

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 351  
3034111

BETWEEN	STEVE WEBB Applicant
AND	TRIBE TECHNOLOGY LIMITED FORMERLY KNOWN AS VO2 SOUTH LIMITED Respondent

Member of Authority:	Trish MacKinnon
Representatives:	John McDowell, counsel for the Applicant Libby Brown, counsel for the Respondent
Investigation Meeting:	4 March 2021 at Napier
Submissions and further Information Received:	11 March 2021 from the Applicant 2 June 2022 from the Respondent
Date of Determination:	28 July 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Steve Webb brings wage arrears claims against his former employer, Tribe Technology Limited which, at the time of his employment with it, was known as VO2 South Limited. Mr Webb claims he was not paid commissions and/or quarterly bonuses to which he was entitled. He withdrew a claim to have been short-paid wages during his employment after the investigation meeting.

[2] Tribe Technology Limited (“TTL” or “the company”) denies Mr Webb’s wage claims and says he was paid all monies due to him.

**Relevant facts**

[3] Mr Webb commenced employment as a Client Manager with TTL, which was at the time known as CodeBlue Hawkes Bay Ltd, in September 2012. His remuneration was by way of a salary plus commission. A schedule attached to Mr Webb's individual employment agreement (IEA) contained the details of the commission incentive scheme.

[4] TTL's letter of offer to Mr Webb of 12 August 2012 enclosed the IEA and advised that its offer included a guaranteed bonus payment of \$2,000 per month for the first three months while he built up his commission earnings.

[5] TTL is a Hastings-based technology company that provides IT, digital consultancy and professional technology services. Its Chief Executive Officer is Rohan Bowyer, who is also a Director of the company.

[6] On 1 May 2015 Mr Webb received written advice of a salary increase and of a revised commission incentive scheme that would come effect for him from that date.

[7] Two years later, following a refinement of the company's business structure, Mr Webb accepted a new position as Digital Consultant, and signed a new IEA, in July 2017. Attached to the IEA was a new Schedule 2 setting out the Key Objectives (KPIs) for the next 12 months.

[8] In May 2018, after a restructuring of the digital consultancy part of TTL's business, Mr Webb's position was disestablished. He was advised there were two available roles within the company he could apply for. Mr Webb decided not to apply for either and was made redundant with effect from 6 July 2018.

[9] On 20 June 2018 Mr Webb queried when he would be paid a quarterly bonus he believed he should have received for the quarter ending April 2018. Shawn Hill, the Head of Digital Consulting, advised him that, as the KPIs had not been met, no bonuses were payable. Mr Webb was unhappy with that response and pursued the matter, lodging a statement of problem in the Authority on 3 August 2018. Three amended versions of the document were lodged in 2018, 2019 and 2020.

[10] The parties attended mediation but were unable to resolve the matter.

### **The Authority's investigation**

[11] Mr Webb had initially claimed personal grievances in addition to wage arrears. His first representative acknowledged in the course of a case management conference with the Authority in November 2018 that no personal grievance had been raised within the 90 day statutory period.<sup>1</sup> His current representative made the same acknowledgement in September 2019 in the course of a further case management conference with Authority. Mr Webb did not seek leave to raise a personal grievance outside the 90 day period.

[12] At the commencement of the Authority's hearing of Mr Webb's claims, Mr McDowell told the Authority one personal grievance for unjustifiable action by the employer that disadvantaged Mr Webb had been raised within time. He properly acknowledged, however, that it related to an event that occurred after Mr Webb's employment had ended, and that it therefore could not be advanced.

[13] In the course of the investigation meeting, I heard evidence from Mr Webb on his own behalf and Mr Bowyer, Mr Hill and Mr Marc Doran for TTL. I have not set out all the evidence heard or submissions received, but have instead, in accordance with s 174E of the Act, set out the material facts and made findings on issues relevant to the determination of Mr Webb's claims. in relation to the monies he says he is owed by TTL.

[14] This determination has been issued outside the timeframe at s 174C(3)(b) of the Employment Relations Act 2000 (the Act) in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

### **Issues**

[15] The issues for the Authority to determine are:

- (a) whether TTL paid all commission and/or bonus payments owing to Mr Webb in respect of his employment; and, if it did not,
- (b) what monies remain outstanding.

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<sup>1</sup> Section 114 of the Employment Relations Act 2000 refers.

## **The claims**

[16] Mr Webb's claims in relation to bonuses and commissions were quantified in the amended statement of problem he filed on 14 July 2020. By his calculation he was owed \$61,515, comprising \$51,515 in commissions and \$10,000 in unpaid bonuses. At the hearing into Mr Webb's claims he amended the latter amount to \$5,000, acknowledging he had received payment of \$5,000 in bonus payments after the 2017 IEA he entered into with his employer came into effect.

[17] In the course of the Authority's hearing of his claims, Mr Webb produced a document setting out the amounts he believed he was owed in unpaid commissions. He filed a revised version of that document after the investigation meeting after acknowledging the document contained errors. In the revised document, Mr Webb quantified his total claim for unpaid commissions as \$39,050.

