

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Kenneth David Harris (Applicant)

AND CentrePort Limited (Respondent)

REPRESENTATIVES J Gibbs for Applicant
M Quigg for Respondent

MEMBER OF AUTHORITY G J Wood

INVESTIGATION 30 November 2004

MEETING

SUBMISSIONS

RECEIVED BY 9 December 2004

DATE OF

DETERMINATION 14 January 2005

DETERMINATION OF THE AUTHORITY

1. Between 1997 and 2003 the applicant, Mr Ken Harris, was the Managing Director of the respondent (CentrePort). His terms and conditions of employment were set out in a written employment agreement which constituted the entire agreement of the parties. According to clause 1.5 of the agreement the terms of the agreement could not be changed orally but only by agreement in writing signed by both parties.
2. One of the terms of the agreement was that as part of his remuneration Mr Harris would receive “an annualised performance payment of not less than \$25,000 payable on achievement of agreed objectives”. It appears to have been agreed, although not in writing, that the annualised period was the financial year of the company, being June to June, which was not the anniversary of Mr Harris’ commencement of employment.
3. On this basis and on the basis that no agreed objectives had been set, Mr Harris received in the next year an equivalent payment as a performance payment for seven months work, to align the payments to CentrePort’s financial year.

4. Later that year Mr Harris was offered a pay rise (which he naturally accepted), despite the fact that there was no agreement in writing signed by him to this effect, as clause 1.5 required. That letter from Mr Nigel Gould, the Chairman of CentrePort, notes that in addition to the salary increase:

“...you and I are required to develop a performance formula which will provide for a further \$30,000 to be realistically able to be achieved during the current financial year. This I would see following the lines which we discussed earlier this month”.

5. Further discussed with Mr Harris was that he would receive 2.5% of the difference between the average of the actual net profit after tax achieved by CentrePort for the just completed year and the budgeted net profit after tax agreed for the following year, less net profit after tax that had been budgeted for the just completed year. The effect of this arrangement was to give Mr Harris 2.5% of any increase in profit achieved over an average of the year in question and that budgeted for the following year, compared to the budgeted profit for the year in question. While that the formula might appear complicated I accept that the purpose was to allow Mr Harris the benefit of averaging profits over two years, including those budgeted for the next year, so that Mr Harris would not be disadvantaged by any expenses incurred in one year that resulted in further profits in the next year.
6. Mr Harris claims that he did not accept this formula. Although he did not disagree with it, he claims that he did not study it in any detail and only thought of it in terms of an upside of what he could be paid compared to the minimum of \$25,000 contained in his employment agreement.
7. Mr Gould, by contrast, considers that Mr Harris not only agreed with the formula but accepted it as a variation to the \$25,000 performance payment referred to in his employment agreement, in the knowledge that there was a downside as well as an upside to the formula.
8. In late 1999 Mr Harris' salary was again increased. Despite this change not being signed by Mr Harris he again accepted the increase. The letter informing him of the increase noted that the existing performance formula was to continue in respect of that financial year. A week later Mr Gould wrote to Mr Harris confirming a bonus for the

year ended June 30, 1999 of \$38,925.00 and explaining how that was calculated, which was in accordance with the formula explained above. Needless to say Mr Harris accepted this sum.

9. In October 2000 Mr Gould and Mr Harris again discussed salary issues. Mr Harris wrote to Mr Gould on 9 October 2000 recommending a nil increase to his own base salary. Mr Harris then set out a calculation for the bonus payable totalling \$22,500 and provided calculations as to how he felt that bonus level was achieved, which he believed was in accordance with the formula that he and Mr Gould had discussed a year earlier. Mr Gould had the bonus recalculated in accordance with the formula and set it at \$28,850, which Mr Harris accepted.
10. Unfortunately, CentrePort did not operate as profitably the next year and accordingly under the formula Mr Harris was not entitled to any performance payment. Mr Harris raised no issue about not receiving any payment that year.
11. Over the next year CentrePort's performance did not improve sufficiently as far as the Board was concerned. No remuneration discussions appeared to have occurred at the end of 2002. Instead matters took a rather different course in February/March 2003 when Mr Gould approached Mr Harris on behalf of the Board looking to arrange for some sort of exit package for Mr Harris.
12. Preliminary discussion was held between Mr Gould and Mr Harris on 5 March and the level of the performance payment for 2002 was discussed. Mr Harris recorded part of this discussion in an email sent the next day to Mr Gould, stating:

"I have to admit failure on replicating the calculation used two years ago to calculate the bonus.

The 2002 year easily exceeded both budget and the 2001 year. Perhaps it would be best if we stayed as per the Employment Contract at \$25,000?"

13. In response Mr Gould applied the existing formula and calculated a bonus of \$18,475.00 for that year. That sum was paid to Mr Harris on 11 March 2003. No issue was taken as to this amount by Mr Harris until after his employment ended, consistent with his approach to all the other performance payments made.

