

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 139
3031251

BETWEEN HERMAN POTGIETER
Applicant

AND INTENT GROUP LIMITED
Respondent

3041414

BETWEEN INTENT GROUP LIMITED
Applicant

AND HERMAN POTGIETER
First Respondent

AND LUMUS LIMITED
Second Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Bruce Murray, Counsel for Mr Potgieter and Lumus
Limited
Tania Waikato, Counsel for Intent Group Limited

Investigation Meeting: 17 January 2019

Submissions and further Information received: 21 January 2019 from Mr Potgieter & Lumus Limited
21 January 2019 from Intent Group Limited

Date of Determination: 11 March 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Herman Potgieter was employed by Intent Group Limited in the position of GM Supply Chain Solutions from 27 April 2016 until his resignation on 4 October 2017. He claims that Intent breached the terms of his individual employment

agreement (IEA) by failing to pay him all of his sales entitlements. This is denied by Intent.

[2] Intent filed a separate claim against Mr Potgieter in which it sought recovery of overpaid wages and penalties for breaches by Mr Potgieter of his IEA and his good faith obligations under the Employment Relations Act 2000 (the Act). The allegations are denied by Mr Potgieter.

[3] 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

[4] The issues requiring investigation and determination were:

- a. What was the agreement between the parties in terms of payment of commission to Mr Potgieter during employment i.e. pursuant to the Third Schedule, Clause 4(b) of the IEA?
- b. Did Intent breach the Third Schedule, Clause 4(b) of the IEA? If so, what amount is owing to Mr Potgieter?
- c. What was the agreement between the parties in terms of payment of commission to Mr Potgieter after termination of his employment i.e. pursuant to the Third Schedule, Clause 6 of the IEA?
- d. Did Intent breach the Third Schedule, Clause 6 of the IEA? If so, what amount is owing to Mr Potgieter?
- e. Is Mr Potgieter entitled to rectification of his IEA so that Clause 6 of Schedule 3 to the IEA reads “The payment of the Sales component of the Bonus Entitlements survives this agreement up to the completion of those respective engagements”?
- f. Was Mr Potgieter overpaid wages for the month of September 2017? If so, should the repayment be repaid by Mr Potgieter?
- g. Did Mr Potgieter breach the terms of his employment agreement? If so, should a penalty and/or damages be imposed under s 134(1) of the Act?

- h. Did Mr Potgieter breach s 4 of the ERA? If so, should a penalty be imposed?
- i. Should either party contribute to the costs of representation of the other party?

[5] An additional claim relating to whether Mr Potgieter's company, Lumus Limited, aided and abetted breaches of the terms of his employment was withdrawn at the commencement of the investigation meeting.

Relevant background

[6] Herman Potgieter is an immigrant to New Zealand. In December 2015 he contacted Intent, looking for a role as an employee or as an independent contractor. Discussions and meetings ensued with Intent expressing interest in Mr Potgieter carrying out work for it.

[7] In March 2016 Intent provided Mr Potgieter with a blank draft copy of its standard independent contractor agreement and IEA so that he could decide which option best suited his requirements

Negotiations for an IEA

[8] On 18 March 2016 Mr Potgieter emailed Intent advising that Immigration NZ required him to have an employment agreement. He advised he was comfortable with the standard IEA terms provided by Intent but had made a few changes. He pointed out:

I need to show to Immigration NZ that I will earn a minimum of \$55,000 per year. The main period of risk associated with a salary is the first few months and I shuffled the payments that I will earn a monthly salary of \$3,500 for the first three months during the probation period and then \$5,000 thereafter.

As mentioned, my own preference is to be paid on the income sharing basis we spoke about. As such I suggested that I get paid either the base salary as above, OR the revenue sharing model that we spoke about, whichever is the highest, so that we can move away from the fixed salary structure as soon as possible.

Based on my somewhat limited understanding, I gave a short write-up of the revenue sharing model that we spoke about in the Third Schedule, but then realised that you probably have a better and existing definition of this. You are welcome to send this to me and I can then integrate it into the rest of the agreement if you do not have the time now.

Lastly, I would like to suggest that the sales commission portion of an engagement survives the ending of this agreement as it ensures continuity of the relationship with the client.

[9] The material change Mr Potgieter made to the draft IEA was the addition of Schedule 3, Bonus Entitlements. This provided:

The parties accept that the above salary serves as a minimum base payment as the parties prefer to work on an output-based remuneration structure. The aim of bonus entitlements is therefore for the Employee earn in line with the business benefits which are generated through this relationship.

The monthly total payment to the employee is the highest of either his Salary, as per the First Schedule, or his Bonus Entitlements of the Third Schedule.

Bonus payments are calculated and paid on a monthly basis.

The Bonus Entitlements consist of three components, which are paid to the Employee as a percentage of the revenue invoiced:

- Overheads and corporate cost: 25% of revenue is retained by the Employer to cover the cost of business overheads and other such corporate cost;
- Sales: The employee is paid a maximum of 20% of revenue generated in line with his relative contribution to successful sales. Of this, 50% is paid for the generation of the sales lead/opportunity and 50% for the rest of the sales process, which includes proposal development, client negotiation, contract formulation and the completion of the sales process;
- Delivery: 55% of revenue is paid for the delivery of the engagement.

Should the parties wish to make changes to this Bonus Entitlement structure, then the Third Schedule may be changed/replaced by the parties without affecting the remaining part of this agreement.

The payment of the Sales component of the Bonus Entitlements survives this agreement up to the completion of those respective engagement/s.

[10] On 28 March 2016 Mr Street responded. Mr Street was a director of Intent until November 2016. His response included a tracked changed version of the IEA with notations. He advised:

I'm largely happy with this – we need to modify the remuneration part as per my note otherwise you are on a better deal than Ian and I – but subject to no objections from Ian on Tuesday and the few amendments we should be good to go with the attached. Can you make the adjustments please. I'm home today if you want to chat.

[11] Mr Potgieter responded advising that he was comfortable with the changes made. He suggested they “chat tomorrow after you heard from Ian”. A subsequent

email from him that day included an amended IEA incorporating the changes made by Mr Street.

[12] On 29 March 2016 Mr Street and Mr Walsh met. Mr Walsh is a founding director of Intent. He advised Mr Street that he was unhappy with the wording in the final paragraph of Schedule 3 and indicated to Mr Street that he wished to change it. Mr Street says he conveyed this to Mr Potgieter that same day and organised for them to meet with Mr Street on 7 April 2016 to go through the changes. Mr Potgieter acknowledges speaking with Mr Street but says he was told the changes Mr Walsh was making to the IEA were administrative in nature.

