IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 124
3024632

	BETWEEN	Tony Wood Applicant
	AND	NZ Cupolex Limited Respondent

Member of Authority:	Jenni-Maree Trotman
Representatives:	Tim Oldfield, Counsel for the Applicant No appearance for the Respondent
Investigation Meeting:	13 April 2018
Additional documents received:	19 April 2018
Determination:	23 April 2018

DETERMINATION OF THE AUTHORITY

A. Mr Wood has not suffered an unjustified disadvantage to his employment.

B. NZ Cupolex has breached Mr Wood's individual employment agreement by failing to pay his contractual entitlements to commission.

C. NZ Cupolex is ordered to pay to Mr Wood the following sums within 14 days of the date of this determination

a. The sum of $38,422.39 net as payment for his outstanding commission entitlements up to 1 February 2018.

b. Interest on the sum of $38,422.39 from 16 February 2018 at the applicable rate of 5% per annum continuing until payment.

D. NZ Cupolex did not breach its duty of good faith.

E. NZ Cupolex is ordered to pay $2,000.00 by way of penalty for its breach of Mr Wood's individual employment agreement. 50% of that amount ($1,000) is to be paid to Mr Wood. The remaining 50% ($1,000) is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

F. Payment of the penalty is to be paid within 28 days of the date of this determination.

G. Costs are reserved.

Employment Relationship Problem

[1] NZ Cupolex Limited is the New Zealand distributor of Cupolex concrete slab foundations. The Cupolex system is a plastic dome component that is used in residential and commercial constructions as a barrier to rising dampness from contact with the ground. Mr Wood has been employed by NZ Cupolex since 3 November 2014 as its Business Development Manager.

[2] Pursuant to the terms of Mr Wood's individual employment agreement (IEA) he is entitled to receive, inter alia, commission payments and a tenure bonus. He says these have not been paid. He asks the Authority to make orders requiring NZ Cupolex to pay his outstanding commission entitlements, his tenure bonus, interest, a penalty for breaching the IEA and a penalty for breaching its obligations of good faith. He also says he has suffered an unjustified disadvantage to his employment arising from an alleged suspension and claims compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[3] No Statement in Reply was filed by NZ Cupolex to either Mr Wood's statement of claim or his amended statement of claim. Both of these documents were personally served on the Company at its registered office at O'Halloran North Shore Limited, 12a Link Drive, Wairau Valley, Auckland. In addition, there was no appearance for or on behalf of NZ Cupolex at the investigation meeting.

[4] Prior to the investigation meeting a minute setting out, inter alia, the date of the investigation meeting was personally served on NZ Cupolex. In addition NZ

Cupolex was served with the notice of investigation meeting. This occurred on 15 March 2018 at its registered office. On 12 April 2018 the Authority emailed a reminder to NZ Cupolex of the investigation meeting. It also attempted to contact NZ Cupolex on the date of the investigation meeting without success.

[5] No good reason has been provided for NZ Cupolex' failure to attend the investigation meeting or be represented. As provided for in clause 12 of Schedule 2 of the Act I have proceeded to act as fully in the matter before me as if NZ Cupolex had duly attended or been represented.

[6] As permitted by 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 but has not recorded all evidence and submissions received.

The issues

[7] The issues requiring investigation and determination are:

a) Has Mr Wood suffered an unjustified disadvantage to his employment arising from an alleged suspension? If so, should a remedy be awarded?

b) What commission is due to Mr Wood under the terms of his individual employment agreement?

c) Is Mr Wood entitled to a tenure bonus?

d) Has NZ Cupolex breached Mr Wood's individual employment agreement by failing to make payment of his commission and the tenure bonus? If so:

   i. What monies are payable by NZ Cupolex to Mr Wood?

   ii. Should a penalty be imposed against NZ Cupolex for breaching the IEA?

e) Has NZ Cupolex breached s 4 of the Employment Relations Act? If so, should a penalty be imposed?

f) Should either party contribute to the costs of representation of the other party?

Background

[8] Mr Wood is employed by NZ Cupolex as its Business Development Manager. He was appointed to that role with effect from 3 November 2014. Mr Wood is also a shareholder in Cupolex Australasia Limited (CAL) and Cupolex Building Systems Limited (CBSL). He has held shares in these companies since 2005.