### *SLA Sales Commissions*

[18] The first aspect of Mr Webb's claims I will consider is for unpaid commission on Service Level Agreements (SLAs). Mr Webb said he received commission payments for only the first 12 months in respect of clients he signed up for SLAs. He claims he was entitled under his IEA to commission for a further 12 months on the day following expiry of the first 3 year contract.

[19] Mr Bowyer gave evidence that the commission scheme was not fully formed in September 2012 and that Mr Webb was involved in discussions over the scheme's formation until it was finalised in early 2013. As noted above, Mr Webb was guaranteed a bonus of \$2,000 per month for the first three months of his employment to ensure he did not miss out while the details of the commission scheme were being finalised.

[20] Mr Bowyer disagrees with Mr Webb's view regarding his entitlement to commissions from SLAs. Under Mr Webb's IEA, there was no entitlement to commission for more than the first 12 months of a contract. If, after the expiry of the contract, it was renewed at a higher level, Mr Webb would have been entitled to commission on the difference between the original and the new level for 12 months. This was expressed in the schedule as commission being paid

“on increased GM over existing GM”.<sup>2</sup> To Mr Bowyer’s knowledge there had not been such an uplift on any of Mr Webb’s SLA renewals.

[21] Mr Doran’s evidence was that it was clear from Schedule 2 of Mr Webb’s 2012 IEA that the commission he was entitled to receive in respect of SLA sales was based on 12 months. He said all the commissions paid to Mr Webb were agreed and paid on that basis. Mr Webb reviewed the commission worksheets and signed them before they were paid. Mr Webb agreed he had reviewed the worksheets, His evidence was that he normally sent an email to Mr Doran stating that he was accepting his employer’s calculations in good faith that they were correct.

[22] In Mr Doran’s view, Mr Webb had the opportunity to raise any concerns at the time and had, on occasion, done so. He gave an example where both he and Mr Webb had taken a commission issue to Mr Bowyer. Mr Bowyer had accepted their view and agreed to change an element in the calculation of a commission, benefitting Mr Webb. Mr Doran noted that Mr Webb was very proactive where commissions were concerned and he was quick to point out any discrepancies he perceived or instances where he thought he should receive a commission and had not.

[23] After examining the wording of the relevant part of Schedule 2, I am not persuaded by Mr Webb’s claim that he was entitled to ongoing commissions after the first 12 months, except in the circumstances described by Mr Bowyer, i.e., where an SLA renewal was at a higher level. In that case, he would be eligible to receive commission for a 12 month period based on the difference between the existing gross margin and the increased gross margin.

[24] The wording of the schedule clearly links both commission and margin recognition to a 12 month period and gives an example illustrating that. I do not accept the interpretation Mr Webb placed on the commission provisions, after his employment had ended.

[25] I find Mr Webb is not owed unpaid commission in relation to SLA renewals.

#### *Method of commission calculation*

[26] The second aspect of Mr Webb’s claim for unpaid commission arises from his belief that TTL wrongly deducted costs from the revenue recognised as the basis for his commission.

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<sup>2</sup> “GM” is gross margin which was defined, for the purposes of the remuneration plan, as the difference between the selling price and the cost of products and services sold.

The amended spreadsheet document Mr Webb filed after the hearing of his claims contains a column headed "Revenue Recognised", on which he has based his calculations of the commission he believes he should have received. In arriving at the amounts in this column, Mr Webb has taken the sales value of the products and/or services to clients and subtracted his monthly salary. In his view, he is entitled to 20 percent of that amount.

[27] Mr Doran disagrees and notes that Mr Webb did not factor in the direct costs incurred by TTL when arriving at his recalculated commission amounts. Mr Doran refers to the formula in Schedule 2 of the 2012 IEA, which provides that the Gross Margin is defined for the purposes of Mr Webb's remuneration plan as the difference between the selling price and the cost of products and services sold. In Mr Doran's view, Mr Webb's calculations of amounts owing to him are erroneous as they have taken only the selling price into account and excluded the cost of the products and services sold.

[28] I agree with Mr Doran. Schedule 2 of the 2012 IEA provides that Mr Webb's commission was 20 percent of the net margin on sales of products and services. The net margin was defined as gross margin less base salary per month. Gross margin was defined in the schedule, as Mr Doran indicated, as the difference between the selling price and the cost of products and services sold.

[29] It is apparent that Mr Webb disagreed with his employer's calculations of the cost of products and services sold, although it is unclear whether he raised such issues during his employment. His solution has been to exclude those costs from his calculations of what he believes he should have been paid by way of commission.

[30] Where he has recognised labour costs, Mr Webb amended the \$75 per hours set and agreed at the outset of the commission incentive scheme to \$60 per hour. This was on the basis of a report he commissioned from a national accounting services business. The business was given a theoretical situation to comment on and its report contains caveats accordingly. I find there was no basis for Mr Webb to adopt a different labour cost factor in his calculations from the agreed factor used by TTL since the commission scheme came into effect.

