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Same candidate? Two agencies.

Who gets the fee?

One of the most common problems faced by agencies placing candidates for permanent jobs is the scenario of another agency putting forward the same candidate to the same client for the same or another position. When this happens it is often the agencies who are told by the client to fight it out amongst themselves as if the client had no part to play in the process, when in fact they are the ones whose actions determine who is entitled to the fee.



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The general assumption is that it is the agency that is first to deliver their CV to the client who is entitled to the fee and this has occasionally led to unethical behaviour on the part of some agencies. However the legal position is quite different.

To understand the legal position you have to understand basic contract law of offer and acceptance. A contract is simply the agreement between two parties to do business, but to be a valid contract there are certain essential elements. These are

- An **offer** to do business on certain terms
- **Acceptance** of that offer on those terms or an agreed variation of those terms
- **Consideration** or an exchange of promises where each party gives something and receives something else in return
- An **intention to create a legally binding contract** rather than a mere agreement.

So what does this have to do with introduction fees? Consider the following scenario:

- Agency 1 sends the CV of X to client C with terms of business claiming a 25% fee = Offer 1
- The following day Agency 2 also sends X's CV to client C with terms of business claiming a 20% fee = Offer 2
- Later that day Agency 3 also sends X's CV to client C but they forget to enclose their terms of business = Offer 3

The client C considers all 3 offers and first contacts Agency 3 to ask what their fees are and is told they are 25% of the annual salary. He then contacts Agency 1 and asks if they will reduce their fees below 25% to which the answer is no. Finally he contacts Agency 2 to arrange an interview having decided that their fees were more acceptable than the other two. As a result of the interview the client offers X the position to start work on the 1st August and pays Agency 2 once has X started work.

Can Agency 1 or Agency 3 claim a fee?

Agency 1 claims that they should have the fee because they got the CV in first. However there is no indication that the client accepted their offer and they will have to prove some act of acceptance before they can claim a fee. To create a binding contract acceptance must be clear and unconditional. C tried to bargain the fee down below 25% but there is nothing in his subsequent actions to indicate that having failed he then accepted their offer.



Agency 3 claims that they are entitled to a fee simply because they sent X's CV to the client. They will have difficulty claiming a fee not only because they will have to prove that the client accepted their offer but they will have to show what the terms of that offer were? Since there were no explicit terms of business sent at the offer stage a court would have to establish the terms of any contract with the client and will be reluctant to imply any terms, unless it is clear what the parties intended, or it is necessary to imply a term in order to give business efficacy to the contract i.e. make the contract work.

However this is not the whole story and occasionally a client may arrange the first interview through one agency and the second through another. So in the above scenario if C approaches both 1 and 2 to arrange an interview it seems the client will have accepted both offers and consequently may actually be liable for two fees. Here the solution is less clear because it is standard practice in the recruitment industry, with the exception of search and selection, for fees to only become payable once the candidate has actually started work.

This introduces a further very important element that needs to be proven by the agency claiming a fee and that is

- That the introduction by that agency actually led to the engagement of the candidate.

In the case of *Wallace Hind Associates v Lastolite Ltd* (2000) the Court of Appeal helped to clarify the meaning of an "introduction". The Court stated that in determining whether a firm of recruitment consultants was entitled to its fee for introducing an applicant to an employer it was necessary to consider whether their introduction was the effective cause of the applicant's engagement by the employer.

Wallace Hind Associates ("WHA"), a firm of recruitment consultants were retained by Lastolite Ltd ("L Ltd") to find an "export sales and marketing manager". WHA introduced a number of applicants including Clive Hudson who was offered the position but turned it down. The job was downgraded and filled with a different applicant introduced by WHA who were paid a fee. At a later date, following a reorganisation within L Ltd they retained a different agency to find suitable candidates for a



position as “sales and marketing director”. That agency introduced Clive Hudson who was offered and accepted the position.

WHA claimed that they had introduced Mr Hudson and were therefore entitled to a fee. The trial judge found against WHA on the wording of their contract with L Ltd, which contained the following clauses:

“B WHA will

- (i) use its best endeavours to identify one or more applicants for the position you wish to fill;
- (ii) conduct an initial assessment of an applicant’s suitability according to the criteria you have given;
- (iii) introduce suitable applicants to you.

C L Ltd will

- (i) tell WHA immediately if you engage an applicant;
- (ii) pay the agreed fee on or before the payment date.”

A covering letter with the terms of the agreement made it clear that no fee would be payable if WHA were unsuccessful.

The judge concluded that the agreement did not entitle WHA to a fee because Mr Hudson had not been engaged in the position for which WHA had been retained to find an applicant. If the fee was payable for his engagement in another position then it should have said so. WHA appealed to the Court of Appeal.

The Court noted that WHA’s terms of business did not actually state that a fee would be payable if the applicant introduced was engaged, but merely required L Ltd to notify WHA if an applicant had been engaged.

Although there was an obligation to pay the agreed fee within a certain period of time, the covering letter clearly stated that a fee would not be payable if applicants introduced by WHA were not engaged. This introduced the concept of “effective cause”. Put simply, WHA had to be able to show that it was their introduction of the applicant that led to his engagement by the client.

The Court of Appeal disagreed with the approach of the trial judge in limiting their right to claim a fee to the position for which they were retained. They felt that the commercial value of the service offered by WHA was in placing employees and it did not matter what job description they were given.

However WHA had to establish on the facts that their introduction had led to the engagement and this they had failed to do. Therefore the appeal failed.

The lessons to be learned by the industry are that it is for agencies to educate clients that it is they who must decide which agency they wish to deal with and then to stick with that agency. The reasons why a client may prefer one agency to another are largely irrelevant but they should not feel bound to proceed with the one who got there first.

To successfully claim a fee and bring to an end the practice of fighting over the fee you must

- Send your terms of business with any CV’s
- Inform the client that if they have approached several agencies and received the same CV from more than one, the client must decide who they wish to deal with and inform the agencies concerned whether they accept or reject their ‘offer’
- If the client asks you to arrange the interview clarify with the client that they accept your terms of business and that they have contacted any other agencies to tell them they have chosen to do business with you.



When calculating holiday pay for permanent employees do you include commission as part of a week’s pay?

The recent case of *Evans v Malley Organisation Ltd* dealt with the issue of whether when you calculate holiday pay for an employee you should include the commission received in the calculation or just calculate based on basic pay.

The Court of Appeal decided that whether commission should be included depended on 2 issues:

- 1. Is the employee’s commission linked to hours worked?** In this case the court decided that the payment of commission did not depend on the length of the worker’s working week i.e. it was not linked to the amount of work but the success of the work. In these situations the court said that commission should not be included in the calculation of holiday pay, only basic pay is relevant to the calculation.
- 2. Is the commission linked to an earlier success (i.e. a fee that was obtained months earlier)?** If it was unconnected with the amount of work done in the 12 weeks before employment ended/salary was due then it would not form part of the calculation under the Employment Rights Act 1996.

Where the employee’s commission was directly linked to hours worked, however, holiday pay should be calculated including commission.

In this case the employee was a sales representative who was entitled to commission on contracts that he obtained. The issue has therefore not been tested in the case of recruitment consultants however it seems likely that most will not be entitled to have commission included in the calculation of their holiday pay.