[9] CAL and CBSL originally operated the Cupolex business in New Zealand. In August 2014 they sold the business to NZ Cupolex, providing vendor finance as part of that transaction. The vendor finance was only partly repaid. This lead to CAL and CBSL making demand for the settlement of the unpaid balance. When NZ Cupolex failed to meet that demand the company was placed into receivership on 15 December 2017. As a non-voting shareholder, Mr Wood said he was not involved in the decision made by CAL and CBSL to appoint receivers. However, whilst he did not vote, he was aware that receivers were to be appointed as he attended the meeting with the receivers before their appointment.

[10] Shortly after the appointment of the receivers Mr Hoole, one of the receivers, and Mr Wood met again. Mr Hoole said he told Mr Wood that he would not be terminating his employment under s 32 of the Receivership Act. He said this was because the receivers had decided to continue to trade NZ Cupolex in order to preserve brand reputation. He said this was with a view to reaching a settlement with the director of the company, Geoff Benson, or alternatively to facilitate the sale of the business as a going concern.

[11] On 28 December 2017 Mr Wood suffered a non-workplace injury. He notified the receivers of his injury. He was placed on ACC and remains so. His injury coincided with the receivers' decision to curtail trading operations. This was necessary as they were unable to obtain the necessary consent from the licensor of the Cupolex product, and for the release of product from the secured creditors.

[12] On 19 January 2018 Mr Benson/NZ Cupolex paid settlement funds to the receivers to meet the claim by CAL and CBSL, and a payment to Mr Wood. The receivers then retired from office. NZ Cupolex' receivership ended on 23 January 2018 and the control of the company reverted back to Mr Benson.

[13] Upon becoming aware NZ Cupolex was no-longer in receivership, Mr Wood phoned and then wrote to Mr Benson on 25 January 2018. He sought confirmation of his employment and the person he was to report to. He confirmed that he no longer had access to the company server. He also advised he had handed the keys to the warehouse and forklift to the receivers so he did not have access to the warehouse or means to process orders.

[14] On or about 26 January 2018 a telephone discussion took place between Mr Wood and Mr Benson. Mr Wood said Mr Benson told him they should move on. He said he confirmed it had been a difficult period and, whilst he felt no animosity towards Mr Wood, he couldn't work with him moving forward as he didn't trust him. He considered Mr Wood had been the instigator behind the Company being placed into receivership. Mr Benson asked him to do the honourable thing and resign. Mr Wood said if he did this they would still need to discuss his contractual entitlements. Mr Benson agreed to provide him with details of the commission he was owed. This did not occur but Mr Wood said the parties did exchange text messages.

[15] Mr Wood then sent an email to Mr Benson on 31 January 2018. This reminded Mr Benson that he was to send him the amount of commission that was owed to Mr Wood. It also asked him to update him on when a meeting was to take place to discuss his employment.

[16] Mr Benson replied that day advising he was taking advice and would respond. He further asked Mr Wood to contact him the following morning. Mr Wood said he tried to call Mr Benson without success. Later that day the parties exchanged without prejudice correspondence.

[17] On 1 February 2018 Mr Wood sent multiple emails to Mr Benson. These emails sought, inter alia, direction on what he was to do and who he was to report to. He also advised of queries he was receiving from clients. These clients were contacting Mr Wood as the mobile number on the Company website still listed his phone number.

[18] Another email was sent by Mr Wood on 8 February 2018 asking Mr Benson to address Mr Wood's duties so that a return to work programme could be put in place by ACC. A letter was then sent by Mr Wood's lawyers to NZ Cupolex on 9 February 2018. Mr Wood said no response was received.

Issue One: Has the Applicant suffered an unjustified disadvantage to his employment arising from an alleged suspension? If so, what remedy, if any, should be awarded?

[19] Under s 103(1)(b) of the Act, an employee may commence a personal grievance claim if one or more of the conditions of employment has been affected to the employee's disadvantage by an unjustifiable action by the employer.

[20] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

[21] In the present case Mr Wood alleges that the Company has restricted his access to its systems, including email and its server, without explanation, amounting to an unlawful suspension.

