**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

2012 NZERA Christchurch 267
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| | BETWEEN | FRANCENE KANE<br>Applicant |
| | A N D | POOLQUIP LIMITED<br>Respondent |

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| Member of Authority: | David Appleton |
| Representatives: | Applicant in person<br>Mr Wayne Cuff, Advocate for Respondent |
| Investigation Meeting: | 4 December 2012 at Christchurch |
| Submissions Received: | 4 December 2012 |
| Date of Determination: | 5 December 2012 |

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**DETERMINATION OF THE AUTHORITY**

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**A. The respondent did make a promise to the applicant to pay her a bonus even though she had resigned. However, that promise was not legally binding on the respondent due to a failure of consideration.**

**B. No legal costs were incurred by the parties.**

# Employment relationship problem

[1] Ms Kane seeks the payment of a bonus that she claims was promised to her by the respondent. The respondent denies that Ms Kane is due the bonus as she left the employment of the respondent company prior to the end of the relevant financial quarter.

**Brief account of events**

[2] Ms Kane worked in the Christchurch branch of the respondent, which sells and installs pools and spa baths. In 2010 the company initiated an incentive bonus scheme

which paid a quarterly bonus of 2% of sales achieved above a pre-notified sales figure. In order to receive the bonus figure, the staff member had to be employed throughout the quarter to which the bonus related.

[3] In March 2012, as she had found a new job, Ms Kane gave notice of her resignation, which was due to expire on 27 March 2012. There is a disagreement over whether Ms Kane was requested to finish early on Friday 23 March 2012 or whether she herself requested to do so. In any event, although she did finish up on 23 March 2012, she would not have worked beyond 27 March 2012 in any event, three days before the quarter end.

[4] Ms Kane acknowledges that, ordinarily, she would not have been eligible to receive a bonus for the January – March 2012 quarter as her notice was due to expire before the end of that quarter. However, she relies upon an oral promise that she claims was made to her by Mr White, a director of the company who runs the Christchurch branch.

[5] Ms Kane said that, after she had tendered her resignation, on his own initiative Mr White said that she would receive the bonus for that quarter. She says that she asked whether that would be the case even though she would be leaving before the end of the quarter and that Mr White confirmed that that was the case. Mr White then asked her for her home address so that a cheque could be sent to her. Ms Kane's evidence is that Mr White repeated on a separate occasion that she was to get the bonus. Ms Kane's evidence is that Mr White did not say that it was subject to Mr Cuff's approval.

[6] Mr White's evidence is that he spoke to each member of staff in early March to tell them that the sales threshold had been exceeded and that bonuses would be paid. However, he said that when he spoke to Ms Kane this was before she had resigned. He did not recall speaking to her after that occasion about the bonus.

[7] Mr White's evidence was confused about whether he had asked Ms Kane for her home address so that the bonus could be paid to her but, if he had done this, that would indicate that he had spoken to her after she had tendered her resignation knowing that she would not be there in early April when the bonus cheques were to be given out.

[8] Ms Kane's evidence is that, at the invitation of the company, she returned to assist the Christchurch branch after she had left. It seems that, when she did this, she was able to ascertain how much bonus she was due. It is her view that she was due the sum of $960 net of tax. The respondent was unable to confirm or deny this as they had not worked out what bonus would have been due to her had she not left before the end of the quarter.

[9] Ms Kane says that Mr White was absent from the office throughout April 2012, on holiday, and when she found out in early April that other staff members had been sent bonus cheques, she called Mr Cuff in Auckland (another director of the company) to enquire where her bonus was. He told her that she would not be paid the bonus as she had not worked to the end of the quarter. Ms Kane explained that Mr White had promised it to her. She says that Mr Cuff replied that that was between her and Mr White. When Mr White returned from his vacation and Ms Kane asked him about the bonus, she was told by Mr White that Mr Cuff had told him that he was not to pay her.

**Determination**

[10] Ms Kane gave a detailed account of the conversations that she says had taken place between her and Mr White. Mr White's evidence, on the other hand, was more hazy, possibly due to the fact that, as he explained, he had been extremely busy in the final few weeks of March. For this reason, I believe that Ms Kane's evidence is more accurate and that Mr White did make an oral promise to Ms Kane that she would receive the bonus even though she was not going to work to the end of the quarter in question.

[11] This raises a legal question regarding whether the promise made by Mr White was binding on the respondent company and whether the sum of $960 net of tax is what Ms Kane would have received had she worked to the end of the quarter.

*Was the promise binding?*

[12] Mr White is a director of the respondent company and runs the Christchurch operation. He was Ms Kane's boss. Therefore, I am satisfied that he had actual authority to bind the company. In legal terms, his promise could be said to have varied the conditions under which the bonus was to be paid, so that the requirement to be present working to the end of the quarter was waived.

[13] However, I must also consider whether the promise was legally binding from a contractual point of view or whether it was a bare promise which could be withdrawn at the whim of the promisor. Ms Kane's evidence was that Mr White did not attach any conditions to her receiving the bonus, effectively saying that it was in recognition of the hard work she had put in.

