

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 97/10
5280797

BETWEEN

PHIL WHITEHEAD
Applicant

AND

MODICA GROUP LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Phil Whitehead on his own behalf
Stuart Wilson for the Respondent

Investigation Meeting: 8 April 2010 at Wellington

Submissions Received: 8 April 2010

Determination: 14 May 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Phil Whitehead, was employed by the respondent, Modica Group Limited (Modica) as a business development manager. Mr Whitehead claims that he was underpaid pursuant to his performance bonus by an amount of \$21,746.07 because of a failure to calculate his performance bonus quarterly. He claims, in the alternative that, if the claw backs sought by Modica are granted, he has still been underpaid by \$14,819.21. He also claims a penalty for breaches of his employment agreement through Modica failing to pay him the sums due.

[2] Modica claims that it owes Mr Whitehead nothing because he was fully paid according to the benefits due under his employment agreement and that, if he was not, then there should be substantial claw backs provided for, because of problems with a number of projects, such as late payment.

[3] The issues for determination are first whether, as Mr Whitehead claims, the performance bonus should be assessed quarterly (including any uncapped portion), or whether, as Modica claims, that the basic bonus should be assessed quarterly, but the uncapped portion (described by both parties as *overage*) should only be assessed annually. The second issue is whether any claw backs may be made and, if so, at what level. The third issue is whether any penalty should be awarded.

The Facts and Findings

[4] Mr Whitehead was employed by Modica for approximately 11 months between October 2008 and September 2009. He worked basically as a salesperson and was paid a salary, plus benefits. The benefits included a term in the employment agreement as follows:

Performance bonus payment of up to \$70,000 per year paid quarterly based on achievement of task-based targets and uncapped (paid on a factor of 10% of revenue target and subject to task based targets);

[5] The financial target was originally revenue growth of \$450,000 per annum, although this was increased towards the end of Mr Whitehead's employment. For convenience purposes, the targets were proportioned monthly; as sales figures were provided monthly.

[6] Mr Whitehead was a top performer for Modica and despite working only 11 months of the year, still earned 98% of his annual revenue target, which meant that he was tracking ahead of target when he left in early September 2009.

[7] As may be expected in a sales role, revenue for which Mr Whitehead could take credit was quite *lumpy*. For example, he achieved no revenue at all in the first three months of his employment to 31 December 2008. In the next three months, however, he earned \$32,187.25 over the budgeted target figure, and in the subsequent quarter \$128,782.64 above the targeted figure.

[8] Mr Whitehead was paid one twelfth of his annual performance bonus payment each month from the first quarter onward, namely \$5,833.33, as it was agreed between the parties that it was in both their interests for that sum to be paid regularly. Mr Whitehead was accordingly paid that sum on eight of the 11 months he worked for Modica. He was not, however, paid anything by way of *overage*. Mr Whitehead has

consistently contended, since the first time he believed it was due, that he ought to have been paid *overage* quarterly.

[9] Modica claims that because the revenue targets were annual ones, and because of the *lumpiness* of earnings, that although the payment of up to \$70,000 was to be calculated and paid quarterly, any *overage* could only be assessed annually.

[10] Without doubt, the benefits clause of the employment agreement is badly worded. It is little wonder therefore that both parties genuinely held different interpretations of the clause. Both agreed, however, that there were two parts to the bonus payment, even although the wording of the agreement is such that the two must be inconsistent - in that it is not possible to have both a performance bonus payment of *up to* \$70,000 per year and also for such a payment to be *uncapped*. I accept, however, the parties' interpretation for the purposes of this determination. It would be wrong to interpret the agreement in a literal way as having a maximum when both parties believed there was no such maximum.

[11] The next issue to determine is whether those two forms of payment should be assessed quarterly, or annually, or a mix thereof.

[12] I accept, as did the parties, that the performance bonus payments of up to \$70,000 per annum should be assessed quarterly, because it is contracted to be paid quarterly. Therefore, Mr Whitehead was correctly paid and indeed unnecessarily paid by way of monthly payments of a third of the quarter's payments even though they were only due at the end of the quarter, as this method assisted Mr Whitehead by giving him a more steady stream of cashflow than would occur with quarterly payments.

[13] The uncapped portion of the bonus, however, must, on a proper interpretation, be assessed on an annual basis. That is because the target was set as an annual target, and it is clear that neither party could have known whether the annual target would be achieved for the year at the end of any one quarter. It is more likely, I conclude, in a bonus payment arrangement that is uncapped, that out-performance or *overage* in any one quarter does not lead to a right to payment in that quarter. It is performance over the year that must be calculated. The *lumpiness* of earnings is a vital component in this decision. The employment agreement's Schedule 1 (which provides for Mr Whitehead's remuneration, job description and key performance indicators) clearly

sets the revenue target as an annual revenue target. This makes good business sense for both Modica and Mr Whitehead. By contrast, the monthly targets were originally simply one twelfth of the annual target, and there were no quarterly targets set as such.

[14] On this basis, Mr Whitehead did not reach the 100% of revenue target to qualify for a bonus payment for *overage*, although this is primarily because he did not work a full year. If he had stayed another month at Modica, he almost certainly would have qualified for such a bonus, but for genuine reasons he decided to leave before that period. I therefore conclude that Mr Whitehead has not been underpaid in terms of his performance bonus payments. Having so determined, there is no need for me to consider any claw backs that may or may not have been provided for under the employment agreement, and otherwise may or may not have been legitimate.

Determination

[15] For all the reasons given above I dismiss Mr Whitehead's claims against Modica Group Limited

Costs

[16] Costs are reserved.

G J Wood
Member of the Employment Relations Authority