[31] I find TTL, in calculating commissions for Mr Webb, applied the formula in Schedule 2 as had been agreed with him. I note that, even if I had found that formula to be defective,

which I do not, I have no jurisdiction to amend it. To do so would entail fixing new terms and conditions of employment which the Authority is specifically prohibited from doing.<sup>3</sup>

[32] I conclude there is no foundation for Mr Webb's claim that his commissions should have been calculated on a basis different from that specified in the schedule to his 2012 employment agreement.

#### *Handover commission*

[33] A further aspect of Mr Webb's claims to unpaid commission relates to a five percent handover commission, provided for in Scheme A. Mr Webb says he did not ever receive this commission. As evidence of his eligibility, he provided an email dated 19 January 2018 from a manager within TTL regarding the reallocation of 25 of his clients to other employees after he had accepted a new role within the company.

[34] TTL denies the entitlement and says Mr Webb was on a different IEA and a different commission/bonus scheme at this time.

[35] Mr Webb's claim cannot succeed. As noted earlier in this determination, he accepted a new role as Digital Consultant in July 2017, and signed a new employment agreement at that time. The new IEA, which came into effect on 31 July 2017, had different remuneration provisions, based on salary plus quarterly bonuses on the achievement of specified KPIs. It did not incorporate a handover commission as his 2012 IEA had done. In agreeing to the 2017 IEA Mr Webb had accepted that it replaced any previous agreements or terms of employment.<sup>4</sup>

[36] Mr Webb has no entitlement to handover commissions.

#### *Bonus payments under 2017 IEA*

[37] The relevant part of the "Remuneration, Expenses & Benefits" clause of the 2017 IEA that Mr Webb signed in July 2017 provided for a "Quarterly individual bonus of \$2.5k based on meeting quarterly KPI's (see Schedule 2)".

[38] Schedule 2 of the 2017 IEA outlined the key objectives for Mr Webb from August 2017 to the end of the financial year. In the letter dated 17 July 2017 from TTL offering the Digital

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<sup>3</sup> Section 161(2)(b) of the Act refers.

<sup>4</sup> In accordance with clause 9.1 of the 2017 IEA.

Consultant's position to Mr Webb, Mr Bowyer referenced discussions regarding the employer underwriting Mr Webb's first two quarterly bonuses to assist with role transition. He would be paid the quarterly bonus regardless of whether or not he met the KPIs for those quarters.

[39] Mr Webb claims he met all of the individual quarterly key objectives in respect of each quarter. He acknowledged in the course of the Authority's investigation meeting that he had received the first two quarterly bonuses for the period from August to September and October to December 2017. He received no bonus for the January to March 2018 quarter, for which the KPI, as expressed in Schedule 2 of the IEA, was to meet 75 percent of his "repeating and bespoke consulting targets". Nor did he receive a bonus payment for the April to June 2018 quarter, for which no KPIs were specified in Schedule 2 of his IEA.

[40] Mr Bowyer's evidence was that neither Mr Webb, nor the Digital Consulting team, achieved the KPI's for the third and fourth quarters. He said Mr Hill had run a workshop for the team in November 2017, which Mr Webb attended. The purpose of the workshop was to discuss and re-evaluate the KPIs.

[41] Both Mr Bowyer and Mr Doran referred to the online systems to which Mr Webb had access to track his progress against applicable KPIs. Mr Doran's evidence was that the Digital Consulting Team set its own targets and team members were able to track their own progress through the online tools. He said Mr Webb had never, during his employment, expressed concern about the KPIs or his understanding of them.

[42] Mr Hill, to whom Mr Webb reported directly after he (Mr Webb) took up the position of Digital Consultant in July 2017, said the Digital Consulting Team KPIs were solidified in late 2017 after the November workshops. The team, including Mr Webb, were very familiar with the KPIs. Mr Hill could not recall Mr Webb raising any queries or concerns about the KPIs until his query about not receiving a bonus shortly before his employment ended.

[43] Mr Hill's evidence was that he had responded to Mr Webb's inquiry that, apart from one matter, which he specified, being achieved, no other KPIs for the two quarters in question had been met and no bonuses were paid to anyone in the Digital Consulting Team.

[44] I prefer the evidence of Mr Hill, Mr Bowyer and Mr Doran over Mr Webb's assertion that he met all his KPIs in those two quarters. Two factors have led me to that preference, the first being Mr Webb's evidence that he was working in a dual role, as both Client Manager and

Digital Consultant, for several months after starting in the new role. That makes it unlikely that he was able to meet all the KPIs of the Digital Consultant role. The second factor, which supports that view, is a letter Mr Webb sent to Mr Hill on 1 June 2018, advising he was still considering, but was unlikely to apply for either of the two available roles. In the letter Mr Webb refers to his “just starting to make some progress” in his role.

[45] For these reasons, I accept the employer’s evidence that Mr Webb did not achieve the KPIs for the final two quarters of his employment with TTL and I decline his claim.

### **Summary**

[46] TTL has paid all commissions and bonuses owing to Mr Webb and his claims fail.

### **Costs**

[47] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination is needed, TTL may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Webb would 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.

[48] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>5</sup>

Trish MacKinnon  
Member of the Employment Relations Authority

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<sup>5</sup> For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).