14. Mr Gould and Mr Harris then entered into negotiations over an exit package for Mr Harris. On 26 March Mr Gould wrote to Mr Harris twice, setting out the terms of Mr Harris's departure from CentrePort. The general thrust of these terms was agreed to by Mr Harris in early May, but negotiations continued over the detail of the terms of the agreement, until a finalised deed of settlement was signed on 30 May in relation to a personal grievance raised by Mr Harris.
15. In the course of those negotiations CentrePort proposed a full and final settlement clause covering all matters between Mr Harris and CentrePort. This was not agreed to by Mr Harris. What was agreed was that "the payments made pursuant to this Deed are in full and final settlement of all claims either party may have against the other relating to the termination of the Employee's employment".
16. Another of the terms of the agreement was that CentrePort would pay Mr Harris "the outstanding bonus payment for the current financial year of \$12,500".
17. Some months later Mr Harris had cause to look at his employment agreement and considered that CentrePort had not met the terms of the performance payment clause, because he considered that he was entitled to a minimum performance payment of \$25,000 each year as he had met all agreed objectives, which to him were meeting the budgets set, which he did each year. CentrePort considered that Mr Harris had agreed to vary that term by the adoption of the formula that applied over several years.
18. The parties have been unable to resolve this issue dispute the use of mediation services. Accordingly it falls to the Authority to make a determination.
19. I find that as a matter of fact Mr Harris did agree to a variation to his employment agreement in respect of the performance payments. Even on his own evidence he accepted that he never objected to the formula being applied, even when it meant that he received a lesser bonus than the only figure mentioned in the agreement, namely \$25,000. This situation went on for several years and indeed on one occasion he received no bonus payment.
20. Documentation makes it clear that the performance measures had to be set and agreed and that Mr Harris and Mr Gould met to this effect. It is clear that the formula

proposed by Mr Gould could have led to a lesser or greater sum than \$25,000 being awarded to Mr Harris. On the basis of Mr Gould's evidence, the lack of any disagreement by Mr Harris and the fact that he actively adopted the formula in correspondence (even when he knew he was to depart he simply questioned whether it would be best to stay as per the agreement at \$25,000) I find, on the balance of probabilities, that Mr Harris had agreed to the formula as a variation to his employment agreement.

21. There is an issue about the variation not being varied by agreement in writing, signed by both parties, as required by the employment agreement. However, that rule does not stop variations being enforceable in the employment area, as is exemplified by the case of *Webb v. PDL Holdings Ltd*, unreported, H Doyle, CA2/03, 17 January 2003. The need to look at these issues in terms of the real course of dealings between the parties is exemplified by the fact that if the employment agreement were to be applied in a strict way, as now argued on Mr Harris's behalf, then he would not be entitled to the pay increases that he received during the course of his employment.
22. I therefore find that there was genuine consent by Mr Harris to the agreement as exemplified by his conduct, and that there was consideration, in that he had the opportunity to and did get significantly more in some years than \$25,000, albeit that there was also a risk of lesser payments, which also occurred.
23. In the alternative, I find that the formula as set by CentrePort and not objected to by Mr Harris, constituted agreed objectives which would result in Mr Harris receiving a performance payment of not less than an annualised amount of \$25,000. This is on the basis that it was agreed that if the average profit for the just completed year and as budgeted for the next year exceeded by \$1 million or more the budgeted profit for the just completed year then Mr Harris had achieved his agreed objective, \$25,000 being 2.5 % of \$1 million. The fact that Mr Harris would be paid a lesser amount than \$25,000 should he not meet that objective is not inconsistent with the setting of an objective of improving profits annually by \$1 million or more.
24. I need not therefore determine the issue of whether or not there was accord and satisfaction in respect of Mr Harris's claim through the signing of the deed, but I do so

for completeness. In respect of this issue the matter of the performance agreement was clearly in Mr Harris' mind before the negotiation of the details of the settlement agreement between him and CentrePort. That much is clear from his email of 6 March.

25. Therefore it remains to determine what the agreement provided for when it stated that payments made were in full and final settlement of all claims either party may have against the other relating to the termination of the employee's employment. The deed of settlement provided for payment of \$12,000 for the outstanding bonus payment for the current financial year. It is implicit from this that the parties considered that that was the only outstanding bonus payment. Any bonus payments owing would of course have been matters relating to the termination of Mr Harris's employment as he was required to be paid all sums owing to him when he left.
26. I also take into account the facts that Mr Harris already knew of the fact that his written employment agreement provided for a performance payment not less than \$25,000 on achievement of agreed objectives, that he was aware of the potential for a claim and that he agreed to a full and final settlement of all claims relating to the termination of his employment.
27. I therefore hold that Mr Harris is barred, by way of settlement of all claims he may have against CentrePort relating to the termination of his employment, from pursuing this claim in any event.

Costs

28. Costs are reserved.

G J Wood
Member of Employment Relations Authority