7 April 2016 meeting

[13] On 7 April 2016 a meeting took place between Mr Potgieter, Mr Street and Mr Walsh. At that meeting Mr Potgieter was provided with an IEA that incorporated changes made by Mr Walsh. The covering letter accompanying the IEA advised Mr Potgieter that he was entitled to seek advice and provided the Department of Labour's website and contact phone number. It went on to advise:

If you agree and wish to accept the terms of employment, please sign the enclosed duplicate of this letter where indicated and return it to me by 5.00 p.m. on April 8th 2016. If I have not heard from you by that date, this offer will be automatically withdrawn.

[14] The material change that had been made to the IEA was to the final paragraph of Schedule 3. The new clause provided:

6. The payment of the Sales component of the Bonus Entitlements survives this agreement in accordance with INTENT Group Limited published Sales Commission Structure; currently v11.0 July 2015.

[15] Mr Street and Mr Walsh said after providing the amended IEA to Mr Potgieter they went through the changes Mr Walsh had made to the IEA. They said they also discussed Intent's Sales Commission Structure, that included a flowchart showing the method of calculation of sales commission, and Mr Street showed Mr Potgieter a copy of this. Mr Potgieter disputes this evidence. He said that other than the addition of a cover letter he was unaware that the IEA differed from that that he had emailed to Mr Street on 28 March 2016.

[16] The parties then signed the IEA. Mr Potgieter was then taken through Intent's induction process. This process included the provision of Intent's Operations Manual version 2.5.

11 April 2016 meeting

[17] On 11 April 2016 the parties met again. At this time administrative changes were made to the First Schedule to the IEA.

[18] Mr Potgieter commenced work on 27 April 2016.

Independent contractor proposal

[19] On 23 November 2016 Mr Potgieter advised Intent that he had obtained confirmation from Immigration NZ that he could operate as an independent contractor.

[20] On 1 December 2016 Mr Potgieter provided Intent with a signed draft independent contractor's agreement.

[21] On 6 December 2016, prior to Intent responding to his offer, Mr Potgieter emailed Mr Street, advising he had inadvertently omitted commission in his offer. That same day the parties met and agreed Mr Potgieter should remain an employee while the parties negotiated his commission entitlements under the proposed independent contractor agreement.

[22] Mr Walsh then emailed Liz Levick, Intent's Accounts Administrator, advising:

Please accept this as confirmation that following discussions with Herman from his side, that we have agreed an effective date for his review as the 14th November 2016 to \$9,500 per calendar month.

[23] Subsequently Mr Walsh agreed that Mr Potgieter's salary would increase to \$10,000 per month. Aside from the salary increase no other changes were made to the conditions of his employment.

Negotiations around commission

[24] Negotiations then ensued between Mr Potgieter and Mr Walsh regarding the commission structure that would be payable under the proposed independent contractor agreement.

[25] By May 2017 the parties had still not reached agreement on a commission structure under the proposed independent contractor agreement. By this stage Intent had commenced work on a project for a major client. To protect commercial sensitivity I will refer to this client as “Client D”. Mr Potgieter was involved with securing and working with Client D and was anxious to sort out his commission entitlement.

[26] It was at or around this time that Mr Walsh reiterated to Mr Potgieter that Intent made use of a Sales Commission Structure Document as a decision making mechanism for determining commission and provided a hard copy of this document to Mr Potgieter.

[27] On 28 May 2017 Mr Potgieter emailed Mr Walsh. Mr Potgieter indicated he had been looking at the flowchart contained within the Sales Commission Structure Document and, based on this and the parties’ discussion, he believed he was entitled to receive commission on another project the company had obtained. To protect commercial sensitivity I will refer to this client as “Client B”.

The beginning of the relationship breakdown

[28] On 13 June 2017 Mr Walsh wrote to Mr Potgieter regarding the independent contractor agreement he had provided to Intent on 1 December 2016. The email advised:

As you are aware your current contract with INTENT has lapsed, before we were able to put a new agreement in place. This effectively means at the moment we have no contract and all agreements are effectively terminated. In order to manage the current commitments and provide sufficient time to conclude discussions we will continue to operate under the current conditions for one further month.

This means

We will continue the current payment structure for 1 month (to avoid any hardship for you) and to enable us to resolve this in good faith.

We currently have no agreed Sales Commission and IP entitlements and so far, despite the numerous discussions and emails, we have been unable to reach an agreement which meets all parties’ needs.

As you mentioned you were wanting to engage a CA to discuss arrangements and potentially mediate, I am available for a one-off meeting with your representative when this is convenient.

[29] Mr Potgieter responded the same day:

That is not the contract that we used as the established president. It has not been counter-signed and the contract is specific that if this was not done as per par 19:10, then it is not valid. Sorry Ian but we cannot use this to close this gap if we cannot get hold of the updated employment agreement.

The agreement, whether we get hold of a signed agreement or not, is as per the original employee agreement of May 2016 (attached), but with only an extension of the date and the amount paid. You yourself mentioned about two weeks ago that you had a look at this agreement and that it stated a 45% consulting payment rather than the 55% that we wrongly thought at the time. Which is the contract that you then had a look at?

[30] On 14 June 2017 Mr Walsh responded:

I am not suggesting an interim agreement, only an extension of our current agreement for 1 further month to enable us to sort this out in good faith. All agreements have terminated. The original agreement had sales commissions continuing, however, there were none generated during this agreement and it has terminated. The second agreement does not refer to sales commissions at all, I can find no signed copies that include this, only an email from you saying you were going to add this, but I have not received anything, nor agreed to anything in this agreement, unless you have a signed agreement you can share, this was not covered off. All we have at the moment is the current arrangement which I am willing to extend for a month while we sort this out.

I have requested a CA mediator be found, so hopefully one can be provided quickly, so we can enter into a binding mediation and bring this to a close.

[31] Mr Potgieter asked Mr Walsh to provide him with the signed contract he wished to extend. Mr Walsh forwarded him a copy of the independent contractor agreement that Mr Potgieter had signed on 1 December 2016. Mr Potgieter responded advising that he considered Mr Walsh had made a mistake as he had “suggested we did not adopt due to the administrative effort around this.”

[32] Mr Walsh responded on 15 June 2017 advising:

I think we agreed to keep you employed as administratively this was the only quick way to get you paid, which you needed, but we adopted the payment schedule and details per the contract I sent you, if you have any other signed docs, send them through, otherwise we will keep using the established precedent until we have reached a resolution.

[33] Mr Potgieter responded:

I will rather that we deal with the situation as it is than to have an interim employee agreement. The previous agreement provides for a sales commission payment that survives the termination of the employment agreement. As such I should be fine from a cash flow perspective, but thanks for your concern...

[34] Thereafter further correspondence was exchanged between the parties.

