

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Gijs Faber (Applicant)
AND Farmers' Holdings Limited (Respondent)
REPRESENTATIVES Ray Parmenter, Counsel for Applicant
Penny Swarbrick, Counsel for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 20 January 2005
SUBMISSIONS RECEIVED 29 April 2005, 16 May 2005
DATE OF DETERMINATION 16 May 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. This is a case about an alleged breach of good faith. Mr Faber says the respondent's CEO Mr Lowe, deliberately misled him in order to avoid the payment of a bonus to which he says he would otherwise have been entitled. The facts are as follows.
2. Mr Faber commenced employment with the respondent in January 2002 in a senior executive role. In March 2003 the respondent's parent company announced its intention to sell the respondent. It then negotiated with key staff members (including Mr Faber) to increase the period of notice required by their employment agreements to six months. In this way it was assured of retaining them during the critical phase of preparation and negotiation for sale. In consideration for this extended period of notice the respondent agreed to pay a special bonus in the event of a sale or, if no sale was concluded prior, a reduced bonus upon the employment continuing to 1 March 2004. The purchase bonus was for 50% of Mr Faber's annual salary.
3. On September 11 2003 negotiations with the proposed purchaser came to a halt. Mr Faber had already received an offer of employment elsewhere and now he decided to take it. Later that day he gave six months notice of his resignation.
4. Mr Faber told me that if need be his new employer was prepared to wait six months for him to start however its preference was for him to start earlier. Consequently, in his letter of resignation Mr Faber advised that he wanted to negotiate an earlier finish date if possible. If he were to complete his full notice period he would have been eligible, if not for the purchase bonus, then at least for the 1 March 2004 payout. Nonetheless at this stage he was prepared to forfeit this opportunity in order to effect an earlier departure. After giving some

thought to the how long the handover would take and after discussions with his new employer he decided that the end of December 2003 would be a good time to go.

5. Mr Faber did not get an opportunity to put this proposal forward until 8 October 2003 when Mr Lowe met with him to discuss the arrangements for his termination. The two had already spoken of how Mr Faber's role could be handled after he had left and both now agreed that his responsibilities should be split between two individuals in his team. It was anticipated that this proposal would be enthusiastically received by them and also that it would provide for a smooth transition.
6. As for the date of termination, Mr Lowe told me he felt that a few weeks would be sufficient for the handover. As a rule he did not believe in keeping people to their notice period as he believed that once someone resigned, "their mind was elsewhere". He proposed 24 October as a suitable date for Mr Faber to leave.
7. Mr Faber conceded that the handover could be managed in this shortened period. It was agreed that the next step would be for Mr Lowe to speak to the individuals who he hoped would take over from Mr Faber. Subject to their consent an announcement would be made about Mr Faber's departure on 13 October.
8. Meanwhile, on 2 October, Mr Lowe had been told by Mr Coates (managing director of the respondent's parent company) that sale negotiations had resumed. In keeping with Mr Coates's requirement that he keep it in strictest confidence, Mr Lowe had made no mention of this to Mr Faber on or before 8 October.
9. I asked Mr Lowe whether (in light of getting Mr Coates's news) he had considered postponing his discussion with Mr Faber until he knew what was happening with the sale negotiations. He said that he had no involvement in the negotiations and had no way of knowing when or even whether they would bear fruit. Indeed, given the drawn out history of the matter, he tended to the view that there was unlikely to be much progress. In the meantime, he proceeded to manage the business as though there would be no change.
10. On the afternoon of 9 October, Mr Lowe had a telephone conversation with Mr Coates in which he was advised that discussions with the prospective purchaser of the respondent were progressing very quickly. Mr Coates advised that he would be coming to New Zealand to sign a deal on Friday 10 October.
11. This took place as planned. After executing the purchase agreement, Mr Coates visited the respondent's office to brief the executive team about the sale and plans for the future. Because he had resigned, Mr Faber was not invited to that meeting. Instead, Mr Lowe met with him individually later the same afternoon to tell him of the sale. He also advised Mr Faber that the "target settlement date" for the sale was 24 October.
12. Up until this point, Mr Faber had given up any thought of receiving a bonus. Now however his immediate response was to ask what implications the sale might have for a bonus payment to him. Mr Lowe replied that Mr Faber would get the bonus if he was still employed on the date of settlement. He anticipated at that stage that if the target date were met, Mr Faber would get his bonus. However he also recommended that Mr Faber take independent advice on the issue.
13. 13 October came and went with no announcement about Mr Faber's departure. Meanwhile, because the 24 October had been described to him as the "target date" for settlement and not

as a guaranteed date, Mr Faber did take advice. Then, on 14 October he wrote to Mr Lowe withdrawing his agreement that Friday 24 October would be his final day of work. Regarding that agreement, the letter read in part:

“I gave my acceptance in good faith; had Farmers provided me with the information that I received from you two days later, my decision would have been different.

This information regarded the announced sale of Farmers Holding on Friday 10 October. This was in contradiction to the announcement on September 11 2003 that Farmers would not be sold...