[22] For the reasons that follow I do not accept that Mr Wood's employment has been affected to his disadvantage.

a. Mr Wood stopped undertaking duties for the Company because he suffered a non-work related injury. He has been incapacitated, and on ACC, since the date of his injury on 28 December 2017.

b. Mr Wood has not been certified by ACC as being ready to resume his duties with the Company.

c. There is no evidence that ACC has engaged with the Company in order to address a return to work plan. Mr Wood has also not corresponded with the Company since 9 February 2018.

[23] In those circumstances I am not satisfied that Mr Wood has been suspended. Nor am I satisfied that he has suffered a disadvantage to his employment by not being provided with access to his emails or the computer server. He does not require access to these systems whilst away from work on ACC.

Issue Two: What commission is due to the Applicant under the terms of his individual employment agreement?

[24] Mr Wood's IEA provides that he is entitled to earn commission on all sales in New Zealand as follows:

> $0-$1M (net sales) – 2% - paid quarterly
>
> $1-$2M (net sales) –1.5% - paid quarterly
>
> $2-$3M (net sales) –1% - paid quarterly
>
> $3-$5M (net sales) –0.5% - paid quarterly

[25] Mr Wood said he has not been paid his contractual entitlements to commission from the beginning of his employment. He says he kept a running total of the sales and the total commission due at the end of October 2017 was $52,000.

[26] During the investigation meeting Mr Wood explained that he did not have any evidence to substantiate this figure. He said the running total was based on monthly sales he retained in his head. I found this evidence unconvincing given that the period for which the claim for commission relates exceeds three years. I was also not convinced by his evidence that this figure did not include November and December 2017. He could provide no explanation as to why, after keeping a running total for 3 years, he would suddenly stop. I find it more likely than not that his running total included November and December 2017.

[27] Mr Wood accepted that his figure of $52,000 was gross whereas the parties had agreed that sales commission would be based on net figures.

[28] In a minute dated 13 March 2018 I directed NZ Cupolex to provide its financial statements showing its net sales for the years ended 31 March 2015, 31 March 2016, 31 March 2017 and 31 March 2018. This was so that I could accurately calculate the commission owed to Mr Wood. NZ Cupolex failed to provide this information.

[29] In the absence of the financial accounts I have looked at the exchange of correspondence between the parties where the issue of Mr Wood's sales commission was discussed. In email correspondence from NZ Cupolex to Mr Wood dated 1 February 2018 it stated that a figure of $38,422.39 was owed to Mr Wood for sales

commission. Mr Wood agreed during the investigation meeting that $38,422.39 was "about right when you take into account tax" on his figure of $52,000.

[30] NZ Cupolex has not paid Mr Wood the sum of $38,422.39. I am satisfied that it has therefore breached the IEA. I order it to pay to Mr Wood the sum of $38,422.39 net within 14 days of the date of this determination for commission owing up to 1 February 2018. I have no evidence to make a finding as to any commission payable from 1 February 2018.

Bonus

[31] The IEA provides that Mr Wood would receive a tenure bonus of $10,000 gross after working with the Company for three years.

[32] For the reasons that follow I am satisfied, on balance, that Mr Wood has already received payment of this sum from the Company.

[33] The receiver's report shows an unspecified payment being made to Mr Wood for wages. During questioning Mr Wood said that he did not receive any monies from the Receiver. However, he recoiled from this testimony after Mr Hoole, the Receiver, gave evidence.

[34] Mr Hoole's evidence was that during the receivership Mr Wood told him he was owed commission by NZ Cupolex. He said that during settlement discussions between CAL, CBSL and NZ Cupolex he spoke with Mr Wood about what he was owed. He said Mr Wood told him he was owed $10,000 for commission. He said he factored this sum into the settlement figure to be paid by NZ Cupolex.

[35] Having heard this evidence Mr Wood then accepted he received $10,000 from the Receiver but said this was not for commission or for his $10,000 bonus. He says this payment was for unpaid salary for the month of December 2017. I find this unlikely.

a. The Company had paid Mr Wood his salary entitlements for the period up to 15 December 2017. Mr Wood's bank statements show he received salary of $7,546.38 net per month. The last payment he received from NZ Cupolex was on 20 December 2017. This was for the period up to 15

December. Mr Wood only worked a further 8 days before he was incapacitated and went on ACC.

b. Mr Wood's bank statements show that he was paid a sum of $7,871.37 for "salary for December 17" on 25 January 2018.