[35] On 21 July 2017 Mr Walsh confirmed in an email to Mr Potgieter that Intent accepted he was an employee. His email was followed up by a letter that confirmed:

1. We refer to your email of 11 July 2017 in response to our letter of 27 June 2017.
2. In your email you have asserted that you remain an employee of Intent Group Limited (Intent) under your employment agreement dated 27 April 2016, despite your offer to become an Independent contractor through your company Lumus Limited (Lumus). We therefore accept that your employment continues under the terms and conditions of your employment agreement (Employment Agreement).
3. You also assert that the Independent Contractor agreement with Lumus (Independent Contract) that you offered was not accepted by Intent at the time the offer was made by you, and the contract subsequently expired on 31 May 2017 in any event. We also accept that position and that you consequently have no rights or entitlements under the Independent Contract.
4. As a consequence of the above, the relationship between yourself and Intent is a normal employer / employee relationship and any negotiations regarding your remuneration are to be conducted on that basis.

The events that followed

[36] Thereafter the parties' relationship continued.

[37] On 25 September 2017 Mr Walsh emailed Mr Potgieter setting out his bonus entitlements.

As per our agreement you are entitled to payments of 45% of the billed revenue for Billed work that you have done on site at [Client D] less any amounts we have already paid you.

For the period of May through to September you have been paid \$50776. During this time you have been billed for 71.346 days at \$2115 a day (2350, less 10%) giving \$67903.46

A net difference of \$17127.56 less PAYE has been loaded for payment

Sales commissions of 4% have been loaded for the period of May through to End August for a total of \$13195.6. The breakdown of this is in the attached spreadsheet. This amount less PAYE has been loaded for payment.

This gives a total sum of \$31043.16 less \$10675.73 PAYE giving a net of \$20367.43

[38] On 4 October 2017 Mr Potgieter resigned from his employment.

Issue One: What was the agreement between the parties in terms of payment of sales commission during employment?

Legal Principles

[39] *Vector Gas Ltd v Bay of Plenty Energy Ltd* is the leading authority on contract interpretation.¹ It is well established that the principles referred to in that case apply to the interpretation of employment agreements.²

[40] These principles were summarised in *Tertiary Education Union v Vice-Chancellor, University of Auckland* in this way:³

- [6] The starting point is an assessment of the natural and ordinary meaning of the words themselves. Even if the words are plain and unambiguous, a cross-check will nevertheless be undertaken against the contractual context. If the words are ambiguous the enquiry will similarly move to an assessment of relevant facts and circumstance. This part of the process is directed at ascertaining the meaning of the words when read contextually.
- [7] The second stage of the interpretative exercise may result in the preliminary assessment of meaning being dislodged. Such a result will not readily arise. That is because the plainer the words used, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say. However, the Court will not ascribe to the parties an intention that a properly informed and reasonable person would not ascribe to them when aware of the circumstances in which the agreement was made. It follows that dislodgment of an apparently plain and ordinary meaning may occur when such a meaning would lead to a nonsensical result, whether because it defies commercial common sense or otherwise. Exceptionally, words used may be construed as having another meaning where the parties have adopted a special meaning or where estoppel arises.
- [8] An objective approach is required. That impacts on the proper scope of the evidence. Evidence of facts, circumstance and conduct relating to the negotiations which show objectively the meaning the parties intended their words to convey is relevant to the contextual enquiry, including the circumstances in which the agreement was entered into. Evidence of post-contractual conduct may be relevant if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both parties intended their words to bear. Evidence of what a party subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time, is irrelevant.

¹ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5 (SC).

² *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2010] ERNZ 317; *E tu Inc v NZ Transport Agency* [2017] NZEmpC 51 at [36].

³ *Tertiary Education Union v Vice-Chancellor, University of Auckland* [2015] NZEmpC 169.

[41] In *Pan Pac Forest Products v Unite Union* the Court commented:⁴

[37] The question as to how particular provisions should operate, and whether one clause overrides another if that is an issue, is to be decided on conventional interpretation principles so as to determine the parties' intentions on an objective basis. Thus, whether a reasonable bystander would conclude that the parties intended that a particular provision would be of paramount importance must be determined by applying ordinary principles.

The terms of the IEA

[42] The relevant clauses in the IEA are:

Remuneration

Details of the Employee's remuneration, and payment of the remuneration, is set out in the First Schedule

Completeness and Acknowledgement

This individual employment agreement represents the entire agreement between the parties and supersedes any prior agreements, implied terms or arrangements either written or oral between the parties. Any changes, additions or variations to this individual employment agreement are not effective unless recorded in writing, dated and signed by both parties.

First Schedule

Bonus Entitlements The Third Schedule provides a description of the quarterly Bonus Entitlements

Company Policies The Employer has various policies which apply to the Employee's employment and form part of the terms and conditions of employment. The Employee is to familiarise themselves with, and comply with, all of these policies from time to time in force. The Employer may introduce new policies or amend existing policies at any time and from time to time in its absolute discretion, and the Employee will be advised of the new policies and/or amendments when that occurs.

Schedule 3 Bonus Entitlements

1. The parties accept that the above salary serves as a minimum base payment as the parties prefer to work on an output-based remuneration structure. The aim of bonus entitlements is therefore for the Employee earn in line with the business benefits which are generated through this relationship.

⁴ [2018] NZEmpC 91.

2. The monthly total payment to the employee is the highest of either his Salary, as per the First Schedule, or his Bonus Entitlements of the Third Schedule.
3. Bonus payments are calculated and paid on a monthly basis.
4. The Bonus Entitlements consist of three components, which are paid to the Employee as a percentage of the revenue invoiced:
 - a. Overheads and corporate cost: 25% of revenue is retained by the Employer to cover the cost of business overheads and other such corporate cost;
 - b. Sales: The employee is paid a maximum of 20% of revenue generated in line with his relative contribution to successful sales. Of this, 50% is paid for the generation of the sales lead/opportunity and 50% for the rest of the sales process, which includes proposal development, client negotiation, contract formulation and the completion of the sales process;
 - c. Delivery: 55% of revenue is paid for the delivery of the engagement.
5. Should the parties wish to make changes to this Bonus Entitlement structure, then the Third Schedule may be changed/replaced by the parties without affecting the remaining part of this agreement.
6. The payment of the Sales component of the Bonus Entitlements survives this agreement in accordance with INTENT Group Limited published Sales Commission Structure; currently v11.0 July 2015.

The meaning of Clause 4(b) of the IEA

[43] At the heart of this dispute is competing contentions as to whether Intent's published Sales Commission Structure (the SC Structure Document) amounts to a policy and, if so, what effect that has on Clause 4(b) of the IEA.