[14] Traditionally, it has been settled law that a variation of contract that benefits only one party must fail for want of consideration. In other words, if Ms Kane did not make any promise or do or forbear from doing anything in return for Mr White's promise, then it would not be binding on the respondent as there would have been no consideration moving from Ms Kane to the respondent.

[15] However, this issue has become more complex since an English case, (*Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1). That English Court of Appeal case involved a builder subcontracting the work of refurbishing a block of flats to a carpenter in return for a set price. When the carpenter found himself in financial difficulties because the set price turned out to be too low, and the builders believed that the job would not be finished on time (risking the incurring of penalties for them under the main contact) they agreed to pay the carpenter an additional sum for finishing the work. They then refused to pay the additional sum when the work was done, saying the carpenter was already bound to finish the work without the extra sum being paid.

[16] The case found that, even though the carpenter was already contractually obliged to carry out the work, the promise by the builders to pay extra was binding because they had been spared the inconvenience of finding a new sub contractor if the carpenter bowed out, and had obviated the risk of sustaining penalties for late completion. This has been called a *benefit in practice* or *a factual benefit.* (See *Law of Contract in New Zealand* by Burrows, Finn & Todd, 4th edition, page 135). However, although this case has been criticised for creating an artificial legal consideration, it is still based upon a need for consideration to be present before a variation can be effective.

[17] Burrows, Finn & Todd (at page 137) posit that the New Zealand Court of Appeal case of *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23 (CA) has held that no consideration is needed for a variation of a contract, once formed. In that case, a fisherman was promised a 10% share of any additional quota allocated to Antons by

the Ministry of Fisheries. Antons refused to pay when there was an increase of quota saying, inter alia, that the promise failed due to lack of consideration.

[18] The Court of Appeal's judgement stated, at [93]:

> *The importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself. Where the parties who have already made such intention clear by entering legal relations have acted upon an agreement to a variation, in the absence of policy reasons to the contrary, they should be bound by their agreement.*

[19] However, the Court of Appeal in *Antons Trawling* also found that there was a *practical benefit* in accordance with the Roffey principle, and so the value of *Antons Trawling* as a precedent for the doctrine that no consideration is necessary in the case of variation has been said to have been weakened, as the no consideration doctrine was found to be an alternative to, and not a replacement for the Roffey principle. (Burrows, Finn & Todd, at page 138). In addition, it has been suggested that *there are significant gaps in the reasoning of the Court which may limit its persuasiveness*. (Duncan Webb, *Consideration and Variation* [2003] NZLJ 54).

[20] Turning to cases of a similar nature that have been decided in the employment sphere, there seems to remain a need for consideration. For example, in the case of *United Food and Chemical Workers Union of NZ and Ors v Talley and Anor*, [1992] 3 ERNZ 423WEC44/92 Chief Judge Goddard commented:

> *An increase in remuneration may have for its consideration a more or less clearly articulated undertaking by the employee to continue working for the employer in the meantime instead of resigning immediately to take up better paid employment elsewhere. Or there may be an abandonment of threatened strike action.*

[21] The Court of Appeal in *Alliance Freezing Co (Southland) Ltd v NZ Amalgamated Engineering etc IUW* [1989] 3 NZILR 785, in relation to merit payments where the payments were made at the employer's discretion, and nothing more was needed from the worker's side other than acceptance, stated, clearly referring to consideration:

> *Clearly such circumstances can create a contractual relationship: acceptance of employment, or of additional responsibility, or even continuing in employment, in return for payment at above award rates, will make that payment the contractual remuneration.*

[22] Although these two cases predate *Antons Trawling*, it would appear that there is sufficient doubt about the *Antons Trawling* case to set it to one side and to proceed on the basis that a variation to a contractual term does need some form of legal consideration to be binding.

[23] In concluding that no consideration was given for Mr White's promise, I rely on the following:

a. Ms Kane's evidence that there were no conditions attached to the promise;

b. Ms Kane did do anything in return for the promise;

c. Ms Kane did not continue to work beyond the date her notice was due to expire.

[24] There are two facts which could have constituted consideration, namely Ms Kane's agreement to finish work on Friday 23 March instead of Tuesday 27 March 2012, if her evidence is to be believed, and her agreeing to come into the office after her employment had terminated to help out. However, Ms Kane said specifically that there were no conditions attached to the promise, and so I cannot find that these actions by Ms Kane constituted consideration for the promise. The promise appears to have been made in recognition of past service by Ms Kane during the quarter, for which she had already received her pay. That past service would not, in my view, be consideration for the promise to waive the requirement to work till 31 March 2012 to receive the bonus.

[25] Whilst Ms Kane had a moral expectation that Mr White and the respondent would not renege from the promise, I must decide this employment relationship problem on the basis of legal principles that apply to employment law relationships in New Zealand. I must, therefore, find that Ms Kane gave no consideration for the promise and that, when it was withdrawn by the respondent, as no contractual variation had taken place, Ms Kane has no actionable right against the company in respect of the promise.

[26] Having decided that Ms Kane is therefore not legally entitled to the bonus, there is no necessity for me to go on to consider the proper amount that would have been paid pursuant to the promise.

**Costs**

[27] Neither Ms Kane nor the respondent were legally represented, so I assume that no legal costs have been incurred.

David Appleton
Member of the Employment Relations Authority