...

In the subsequent light of an expected settlement date for the sale of Farmers on or before the end of October, I question Farmer’s recommendation of the 24th as my final date...Your recommended final date for my employment versus the expected timeline for settlement of the sale of Farmers would surely place my entitlement at risk.

I emphasise that I expect Farmers Holdings to honour its obligations to me regarding payment of the special bonus, as I have honoured my commitment to provide full and active support to the process of selling Farmers.”

14. Mr Lowe explained to me that he would have preferred not to change the termination date which had already been set (24 October.) However because of the events that had intervened since 8 October, he had yet to speak to the staff with whom he intended to replace Mr Faber and had not made the proposed announcement. As a result the handover process had not begun and the first of the two weeks he had initially allowed for this had already elapsed. He reasoned that it would be in the respondent’s interests as well as Mr Faber’s for the termination date to be moved back a week, which would mean that there would be a two week transition period as initially planned.

15. The next day, Mr Lowe held a short (15 minute) meeting with Mr Faber to discuss the termination date. He told Mr Faber that he had reviewed the situation and was willing to push the departure date out until 31 October. Mr Lowe then showed Mr Faber an e-mail he had received that morning from the parent company’s General Manager, Finance. It contained the following:

“...given that the sale process should be complete by Friday...”

16. What Mr Lowe did not disclose to Mr Faber was that on 13 October he had received another letter from Mr Coates which read:

“The settlement and completion of the sale of Farmers is expected to occur between the 24th October and the 7th November. It is important to note that FAL has a positive obligation under the sale agreement that the business must be carried on in the normal course. In order to be in a position to make that assertion the following needs to be strictly adhered to...

No large expenditure programs or amounts are to be initiated or entered into without prior approval...

...To provide guidance on the definition of major or minor material it is anything that individually or in aggregate is greater than \$50,000...”

...

It is preferable when implementing the above to err on the side of caution...”

17. Settlement was therefore expected between 24 October and 7 November. (In fact, subject to the payment of penalties, it was possible that it might not be until after that date.) I asked why Mr Lowe had chosen to show Mr Faber the e-mail from the General Manager, Finance

thus reinforcing the message that settlement would occur by 24 October, when he knew that in fact it might not take place until 7 November or later. Mr Lowe's response was that he felt able to rely on the email as indicating that the process was on target for settlement on 24 October.

18. I reminded Mr Lowe that he had told me that on 8 October he had no confidence in the parties to be able to progress their negotiations or close a deal. He had also told me that he was not privy to any information about the process beyond what is recorded above. I asked him how then he felt able to rely on settlement occurring by 24 October. He reiterated that the e-mail of 15 October had reassured him of this, and noted that its author was lead negotiator in the sale process.
19. I note also the injunction to gain approval for any spending of \$50,000.00 or more. Mr Faber's base salary was \$244,625.00 and he calculates his bonus at \$122,312.50 gross. Mr Lowe also told me that he chose to push the date of termination out to 31 October rather than 7 November because he could justify this change "in business terms or to whoever asked" in a logical way, as being consistent with the original plan to have a two week handover. He conceded however that there would have been no significant issue for the respondent had the handover been conducted over three weeks rather than two.
20. Mr Faber responded to this by saying that he would take advice before doing or saying anything else. Mr Lowe told him that this was a 'take it or leave it' offer. On 21 October, through his representative, Mr Faber accepted this offer however he did so on the basis that:

"his acceptance of that position is without prejudice to his likely claim against his employer...when you implemented the departure date of 24 October, you had a good faith duty (under s 4 Employment Relations Act) to tell him why you were selecting that date and to tell him that the sale was pending.

If the sale does not take place before 31 October and if you do not pay my client his bonus when the sale does take place, litigation will follow."
21. Mr Faber duly left his position on 31 October. Settlement of the sale took place on 6 November. The respondent has rejected Mr Faber's claim to a bonus on the basis that he "was not employed at the time of settlement."

Issues

22. For Mr Faber, Mr Parmenter argues that the respondent, through Mr Lowe, breached its duty of good faith at both the 8 October and 15 October meetings. On the first of these occasions, he said, the respondent improperly suppressed relevant information by placing an embargo on Mr Lowe. On the second, he said Mr Lowe deliberately attempted to mislead Mr Faber by setting out to give the impression that settlement would be concluded on 24 October, when he knew from Mr Coates that this marked the beginning, not the end, of the timeframe for settlement. He says that this failure to treat Mr Faber in good faith amounted to a breach of his employment agreement and that as a result of it he failed to receive the bonus payment for which he would otherwise have been eligible. He therefore claims damages amounting to the quantum of the bonus, penalty for breach and of course, costs.
23. Ms Swarbrick replied that the respondent acted in good faith at all times and was at the mercy of its parent company. She said that there was no disclosure from the parent to the respondent and Mr Lowe himself was kept in the dark to a large extent. In relation to the meeting of 15 October she said that Mr Lowe represented the situation accurately as he saw it.