[44] Mr Potgieter submitted the meaning of Clause 4(b) of the IEA is clear and unequivocal. He was entitled to be paid a maximum of 20% of revenue generated in line with his relative contribution to successful sales. Of this, 50% was to be paid for the generation of the sales lead/opportunity and 50% for the rest of the sales process, which includes proposal development, client negotiation, contract formulation and the completion of the sales process. He submits the SC Structure Document is not applicable to this calculation.

[45] Intent accepts that Mr Potgieter was entitled to be paid a maximum of 20% of revenue generated in line with his relative contribution to successful sales. However, in terms of his contribution, it maintains that this must be paid in accordance with, and

subject to the SC Structure Document that it maintains is a Company Policy and therefore becomes a term of the IEA in accordance with Schedule 1.

What is the status of the SC Document?

[46] I begin my analysis by considering the status of the SC Structure Document.

[47] Mr Potgieter sought to persuade me that the SC Structure Document did not form part of the terms and conditions of his employment because it was not incorporated by reference in the IEA. This submission relied upon the dicta in *Cuttriss v Carter Holt Harvey Limited* where the Court stated:⁵

[34] ...the way Courts over the years have viewed company policies, as being binding on the employer but, in the absence of contractual provisions or incorporation into the contractual agreement, they are not binding upon the employee. They may however form the basis of binding directions and affect the performance of the employment relationship.

[42] Certainly matters contained in policy manuals which are fairly and reasonably promulgated, can form the basis of lawful and reasonable instructions and govern the practices of the workplace. They can also be determinative of the actions taken by the employer if those actions are inconsistent with the promulgated policy. That does not however automatically raise them to the status of contractual terms, in the absence of agreement expressed or implied or by incorporation of the policies into the employment agreement.

[48] I do not accept this submission. I am not persuaded that the findings made by the Court in *Cuttriss* extend to a blanket requirement for express reference in the IEA to a particular policy before that policy can become a term of the IEA in a situation such as this where a “company policy” clause is incorporated into an IEA.

[49] I am fortified in this view by the findings of the Court in *Porteous v Chief Executive of the Department of Building and Housing*.⁶ In that case the Court found that, even though a “Change Management Protocol” was not mentioned in the IEA it was incorporated into the employment agreement by virtue of Clause 19 of the IEA. The Court stated:⁷

The ordinary meaning of the words used [in Clause 19] includes documents which existed when the employment agreement was concluded as well as those which subsequently came into effect.

⁵ [2007] ERNZ 233.

⁶ [2010] NZEmpC 67.

⁷ *Porteous v Chief Executive of the Department of Building and Housing*, at note 6, at [46].

[50] Mr Potgieter also submitted that the SC Structure Document was not a policy. As such, it was not, by the Company Policies provision in the IEA, a part of the terms and conditions of the IEA. I also do not accept this position.

[51] The Company Policies provision in the IEA provides that Intent has various policies “which apply to the Employee’s employment and form part of the terms and conditions of employment”. The term “policy” is not defined. However, I am satisfied it should be given its ordinary and natural meaning. Namely, “a course or principle of action adopted or proposed by a ... business, individual etc.”⁸

[52] The evidence was:

- a. Intent adopted the SC Structure Document as a means of calculating its employees “relative contributions” to sales.
- b. Intent published the SC Structure Document on its intranet and referred to its contents in its induction manual. This manual provided a statement that employees “will be subject to the full set of policies and guidelines as outlined in this operations manual”.
- c. The SC Structure Document was used by Intent to calculate all sales commissions payable to its employees.

[53] I find the SC Structure Document was a policy and was therefore within the scope of the Company Policies Clause in the first schedule.

What effect does the SC Structure Document have on Clause 4(b)?

[54] The SC Structure Document is similar to Clause 4(b) in that they both provide for payment of sales commission up to a maximum of 20%. 10% for the initial sales lead/opportunity and a combined total of 10% for proposal development, client negotiation, contract formulation and the completion of the sales process. In that regard they are consistent and can operate alongside one another.

[55] The key difference is that the SC Structure Document details situations when commissions will apply and when deductions are to be made before commission is paid. The IEA is silent in that regard.

⁸ NZ Oxford Dictionary.

[56] The SC Structure Document, version 11.0 dated July 2015, included a flowchart explaining how sales commission was calculated in various situations. For example, where a potential client contacted Intent unprompted, where Intent made a cold call to a new non-current client, where Intent on-sold additional work to the same client and where referrals came from existing/past clients. Beneath the flowchart it stated:

Commissions are paid against billable revenue, typically time (not expenses such as disbursements, material, IP, non exclusive sub-contractors)

1. For all the jobs, there is a Door Opener(s), a Proposer(s) and a Closer(s). The proposer is eligible for 5%. This is the person(s) who follow up and develop the offering. The closer(s) help get the sale. In many cases these are intertwined. Those involved in the selling process agree the split of the commission structure.
2. INTENT People who are paid for non billed days are only eligible for commissions at half rate (i.e door opener – 5%; Proposer – 2.5%, Closer – 2.5%). The remaining commission go to INTENT
3. It is an expectation that all marketing/travel expenses are borne by the commission beneficiaries where INTENT pays for marketing expenses, by prior approval only, INTENT will become the door opener with consultants involved sharing the proposer/closer amounts
4. Sales commission are paid against the earning components (not expenses) and are based on the premise that expected revenues are received such that actual costs incurred and INTENT overhead (25%) are fully recovered. In the event that a job makes a loss, this loss is firstly recovered from Sales commissions at the discretion of the Directors following appropriate discussions.

[57] Two subsequent versions of the SC Structure Document were issued during Mr Potgieter's employment. The first in October 2016 made only minor changes. The second, issued in March 2017, changed clause 3 to read:

3. It is an expectation that all marketing/travel expenses are borne by the commission beneficiaries. Where INTENT pays for marketing expenses, by prior approval only, INTENT shares equally with the commission beneficiary(ies) the commissions which the beneficiary(ies) is/are entitled to claim.

[58] I am satisfied, on balance that a reasonable and properly informed person, having regard to the relevant background, would conclude that the parties intended Clause 4(b) and the Commission Structure Policy to operate together.