[36] For completeness I did consider, but do not accept, that the payment made to Mr Wood on 25 January 2018 relates to the payment of $10,000 paid under the Receiver settlement. This is because:

a. Mr Wood said that the payment of $10,000 was paid at the same time as his share of the settlement proceeds, as shareholder of CAL and CBSL, was paid i.e. a payment of a lump sum was made. The payment relied upon did not include any other sum.

b. Mr Wood said the $10,000 was paid into his Family Trust bank account. I accordingly directed him to provide me with a copy of the bank statement showing payment of this amount. He has failed, without excuse, to comply with my directions. The payment relied upon was paid into his personal bank account.

c. Mr Wood said the $10,000 was paid by the Receiver to CAL/CBSL who then paid him. The payment relied upon came from KGA Limited. I do not know who this entity is.

[37] During the investigation meeting I directed Mr Wood to provide me with the email correspondence exchanged between himself and relevant parties concerning the payment of the $10,000 so that I could satisfy myself what the reason for the payment was. Mr Wood, through his solicitors, informed me on 19 April 2018 that there is no correspondence. I find this unlikely. With the number of entities involved in the settlement with NZ Cupolex, and the money involved, it is more likely than not that the payment of monies, and the reasons for the payments, would have been documented.

[38] I have viewed correspondence exchanged between NZ Cupolex and Mr Wood and his solicitors following the Receiver settlement. There is no mention in this correspondence of the tenure bonus. This was not raised by Mr Wood's lawyers in their demand letter of 9 February 2018 nor was it raised in the original statement of

problem dated 16 February 2018. Mr Wood said this was because he only remembered that this bonus was due when it came time to file his witness statement on 28 March 2018. I find this unlikely. Especially in circumstances where Mr Wood would have the Authority believe that he had kept track of his commission entitlements "in his head" for a period of 3 years. I find it more likely that the issue of the tenure bonus was not raised because the bonus had been paid.

[39] In the foregoing circumstances, I find it more likely than not that Mr Wood has been paid the tenure bonus. I am satisfied that NZ Cupolex has not breached the IEA.

Issue four: Should a penalty be imposed against the Respondent for breaching the IEA?

[40] NZ Cupolex has breached the terms of the IEA by failing to make payment of Mr Wood's commission entitlements. I am satisfied that a penalty should be imposed on NZ Cupolex.

[41] The quantum of any penalty is to be determined using the four step approach outlined by the Employment Court in *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited*.[1]

Step 1: Nature and number of breaches

[42] Step one is to identify the number of breaches and the maximum penalty applicable. In this case there was one breach. The maximum penalty that may be imposed upon a company or other corporation is $20,000 per breach. The starting point is, therefore, a penalty of $20,000.

Step 2: Severity of the Breach

[43] Step 2 involves the consideration of the severity of the breach to establish a provisional starting point for the penalty. This will include an adjustment for aggravating and mitigating factors in relation to the breach.

[44] The aggravating feature of NZ Cupolex' breach is its failure to provide the sales figures directed in order that Mr Wood's commission entitlements could be verified and calculated. This certainly applies to the period from 1 February 2018.

[1] *[2016] NZEmpC 143*

[45] Against that, the mitigating factors are these:

a. The IEA provided that commission was payable quarterly. NZ Cupolex did not comply with this requirement. However, Mr Wood acquiesced in NZ Cupolex' failure to pay sales commission for a period of over three years. He said he did this to enable the Company to invest in products and its brand. This ensured the success of the product and increased his entitlements through increased sales.

b. Mr Wood did not make a demand for payment of sales commission from NZ Cupolex until the end of January 2018.

c. NZ Cupolex, from what I have viewed, then took immediate steps to calculate the commission owed to him. This was quantified on 2 February 2018. A demand for further information was then sought by Mr Wood's solicitors. This letter advised that "once we have the commission breakdown information and have confirmed its accuracy we will be seeking payment within 7 days." No demand for payment was made however a Statement of Problem was served on NZ Cupolex which set out Mr Wood's claim.

d. The Company acknowledged in email correspondence that it owes commission to Mr Wood in the sum of $38,422.39.

e. The Company does not appear to have come before the Authority previously.

