mr Webb further submits that the Authority should in all the circumstances have the Court determine the matter because of the amount of money involved and the likelihood that the unsuccessful party would seek a rehearing in the Employment Court. Removing the matter and having one hearing rather than two would save both parties costs.

[39] However, it is a party's right to challenge a determination from the Authority and a representative will need to conduct their case in a way that is cost-effective to the client and with eyes open to the possibility of further litigation. Appeals or challenges of any decision from any forum are an essential check and balance on the administration of justice and should not be lightly dispensed with here. I am therefore not of the opinion that in all the circumstances the Court should determine the present case.

Conclusion

[40] For the reasons given, the application for removal to the Employment Court is declined.

What about costs?

[41] Costs are reserved.

Peter Fuiava
Member of the Employment Relations Authority

[6] The Act, Sch 2, cl 10.