[59] I am fortified in this finding by the following:

- a. Clause 4(b) provides that a *maximum* of 20% of revenue was payable to Mr Potgieter for his *relative contribution* to successful sales. While the proportion attributable for certain aspects of the sales process is provided, no process for reaching a percentage based on relative contribution is provided. The SC Structure Document provides that process.
- b. Other terms in the IEA. Clause 6 of the Third Schedule to Mr Potgieter's IEA expressly provides that the "payment of the Sales component of the Bonus Entitlements survives this agreement in accordance with INTENT Group Limited published Sales Commission Structure; currently v11.0 July 2015". It would be inconsistent for the SC Structure Document to be inapplicable during Mr Potgieter's employment and yet applicable after termination by reason of this specific reference to it.
- c. The parties' post-contractual conduct. The subsequent conduct of the parties may also be an aid to interpretation if it "tends to establish a fact or circumstance capable of demonstrating objectively what meaning both parties intended their words to bear."⁹ Following the execution of the IEA the parties conducted themselves in a manner consistent with their shared understanding that Clause 4(b) was to be read in conjunction with the Sales Commission Policy.
 - i. Mr Potgieter was provided with Intent's Operations Manual on 7 April 2016 during his induction. On 8 April 2016 Mr Potgieter reviewed the Manual and made various notations including to Clause 8.1.7. In answer to questions from the Authority he said "these marks or ticks show that I read and noted the particular item".
 - ii. Clause 8.1.7 provided:

Sales Commissions may be paid to Consultants and this will be determined at the establishment of the Job by the job manager in discussion with the consultants involved. There are a number of guiding principles.

No one owns a client. An opportunity or engagement may be owned by one or more individuals but typically is owned by the individual who first logs it as an opportunity at the INTENT Sales Meeting and via the Highrise Deals tracking. The principles of the

⁹ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; at [30] onwards.

commission structure are to encourage and reward relationship development and reward ongoing involvement.

Sales Commission is generally calculated as 20% of the consultant time fee charged to the client (sell).

The sales commission is paid to those who sold the job in the following proportions:

- 10% goes to whoever introduced the client to the company, i.e. “the door opener”,
- 5% goes to those who developed the proposal, and
- 5% goes to whoever closed the deal.

The exact proportion of sales commission payable to individuals may be a matter of negotiation bearing in mind the need for fairness and equity and the company value of Generosity.

Consultants should be asked if they want to (and are given the opportunity to) cover the cost of any marketing expenses themselves in the first instance. If INTENT is required to cover the cost of the marketing to a client, then the available commissions for the job won are less than would otherwise be calculated.

Applicable commissions differ on the basis of source of the job (onsell vs referral vs cold/new). Refer to 2014 Commissions Structure flowchart in Sharepoint/INTENT Operations/INTENT Operations Manual for further detail on commission guidelines.

- iii. Mr Potgieter subsequently met with Intent on 11 April where changes were made to the IEA. He did not raise any concern about the calculation of Sales Commission as recorded in Clause 8.1.7 of the Manual.
- iv. Thereafter Mr Potgieter had access to the SC Structure Document via Intent’s intranet system, was aware that a copy of the Policy was on the office wall behind Ms Levick’s desk and, in May 2017 at the time he started becoming entitled to receive sales entitlements, he was provided with a hard copy of the policy. It was also reiterated to him by Mr Walsh in May 2017 that the SC Structure Document was being used by Intent to calculate his entitlements.
- v. Mr Potgieter did not raise any concern about Intent using the SC Structure Document to calculate his entitlements during his employment or indeed for a period of some months following his

resignation. Instead he accepted that it applied to him as illustrated by his email to Mr Walsh on 28 May 2017 where he claimed part of the sales commission for a previous job undertaken for Client B based on the SC Structure Document.

I am having a look at the commission flow-chart as we discussed and now realise that my contribution to [Client B] has not been discussed. This is more of a discussion issue but I am putting my understanding of the background as you probably wish to discuss this with Geerten:

....

Based on our discussion of last week and looking at the commission flow chart, I believe I also played a similar role as door opener and in the original [Client B] sale process, as you and Geerten have done in [Client D].

Finding on Issue 1

[60] I find Mr Potgieter was entitled to be paid sales commissions under the Third Schedule, Clause 4(b) of his IEA calculated on the basis set out in the SC Structure Document.

Issue Two: Did Intent breach Clause 4(b) of the IEA? If so, what amount is owing to Mr Potgieter?

[61] To answer this question I must first assess what Mr Potgieter's entitlements were under the IEA.

Initial 10% - Door Opener

Client D

[62] The SC Structure Document provides that where a cold call is made to a non-current client then the consultant who is in touch with the client and following up becomes the "Door Opener". The Door Opener is entitled to receive 10% of the billable revenue generated by Intent excluding expenses and GST.

[63] Client D was a non-current client of Intent. Mr Potgieter approached this client for Intent. In doing so, I am satisfied that he had assistance from Mr Walsh and Geerten Lengkeek, another director of Intent. I am fortified in this finding by Mr Potgieter's acknowledgement in his email to Mr Walsh of 28 May 2017. The 10% needs to be split.

[64] Doing the best that I can in the circumstances, and with the information provided by the parties as to the work undertaken by each consultant I find Mr Potgieter's contribution entitled him to receive 9% of the initial 10% split.

Client B

[65] Under the SC Structure Document version 12.0 that was in force at the time, where Intent "on-sold" additional work to an existing client within 2 years of the last project, the original door opener received the 10% initial commission.

[66] The evidence was that the project secured in 2016 with Client B was an on-sell of previous jobs that Mr Walsh and Mr Lengkeek had completed for Client B in 2013 and 2014. As such, Mr Walsh and Mr Lengkeek were entitled to the initial 10% "door opener" sales commission. Mr Potgieter was not entitled to receive any portion of this.

Remaining 10% - Proposer and Closer

[67] The remaining 10% was to be divided equally between the Proposer and the Closer.

Client D

[68] In terms of Proposer, I am satisfied Mr Potgieter undertook the majority of the work, however Mr Walsh and Mr Lengkeek assisted him through this process. Mr Potgieter's contribution entitled him to receive 3% of the initial split, and Mr Walsh and Mr Lengkeek were each entitled to 1%, after any applicable deductions.

[69] In terms of "Closer", the uncontested evidence was that the proposal provided for a 3 year contract with Client D. No contract was signed however Intent did start working for Client D in May 2017 and continued to work and invoice this client until July 2017. In those circumstances I find the deal was closed. I am satisfied Mr Potgieter undertook the majority of the work in closing the deal, however Mr Walsh and Mr Lengkeek assisted him through this process. Mr Potgieter's contribution entitled him to receive 3% of the initial split, and Mr Walsh and Mr Lengkeek were each entitled to 1%, after any applicable deductions.

Client B

[70] Mr Potgieter did not contribute to this project after the initial opening.

Was Intent entitled to make any deductions?

Non-billed days

[71] Clause 2 of the SC Structure Document provides for a half-rate deduction from Mr Potgieter's sales commission because he was paid a salary for non-billed days. This results in a reduction in the sales commission payable in relation to Client D (15%) to 7.5%

Marketing/travel expenses

[72] Clause 3 of the SC Structure Document provides for a further equal share deduction of the remaining commission where Intent has incurred marketing and travel expenses *and* it has obtained Mr Potgieter's prior approval prior to incurring these costs. I consider any marketing/travel expenses must directly relate to the project pursuant to which commission is being calculated.