[46] In these circumstances I assess the degree of severity at 40%. A potential penalty of $8,000.

Step Three: Ability to pay a penalty

[47] Step three requires the Authority to consider the means and ability of the Company to pay the penalty reached under step 2. Mr Wood said he did not know if the Company was still trading. I find this evidence doubtful given Mr Wood's involvement in the industry and his shareholding in the Australian entities.

[48] In email correspondence I have viewed I see that Mr Wood threatened to place NZ Cupolex into liquidation if payment was not received. He was earlier involved in

meetings before it was placed into receivership. His witness statement states that during the receivership he became aware that the Company had many other debts aside from that owed to CAL and CBSL. The receiver's report states the amount due to unsecured creditors was "unknown" and the amount due to IRD was $53,410.

[49] I am satisfied in these circumstances that the potential penalty should be reduced to $4,000.

Step 4: Proportionality of penalty

[50] Step 4 is to apply the proportionality principle. This is consideration of whether the potential penalty I have arrived at is proportionate to the breach and any harm occasioned by it. At this stage I must assess if the amount I have reached is just in all of the circumstances. Looking at recent Authority and Court imposed penalties I conclude an appropriate penalty is $2,000.

[51] I consider it appropriate that part of the penalty be paid to Mr Wood as he has suffered the impact of the breach and has been obliged to take steps to enforce his rights.

[52] NZ Cupolex is ordered to pay $2,000 by way of penalty for its breach of the IEA. I direct that 50% of that amount ($1,000) is to be paid to Mr Wood. The remaining 50% ($1,000) is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

[53] Payment of the penalty is to be paid within 28 days of the date of this determination.

Issue Five: Has the Respondent breached s 4 of the Employment Relations Act? If so, should a penalty be imposed?

[54] The Act requires parties to an employment relationship to act in good faith. Parties to an employment relationship must be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

[55] Mr Wood submits NZ Cupolex breached its obligation to act in good faith. He submits it did this by failing to communicate with him during his employment, particularly in the period from the end of the receivership onwards.

[56] The correspondence I have viewed shows that the parties communicated with each other until on or about 9 February 2018. However, during the investigation meeting, Mr Wood said the parties also corresponded by way of text. He said he had provided a copy of these text messages to his solicitors. I directed Mr Wood to provide a copy of these text messages to the Authority. On 19 April 2018 his solicitors advised that Mr Wood did not retain a copy of the messages. I do not find this credible given the evidence he provided at the investigation meeting.

[57] In the absence of these text messages, and taking into account the dialogue between the parties up to the filing of Mr Wood's statement of problem, I am not satisfied that NZ Cupolex has failed to engage with Mr Wood. I find there has been no breach of good faith.

Issue Six: Interest

[58] Mr Wood claims interest on the amounts awarded by the Authority. In the circumstances I consider it appropriate to order interest is payable by NZ Cupolex.

[59] NZ Cupolex is ordered to pay interest on the commission due of $38,422.39 from 16 February 2018 at the applicable rate of 5% per annum[2] continuing until payment. This must be paid within 14 days of the date of this determination.

Issue Seven: Costs

[60] Costs are reserved.

[61] Mr Wood is encouraged to resolve any issue of costs with NZ Cupolex. If he is unable to do so, and an Authority determination on costs is needed, an application for costs can be made within 14 days. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[62] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence such as invoices. In addition, a copy of Mr Wood's retainer letter must be provided.

[63] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[3]

[2] Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177), Clause 4

Certificate of Determination

[64] I direct, pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000 that Mr Wood be provided with a certificate of determination, sealed with the seal of the Authority recording that NZ Cupolex is ordered to:

A. To pay to Mr Wood, the following sums within 14 days of the date of this determination:

    i. The sum of $38,422.39 net as payment for his outstanding commission entitlements up to 1 February 2018.

    ii. Interest on the sum of $38,422.39 from 16 February 2018 at the applicable rate of 5% per annum continuing until payment.

B. The sum of $2,000.00 by way of penalty for its breach of Mr Wood's individual employment agreement. 50% of that amount ($1,000) is to be paid to Mr Wood. The remaining 50% ($1,000) is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

C. Payment of the penalty is to be paid within 28 days of the date of this determination.

Jenni-Maree Trotman
Member of the Employment Relations Authority

[3] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].