24. In his submissions Mr Parmenter tended to treat the respondent and its parent as one and the same, referring to the actions of Mr Coates as though they were actions on the part of Mr Faber's employer. I had heard no evidence specifically to support this. Immediately after the investigation meeting I checked the Companies Office website and discovered that Mr Coates was a director not just of the parent company, but also of Farmers Holdings Ltd from at all material times (right up until 6 November 2003.) At the times material to these proceedings Mr Lowe was also a director of the respondent.
25. After checking the Companies Office website I convened a telephone conference with Ms Swarbrick and Mr Parmenter and offered the opportunity to make further submissions. In due course Ms Swarbrick did so. She asserted that the fact that Mr Coates was a director common to both companies does not mean that his knowledge can be attributed to both companies. She then went on to say that even if the knowledge of the sale process was said to have been reposed in Farmer's Holdings Limited, it was knowledge which, because of its extreme commercial sensitivity, could only have been available to the Board. Boards of Directors, she noted, are not required by law to disclose confidential information about a company's affairs to employees of that company.

Determination

26. I reject Ms Swarbrick's assertion that there was no disclosure between the parent and respondent. Mr Coates was at one and the same time both director of the respondent and managing director of its parent. A company is a separate legal entity from its directors but does not have a mind of its own; its mind is that of its directors. If a director of the employer (Mr Coates) knew the timetable for the sale, it cannot be said that the employer did not.
27. However that is not to say that there was full disclosure between the directors. Ms Swarbrick also argued that it was a question of fact to be determined on the evidence as to what was known to Mr Lowe at the material times and so whether he was in fact acting in breach of good faith. I agree with this submission and now proceed to consider the factual issues.
28. I am not persuaded that the respondent was in breach of its obligations of good faith in respect of the meeting of 8 October. Although the timing of the meeting was such as to give rise to an understandable mistrust on Mr Faber's part, the evidence is not sufficient to satisfy me that this was not simply a coincidence. Mr Parmenter asks me to draw an inference that the requirement on Mr Lowe to keep the sale negotiations confidential was not made in good faith. However I accept that there might be good commercial reasons for such a requirement completely unrelated to Mr Faber's employment situation. Nor do I have any evidence that Mr Lowe or Mr Coates at that stage attached any significance to the date 24 October. In the absence of evidence in support of Mr Faber's suspicions, I cannot accept them as being proven.
29. However I have concluded that the respondent was in breach of its obligations of good faith in respect of the meeting of 15 October. My reasons are as follows.
30. On 8 October Mr Lowe and Mr Faber had come to a conditional agreement that he would leave on 24 October. The conditions were to be met by 13 October. They were not. On 14 October Mr Faber advised that he no longer wished to leave on 24 October. I consider him within his rights to treat the conditional agreement as lapsed because the conditions were not met. In any event, on 15 October Mr Lowe reopened negotiations with an offer that the final day be 31 October. Obligations of good faith applied to that process.

31. In response to Mr Faber's concerns about the imminent sale, Mr Faber showed him the email of 15 October. There is only one construction to be placed on the fact that Mr Lowe chose to show Mr Faber this email at all. It is that he wished to reassure him that the sale would go through prior to 31 October and persuade him to agree to that as his departure date.
32. Mr Lowe has said that he did so in the genuine belief that the sale would go through in time. This is at odds with what he had heard from Mr Coates in the email of 13 October (that the sale would go through between 24 October and 7 November) and with his own earlier caution about the progress of the sale process. Nor is it consistent with the general impression I formed of him. This was that he is a very astute and careful man who would be highly unlikely to say anything at all that was not carefully considered. It is not credible given all the circumstances that he would suddenly take a firm view of what might be likely to happen.
33. I conclude that Mr Lowe knew that there was no certainty that the sale would go through in time, but made representations to Mr Faber calculated to make him think otherwise. He did so under instructions to limit spending in the lead up to the sale. I believe he was also attempting to do what he could for Mr Faber in the face of those instructions by proposing a date (31 October) that he could, as he told me, justify "*in business terms or to whoever asked*" as being consistent with the original plan to have a two week handover. However such conduct cannot be described as being in good faith.
34. This failure to treat Mr Faber in good faith was further compounded when Mr Lowe insisted that Mr Faber go on either 24 October or 31 October. Given that the conditional agreement that Mr Faber leave on 24 October had lapsed, Mr Lowe could not require Mr Faber to go at any particular time before his full notice had expired.
35. The obligation of good faith dealing is incorporated into the employment agreement. There has been a breach of this obligation. As a direct result the applicant has suffered the loss of a bonus of \$122,312.50. He is entitled to damages in the amount of the unpaid bonus.
- 36. I therefore order that the respondent pay to the applicant the sum of \$122,312.50 gross.**
37. The applicant has also sought a penalty. This remedy is declined. My reason for this is that although I have been able to make factual findings on the balance of probability I do not consider the evidence meets the high standard of proof required for a penalty application to succeed.

Costs

38. This issue is reserved. The parties should advise within 28 days of the date of this determination if they wish me to proceed to determine costs.