[73] While there is evidence that Intent incurred marketing expenses there is no evidence that this was specifically for Client D. It is more likely than not that the marketing material and the videos produced by Intent were for general marketing purposes to all of Mr Potgieter's clients. Even if I am wrong, there is no evidence that Intent obtained Mr Potgieter's approval before incurring these costs. I therefore order no reduction for the sales commission payable in relation to Client D under this head.

[74] There is evidence that Intent paid travel expenses for Mr Potgieter that was associated with Client B but not Client D. I therefore order no reduction for the sales commission payable under this head.

Lumus Fees

[75] The parties agree that prior to the calculation of commission Lumus' invoices are to be deducted from the revenue billed to Client D.

Finding on Issue Two

[76] I have found that Mr Potgieter was entitled to payment of commission on the Client D project based on 7.5% of its billable revenue. Intent paid him 4%. It has therefore breached the IEA.

[77] Intent is ordered to pay Mr Potgieter a sum representing 3.5% of the revenue billed on the Client D project up to the date his employment ended excluding the month of September 2017.

[78] For the avoidance of doubt, before calculating the commission payable to Mr Potgieter on the billed revenue, Intent must deduct from the billed revenue any GST component, expenses and any amounts invoiced by Lumus to Client D up to the date Mr Potgieter's employment ended.

[79] Payment of the foregoing amounts must be paid to Mr Potgieter within 28 days. If the parties have any difficulty calculating the amount due then the matter is to be referred back to the Authority for determination.

Issue Three: What was the agreement between the parties in terms of payment of commission to Mr Potgieter after termination of his employment i.e. pursuant to the Third Schedule, Clause 6 of the IEA?

[80] The Third Schedule, Clause 6 provides:

payment of the Sales component of the Bonus Entitlements survives this agreement in accordance with INTENT Group Limited published Sales Commission Structure; currently v11.0 July 2015.

[81] "Survives" is not defined by the IEA but, in the context of Clause 6, I am satisfied it means that the Sales Component of any Bonus entitlements that Mr Potgieter had obtained under Clause 4 continues to exist following termination of the IEA in accordance with the SC Structure document.

[82] The meaning I have applied:

- a. Accords with the natural and ordinary meaning of the word. The New Zealand Oxford Dictionary defines "survives" as "continue to live or exist; be still alive or existent".

- b. Is consistent with the terms of the IEA. Nothing in the IEA suggests that “survives” should be read in any way other than its natural or ordinary meaning.
- c. Is consistent with the intentions of the parties.
 - i. Mr Potgieter initially proposed that Clause 6 should read (emphasis added):

The payment of the Sales component of the Bonus Entitlements survives this agreement *up to the completion of those respective engagement/s.*
 - ii. Mr Walsh deleted the words “up to the completion of those respective engagement/s” and added the words “in accordance with INTENT Group Limited published Sales Commission Structure; currently v11.0 July 2015”. No change was made to the survival of the Bonus Entitlement just the manner of calculation.
- d. Is consistent with the actions of the parties following execution of the IEA. Mr Walsh, in his 14 June 2017 email, stated that "the original agreement had sales commissions continuing". This statement was made at a time when Mr Walsh believed the IEA had ended and the parties had entered into an independent contractor agreement.
- e. In answer to questions from the Authority, Mr Walsh confirmed that it was the parties’ intention that Mr Potgieter would become an independent contractor as soon as this was allowed by Immigration NZ. He said Clause 6 was put into the IEA, *in part*, to cover that situation and the addition of the words “in accordance with INTENT Group Limited published Sales Commission Structure; currently v11.0 July 2015” was to ensure any ongoing entitlement was calculated in accordance with the SC Structure document.

Finding on Issue Three

[83] Mr Potgieter’s entitlements under the Third Schedule, Clause 4(b) continue to exist following the termination of the IEA in accordance with the SC Structure Document.

Issue Four: Did Intent breach the Third Schedule, Clause 6 of the IEA? If so, what amount is owing to Mr Potgieter?

[84] Intent continued to invoice Client D following the termination of Mr Potgieter's employment. Mr Potgieter has not received his entitlements to sales commission in relation to this project. For the reasons previously addressed, Mr Potgieter is entitled to payment of commission on the Client D project based on 7.5% of its billable revenue.

Finding on Issue Four

[85] Intent breached clause 6 of the Third Schedule to Mr Potgieter's IEA.

[86] Intent is ordered to pay Mr Potgieter a sum representing 7.5% of the revenue billed on the Client D project from the date his employment ended up to the date the contract with Client D was terminated, namely 23 July 2018.

[87] For the avoidance of doubt, before calculating the commission payable to Mr Potgieter on the billed revenue, Intent must deduct from the billed revenue any GST component, expenses and any amounts invoiced by Lumus to Client D for work performed on the Client D project up to 23 July 2018.

[88] Payment of the foregoing amounts must be paid to Mr Potgieter within 28 days. If the parties have any difficulty calculating the amount due then the matter is to be referred back to the Authority for determination.

Issue Five: Rectification of Clause 6?

[89] Rectification is an equitable doctrine that permits the Authority, in appropriate circumstances, to alter the terms of a written document to accord with the intentions of the parties executing it. It is an available remedy to the Authority by virtue of 162 of the Act.

[90] The Court in *Goodall v Department of Corrections* described rectification as:¹⁰

...an equitable remedy, preserved by the Contractual Mistakes Act 1977, available where an agreement has not been recorded in a way that accurately reflects the intentions of the parties. The party seeking rectification must show that there was a common intention between the parties prior to the

¹⁰ [2001] ERNZ 688 at [37].

contract being entered into and that the terms of the contract did not accurately reflect that mutual intention.

[91] The evidential onus is on the party seeking rectification.¹¹

Analysis

[92] In the present case I am satisfied that Mr Potgieter has not discharged this onus.

[93] Based on the evidence that I heard and viewed, there was a common intention between the parties that Mr Potgieter's sales commissions would survive the termination of the Agreement. However, on balance, there was no common intention for this to continue to the completion of the respective client engagements without recourse to the SC Structure document.

[94] I accept that Mr Street told Mr Potgieter, prior to the parties meeting on 7 April 2017, that Mr Walsh was unhappy with the wording in the final paragraph of Schedule 3 and he wished to change it. I accept Mr Street then organised for the parties to meet on 7 April 2016 to go through the changes and Intent's induction manual. While the parties did sign the IEA that day, the expectation of Intent going into the meeting was that Mr Potgieter would have until close of the following day to review and sign the agreement.

[95] Prior to the parties signing the IEA on 7 April Mr Walsh intentionally deleted the words "up to the completion of those respective engagement/s" from Clause 6 and added the words "in accordance with INTENT Group Limited published Sales Commission Structure; currently v11.0 July 2015". I accept this was conveyed to Mr Potgieter prior to him signing the IEA.

[96] Even if the conclusion I have reached is wrong, I would not have granted rectification on the grounds that there has been excessive delay in Mr Potgieter seeking this remedy. On Mr Potgieter's own evidence he obtained a hard copy of the SC Structure document in May 2017. He was aware from this time that Intent was calculating his commission based on this policy. No explanation for his delay in raising this issue has been provided.

¹¹ *Barber v Barber* [1987] 1 NZLR 426 (CA).

Finding on Issue Five

[97] Mr Potgieter's application for rectification is declined.

Issue Six: Was Mr Potgieter overpaid wages for the month of September 2017? If so, should the overpayment be repaid?

The Claim

[98] Intent claimed Mr Potgieter was overpaid wages in the sum of \$2,115.24. It pleaded that, through the examination of its payment records, it had discovered that it had mistakenly paid Mr Potgieter a sum of \$12,115.24 for the month of September 2017 being made up of his monthly salary of \$10,000 and part of his bonus entitlements for the Client D project under clause 4(b) amounting to \$2,115.24.

The Law

[99] The primary ground for recovery of mistaken overpayments is restitution. The leading case on restitution in the context of mistaken overpayments by an employer to an employee is the Employment Court decision of *Foai v Air New Zealand Ltd.*¹² In that case the Court cited the New Zealand Court of Appeal's approach to restitution:¹³

The courts have held that a claimant must demonstrate three things in order to make out a cause of action in unjust enrichment: that the defendant has been enriched, that this enrichment was gained at the claimant's expense, and that the defendant's enrichment at the claimant's expense was unjust. If these three requirements are all satisfied, then the further question arises, whether there are any defences to the claim, and if there are not, then the court must decide what remedy should be awarded. However, there is an additional consideration that the court must also bear in mind, namely that some overriding legal principle [may] justify the defendant's enrichment and thereby nullify the claimant's right to restitution.

[100] The Court also cited the High Court of Australia's approach:¹⁴

... In summary:

recovery depends upon enrichment of the defendant by reason of one or more recognised classes of 'qualifying or vitiating' factors;

the category of case must involve a qualifying or vitiating factor such as mistake, duress, illegality or failure of consideration, by reason of which the enrichment of the defendant is treated by the law as unjust;

¹² [2012] NZEmpC 57.

¹³ Citing *Commissioner of Inland Revenue v Stiassny* [2012] NZCA 93 at [92].

¹⁴ Citing *Equuscorp Pty Ltd v Haxton* [2012] HCA 7 at [30].

unjust enrichment so identified gives rise to a prima facie obligation to make restitution;

the prima facie liability can be displaced by circumstances which the law recognises would make an order for restitution unjust.

[101] In *Foai* the Court held that a mistake was a “commonly recognised” qualifying or vitiating factor that could lead to a need for restitution. Therefore, if the employer could make out a mistake it could claim restitution.

[102] The onus is on Intent to prove a mistake. The Court cited the Privy Council’s approach to this burden:¹⁵

To succeed in an action to recover money on that ground, [a mistake of fact], the plaintiff has to identify a payment by him to the defendant, a specific fact as to which the plaintiff was mistaken in making the payment, and a causal relationship between that mistake of fact and the payment of the money.

[103] The Court in *Foai* also addressed defences to a claim of restitution. These include the common law defence of change of position and the statutory defence of alteration of position under s 94B of the Judicature Act 1908. Section 94 provides:

Relief, whether under section 94A or in equity or otherwise, in respect of any payment made under mistake, whether of law or of fact, shall be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be.

Analysis

[104] Under Clause 2 of the Third Schedule of the IEA, Mr Potgieter was entitled to be paid the higher of either his Salary, as per the First Schedule, or his bonus entitlements set out in the Third Schedule. The bonus entitlements set out in the Third Schedule were 45% of revenue billed and paid for Mr Potgieter’s clients and the sales commission set out in Clause 4(b).

[105] I am satisfied that Intent mistakenly paid Mr Potgieter both his monthly salary and part of his sales commission under Clause 4(b). This mistake resulted in Mr Potgieter being enriched at Intent’s expense and is unjust. However, the amount of the overpayment claimed by Intent is incorrect.

¹⁵ Citing *Dextra Bank & Trust Company Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193, (PC Jam) at [62].

[106] Intent's claim relies on the assumption that Mr Potgieter was only entitled to receive 4% sales commission on the Client D project. I have already found that Mr Potgieter was entitled to receive 7.5% from the Client D project. Using the figures provided by Intent, 7.5% of the billed revenue to Client D during September (\$52,881) totals \$3,966.07.

[107] Adding the sum of \$3,966.07 to Mr Potgieter's entitlement of 45% of revenue billed and paid (\$7,614) I reach a figure of \$11,580.07. Deducting this sum from the amount paid to Mr Potgieter for the month of September 2017 (\$12,115.24) I find Mr Potgieter was overpaid by \$535.17.

[108] Mr Potgieter did not plead change of position or the statutory defence of alteration of position under s 94 of the Judicature Act. Instead he pleaded monies were owed to him by Intent for "further bonus entitlements under the employment agreement...which needs to be taken into account in calculation of his bonus entitlement under the employment agreement." I have taken all of his commission entitlements into account for the month of September 2017 in calculating the amount that was overpaid to him.

Finding on Issue Six

[109] I find Mr Potgieter was overpaid the sum of \$535.17. This sum is to be deducted off the amounts I have ordered Intent to pay in this determination.

Issue Seven: Did Mr Potgieter breach the terms of his IEA? If so, should a penalty and/or damages be imposed under s 134(1) of the Act?

[110] Intent claims that Mr Potgieter breached the terms of his IEA by holding himself out to be an independent contractor during the period from on or around 4 November 2016 to 11 July 2017. It alleges these actions were a breach of his duty of fidelity to Intent and caused Intent to alter its legal position resulting in losses.

[111] Mr Potgieter denies this claim. While acknowledging he offered to become an independent contractor, and the parties negotiated for several months in an attempt to finalise an agreement, his offer was never accepted and he did not become an independent contractor. He denies breaching his duty of fidelity.

[112] For the reasons outlined below I accept the position advanced by Mr Potgieter.

