

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 392/09
5120391

BETWEEN ANTON PIRES
 Applicant

AND NORFOLK ELECTRICAL
 AND MECHANICAL
 LIMITED TRADING AS
 CLIMATEC
 Respondent

Member of Authority: Vicki Campbell

Representatives: Joanne Watson for Applicant
 Stephen Langton for Respondent

Investigation Meeting: 20 August 2009

Submissions Received: 28 August 2009

Determination: 6 November 2009

DETERMINATION OF THE AUTHORITY

[1] Mr Anton Pires was employed as a Sales Engineer by Norfolk Group Electrical & Mechanical Limited (“Climatec”) from 9 July 2001 until he left his employment on 29 February 2008.

[2] Mr Pires moved into a new sales role in June 2007. In his new role Mr Pires was to make sales on behalf of Climatec and in return for his services he would be paid on the basis of a base salary and commission payments as an incentive to increase his income by increasing sales. The terms and conditions of Mr Pires employment were altered by agreement and set out in a written individual employment agreement.

[3] Mr Pires claim is that Climatec has failed to pay all commission payments due to him to the extent of \$5,545.24. Climatec denies the claim and says Mr Pires has been paid all amounts to which he became entitled. Indeed, Climatec claims Mr Pires

has been overpaid his commission payments and seeks repayment of this, plus interest.

[4] This is a dispute about the operation, interpretation and application of Mr Pires individual employment agreement. The issues for determination are whether Mr Pires has been paid his commissions in accordance with his employment agreement or whether Climatec has overpaid Mr Pires .

Relevant terms of the employment agreement

[5] The first schedule to the employment agreement sets out the remuneration details attaching to Mr Pires employment from 1 May 2007. In relation to commission payments it states:

5% on all sales over budget.

Commissions are subject to jobs returning 25% gross profit and at management's discretion thereafter.

All sales over and above the budget that don't achieve the minimum gross profit will be paid out on a pro-rate basis depending on the final outcome of the Projects.

Projects which are shared or won as a result of a joint effort, individual third parties or the NEC are also subject to pro-rata payment and commissions.

Both the above are subject to the discretion of the management.

Commissions are paid once the budget has been achieved and Projects completed. Completed Surplus Jobs are added together and the average Gross Profit is applied to calculating commissions due. Pro rata payment details will be indicated to you separately.

[6] The rules to be applied when interpreting the provisions of an employment agreement are well established and were summarised by the Employment Court in *ASTE V Chief Executive of Bay of Plenty Polytechnic*¹:

Agreements should be interpreted with reference to the factual matrix or surrounding circumstances. This includes matters such as the background to the transaction and the practice of the industry or sector in question. The law has now moved on from the earlier position that such evidence was only admissible when the words of the agreement were ambiguous or unclear. Indeed, the current state of the law appears to be that in all cases such reference is possible and even desirable. The Court of Appeal has developed the following approach in contract cases. One looks first at the words used – they must obviously be the starting point – and then at the surrounding circumstances to make sure that the first impression of the meaning is correct and nothing in the circumstances requires modification of that most natural meaning of the words.

¹ [2002] 1 ERNZ 491.

[7] Mr Pires sales budget was \$500,000 for the period May 2007 to March 2008 and \$1,000,000 thereafter. That means he was expected to sell \$500,000 worth of products and services on behalf of Climatec. Mr Pires' claim is that once he had achieved the sales of \$500,000 he became entitled to the payment of commission at the rate of 5% on the sales made over and above the \$500,000. Mr Pires says the sales made up to and including the \$500,000 did not have to meet the 25% profit margin before commissions became payable.

[8] Climatec says the requirement of a 25% profit margin on sales included those sales making up the \$500,000 sales target.

[9] To interpret the clause in the way Mr Pires wants it interpreted would require me to read additional words into the second sentence of the clause to reflect his view that only those jobs over and above the budget figure are required to meet the 25% profit margin. The fact that the words are not included in that sentence but are included later in the clause:

All sales over and above the budget that do not achieve the minimum gross profit will be paid out on a pro-rata basis. [my emphasis]

is, in my view, a significant indicator that the words mean what they say, that is that all sales, including the first \$500,000, must meet the profit margin of 25% before they are eligible for inclusion for commission payments.

[10] With regard to the surrounding circumstances, the emphasis on all jobs (not just those over the \$500,000 threshold) having to reach the profit margin of 25% was highlighted in an email to Mr Pires before he signed his employment agreement. In that email Mr Chris De Villiers states (verbatim):

Theres also the question about Profit on these bigger jobs, the sales agreement clearly states that all jobs need to return a mininum of 25% GP, failing that it comes down to your managers discretion, as to wether the commission is paid proportionately or not at all.

[11] I accept the submissions on behalf of Climatec that the fact that no commissions were paid to Mr Pires until after he had signed his employment agreement, indicates that the parties never reached a common understanding about the commission payments and calculations until it was confirmed in the employment agreement.

[12] I find that in order to qualify for commission payments Mr Pires was required to meet his sales budget (\$500,000) and that the payment of any commission was subject

at all times to the jobs Mr Pires sold or was involved in selling, returning a gross profit of not less than 25%. Therefore Mr Pires was not entitled to any commission payments until he had sold \$500,000 worth of goods and services with a margin of not less than 25%. I find that both thresholds had to be achieved before Climatec were liable to pay commission payments.

[13] The purpose of the commission is to share with Mr Pires any profit the company makes from his work in selling goods and services. I agree with the submissions made on behalf of Climatec, that to find that commission payments must be paid irrespective of whether a profit has been turned from those sales does not make commercial sense.

[14] I find the commission payments made to Mr Pires have been made in accordance with plain meaning of the words in the employment agreement and I can be of no further assistance to him.

Counter-claim

[15] Climatec says it overpaid Mr Pires when it paid an interim commission payment in December 2007. Mr Pires was paid commission based on the projected profits of all the projects and jobs he had sold up to that point in time. On 28 February 2008 Mr Pires was advised that a reconciliation of the commission payments made to him showed that he had been overpaid as some jobs had not been completed and others had not reached the 25% gross profit threshold.

[16] I find Mr Pires has been overpaid his commission payments to the extent of \$5,498.00 and holiday pay of \$981.00 as per the counter-claim specified in the Statement in Reply.

[17] Climatec seeks payment of interest on the amount outstanding from 19 December 2007. I decline to award interest on the basis that there was a genuine dispute with regard to the interpretation of the commission clause and Mr Pires was entitled to seek a determination with respect to that issue.

Mr Anton Pires is ordered to pay to Norfolk Group Electrical & Mechanical Limited the amount of \$6,479 being commission and holiday pay over paid within 28 days of the date of this determination.

Costs

[18] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Climatec may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority