

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 62
5554077

BETWEEN KEN HARLOCK
 Applicant

AND WESTPAC BANKING
 CORPORATION
 Respondent

Member of Authority: Vicki Campbell

Representatives: Andrew Caisley and Scott Worthy for Applicant
 Phillipa Muir and Anna Sinclair for Respondent

Investigation Meeting: On the papers before the Authority

Submissions Received: 22 January 2016 from Applicant
 5 February 2016 from Respondent

Determination: 1 March 2016

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. The application for any and all documents and/or material relating to the payment of bonuses to eligible employees, as defined by the Variable Reward Plan; the amount of the bonuses paid to named employees; and the relevant ratings of those employees including their behaviour and performance ratings is declined.**
- B. Westpac Banking Corporation is directed to lodge in the Authority and serve on Mr Harlock, information about its financial performance for the fiscal years 2010/2011 through to and including 2013/2014.**

C. The application that Westpac produce to the Authority documents relating to the total “Variable Reward Pool” is declined.

D. Costs are reserved.

Employment relationship problem

[1] In a statement of problem lodged in the Authority on 18 November 2015 Mr Ken Harlock claims he was unjustifiably dismissed from his employment with Westpac Banking Corporation (Westpac) and that one or more conditions of his employment were affected to his disadvantage by unjustifiable actions on the part of Westpac. Westpac denies all Mr Harlock’s claims.

[2] As part of his unjustified disadvantage claim Mr Harlock says he had a contractual entitlement to be paid a bonus pursuant to his terms and conditions of employment. Mr Harlock claims that for the fiscal year of 2013/2014 he received a bonus payment that was proportionally lower than his peers received and lower than historical benchmarks.

[3] In the alternative Mr Harlock says that if the bonus was entirely discretionary, Westpac’s decision to pay a substantially lower bonus was neither fair nor reasonable because Mr Harlock received the same or similar performance ratings as in previous years of his employment and Westpac’s overall financial performance for that year was higher than previous years.

[4] In his statement of problem Mr Harlock requested the Authority, as a preliminary matter, direct Westpac to disclose specified documents that he says are necessary and cogent to the matters that the Authority is required to investigate. The grounds on which Mr Harlock makes this application is that his claim will not be able to be properly advanced without them.

[5] Westpac objects to disclosure of the documents on the grounds that they are not necessary to the proceedings, are irrelevant to the matters in question and contain personal or commercially sensitive information.

[6] The parties have consented to the Authority dealing with this preliminary issue on the papers currently before it and submissions have been received from counsel for both parties. In coming to my conclusions in this matter I am mindful of the fact that I am not in receipt of any evidence from the parties and am relying on counsel's submissions.

Determination

[7] The Authority may, in investigating any matter call for evidence and information from the parties under section 160(1)(a) of the Employment Relations Act 2000 ("the Act"). The Authority may take into account such evidence and information as in equity and good conscience it sees fit, whether strictly legal evidence or not.¹

[8] There is no formal process for discovery of documents in the Authority and no jurisdiction to make an order for general discovery however, where the Authority does call for evidence or information to assist in its investigation of an employment relationship, those documents must be relevant to the proceedings.

[9] Mr Harlock requests the following documents relating to the fiscal years 2010/2011 through to and including 2013/2014 be disclosed:

- a) Any and all documents and/or material relating to the payment of bonuses to eligible employees, as defined by the Variable Reward Plan. Mr Harlock sets out the names of 17 employees of Westpac for whom he seeks the documents;
- b) The amount of the bonuses paid to the named employees;
- c) The relevant ratings of the named employees including their behaviour and performance ratings;
- d) Westpac's financial performance, including the Applicant's Business Unit's performance and the Institutional Bank's performance; and
- e) Westpac's total "Variable Reward Pool".

¹ The Employment Relations Act 2000 section 160(2).

[10] In its submissions Westpac states that Mr Harlock's employment can be distinguished from those employees listed in the following ways:

- a) Employees categorised by Mr Harlock as "Managers" are all "Executive Directors" whose roles have a significantly greater level of responsibility and accountability than Mr Harlock's former role.
- b) The employees categorised as "Peers" occupy roles with a core component being direct sales activity which Mr Harlock's former role did not have. Three of the four employees occupied roles which had a "global focus" whereas Mr Harlock's role was New Zealand focussed.
- c) The employee's categorised as "Staff" all reported directly to Mr Harlock. Mr Harlock would have been part of the decision making process for determining the bonuses of these individual employees and would be fully aware of the bonuses received.

[11] I am not satisfied the information pertaining to the individuals named by Mr Harlock will be of assistance in determining his claims. If I am wrong about that and if, during the Authority's investigation into Mr Harlock's claims, I think it would be helpful for me to consider further information, then I will ask for that information at that point in time.

[12] In relation to the financial performance information, Westpac submitted that as a former Director Mr Harlock had intimate knowledge of Westpac's financial performance and that information is publically available on Westpac's website. There should therefore be no concerns about providing this information to the Authority to assist it in its investigation.

[13] Mr Harlock submits that the overall financial performance of him and his team was significantly stronger than the previous financial year and Westpac's financial performance overall was stronger.

[14] Westpac Banking Corporation is directed to lodge in the Authority and serve on Mr Harlock, information about its financial performance including the results for Mr Harlock and his team. Mr Harlock's claim is for payment for the 2013/2014 year.

As it will be useful to the Authority to have comparative data it would assist the Authority to view the financial information for the fiscal years 2010/2011 through to and including 2013/2014.

[15] With respect to the information about Westpac's Total Reward Pool, Westpac submits that this information is not published internally and is not relevant for the purposes of determining Mr Harlock's claims. The Variable Reward Plan Rules are set out in writing and Mr Harlock has a copy of these which he has lodged with his statement of problem. At this stage of the investigation process I am not satisfied having the information about the Total Reward Pool will be of assistance in determining Mr Harlock's claims. Again, if I am wrong about that and if, during the Authority's investigation into Mr Harlock's claims, I think it would be helpful for me to consider further information, then I will ask for the information at that point in time.

Costs

[16] Costs are reserved and can be dealt with after the substantive matter.

Vicki Campbell

Member of the Employment Relations Authority