No breach of fidelity

[113] The duty of fidelity and loyalty that an employee owes to an employer is broken "... when there is conduct which undermines the relationship of trust and confidence which must exist between employer and employee".¹⁶

[114] For the reasons that follow I am satisfied that this duty was not breached:

Parties were aware Mr Potgieter was not an independent contractor

- a. Firstly, on balance, I find at all material times the parties were aware Mr Potgieter was not an independent contractor. The parties' intention was that Mr Potgieter would remain an employee until such time as they had reached agreement on the commission that would be payable to him under an independent contractor agreement. I am fortified in that finding by the evidence provided by Mr Potgieter, Mr Walsh and Ms Levick.
- b. Mr Potgieter said the parties agreed in December 2016 that he would continue working as an employee, with an increased salary, and then negotiate in good faith to formulate an independent contractor agreement in the following months.
- c. Mr Walsh accepted during questioning from the Authority that he didn't sign the independent contractor's agreement put forward by Mr Potgieter because it omitted commission. He also accepted that Intent continued to pay Mr Potgieter as an employee, including deducting PAYE, accruing holiday pay, and paying for his expenses, because "we didn't have an agreement that he was a contractor". In an email from Mr Walsh to Ms Levick dated 6 December 2016, immediately after his discussed with Mr Potgieter, he advised her to increase Mr Potgieter's salary following what he described as a "review".
- d. Ms Levick said at all times Mr Potgieter was coded as an employee in Intent's accounting systems and she filled out IRD employee deduction forms on the basis of her understanding that he was an employee. She confirmed Intent did not pay GST on any amounts paid to Mr Potgieter as

¹⁶ *Big Save Furniture v Bridge* [1994] 2 ERNZ 507, at 517 referring to the earlier dicta of the Court of Appeal given in *Tisco v Communication and Energy Workers' Union* [1993] 2 ERNZ 779, at 782.

required in the draft independent contractor agreement provided by Mr Potgieter.

e. By letter dated 21 July 2017 Intent confirmed:

5. In your email you have asserted that you remain an employee of Intent Group Limited (Intent) under your employment agreement dated 27 April 2016, despite your offer to become an Independent contractor through your company Lumus Limited (Lumus). We therefore accept that your employment continues under the terms and conditions of your employment agreement (Employment Agreement).
6. You also assert that the Independent Contractor agreement with Lumus (Independent Contract) that you offered was not accepted by Intent at the time the offer was made by you, and the contract subsequently expired on 31 May 2017 in any event. We also accept that position and that you consequently have no rights or entitlements under the Independent Contract.
7. As a consequence of the above, the relationship between yourself and Intent is a normal employer / employee relationship and any negotiations regarding your remuneration are to be conducted on that basis.

Intent expressly or impliedly consented to Mr Potgieter approaching third parties to elicit work on behalf of Lumus Limited and Intent

- f. I find, on balance, that the parties expressly or impliedly agreed to Mr Potgieter approaching third parties for the purpose of marketing Lumus Limited's intellectual property program where that program was to be used by Intent/Mr Potgieter when carrying out consulting work for these entities.
- g. Consistent with this agreement, Intent approved contact by Mr Potgieter with third parties on behalf of Lumus and Intent and joined into those arrangements. For example:
 - i. Lumus engaged a software development company to develop its software. Mr Walsh acknowledged he had attended meetings with this company and Mr Potgieter. Intent was a party, with Lumus, to a tri-partite non-disclosure agreement with the software company. This agreement provided:

The parties are engaging regarding the collaborative development, marketing, implementation and provision of software and/or consulting services.

- ii. Intent was aware that Lumus was supplying intellectual property to Client D that was used in the provision of services by Intent. It agreed any invoices issued by Lumus to Client D would be deducted off the revenue billed before calculation of any commission to Mr Potgieter.
- iii. Mr Potgieter met with representatives from two other companies. These meetings were held at Intent's offices with Intent representatives present. Mr Potgieter provided his Intent business card.

No evidence that Mr Potgieter represented he was an independent contractor

- h. For completeness I did consider, but do not accept, Intent's submission that Mr Potgieter held himself out as an independent contractor. The evidence was that he said Lumus was working in partnership with Intent. On the facts set out above, this appears correct. The companies were working together for the benefit of each other. That relationship did not displace the employment relationship between Mr Potgieter and Intent.

Finding on Issue Seven

[115] I find Mr Potgieter did not breach his IEA.

Issue Eight: Did Mr Potgieter breach s 4 of the Act? If so, should a penalty be imposed?

[116] Section 4 of the Act requires parties to an employment relationship to act in good faith. This includes not doing anything, directly or indirectly, to mislead or deceive each other.

[117] For the reasons already addressed under Issue Seven I find Mr Potgieter did not breach s 4 of the Act. At all material times Intent was aware he was an employee and that it had not concluded an independent contractor agreement. Notwithstanding this knowledge it was content to allow him to contact third parties on behalf of itself

and Lumus to elicit work. Mr Potgieter did not do anything to directly or indirectly mislead Intent.

Finding on Issue Eight

[118] I find Mr Potgieter did not breach s 4 of the Act.

Issue Nine: Costs

[119] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves especially in light of the mixed success that they have each had in this investigation.

[120] If they are not able to do so, and an Authority determination on costs is required, then they may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the other party will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Outcome

[121] The outcome of the Authority's investigation is:

- a. During his employment Mr Potgieter was entitled to be paid sales commissions under the Third Schedule, Clause 4(b) of his IEA calculated on the basis set out in the SC Structure Document.
- b. Mr Potgieter's entitlements under the Third Schedule, Clause 4(b) continue to exist following the termination of the IEA in accordance with the SC Structure Document.
- c. Intent breached the Third Schedule of the IEA by:
 - i. Paying Mr Potgieter commission under the Third Schedule, of his IEA at the rate of 4% instead of 7.5%; and
 - ii. Not paying him his sales commission entitlements following the termination of the IEA in accordance with the SC Structure Document.

- d. Intent is ordered to pay Mr Potgieter the following sums within 28 days of the date of this determination.
 - i. A sum representing 3.5% of the revenue billed on the Client D project up to the date Mr Potgieter's employment with Intent ended excluding the month of September 2017; and
 - ii. A sum representing 7.5% of the revenue billed on the Client D project from the date Mr Potgieter's employment with Intent ended to 23 July 2018.
- e. If the parties have any difficulty calculating the amount to be paid by Intent to Mr Potgieter then the matter is to be referred back to the Authority for determination. For the avoidance of doubt, before calculating the commission payable to Mr Potgieter on the billed revenue, Intent must deduct from the billed revenue any GST component, expenses and any amounts invoiced by Lumus Limited to Client D for work performed on the Client D project up to 23 July 2018.
- f. Mr Potgieter's application for rectification is declined.
- g. Mr Potgieter was overpaid the sum of \$535.17. This sum is to be deducted from the amounts I have ordered Intent to pay in this determination.
- h. Mr Potgieter did not breach his IEA.
- i. Mr Potgieter did not breach s 4 of the Act.
- j. Costs are reserved.

Jenni-Maree Trotman
Member of the Employment Relations Authority