

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 3
5464485

BETWEEN PHILIP METAXAS
 Applicant

A N D MARLEY NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Applicant in person
 Bruce Borthwick, Representative for Respondent

Investigation Meeting: 11 November 2014 and 7 January 2015 at Christchurch

Submissions Received: 7 January 2015 from Applicant and Respondent

Date of Determination: 12 January 2015

DETERMINATION OF THE AUTHORITY

- A. The Applicant is not entitled to receive a bonus under the respondent's 2013 bonus scheme rules.**
- B. Costs are reserved.**

Employment relationship problem

[1] Mr Metaxas is seeking payment from the respondent of a bonus that he says was promised to him in relation to the 2013 calendar year. He seeks the sum of \$4,993.00. The respondent resists the claim on the basis that Mr Metaxas left its employment before the end of the 2013 calendar year thereby disentitling him to payment of any bonus according to the rules of the company's 2013 bonus scheme.

Background

[2] Mr Metaxas commenced employment with the respondent company as a Territory Manager on 29 October 2012. His employment was governed by an individual employment agreement signed by Mr Metaxas on 19 October 2012. The employment agreement contained the following term, under the remuneration clause:

You will be invited to participate in the Company's bonus scheme in 2013 at a level of 5,000 bonus units. The invitation into the bonus scheme including the details on how the bonus scheme works will be enclosed separately from this letter. The bonus scheme is re set every year accordingly invitations to the bonus scheme are issued on a yearly basis.

[3] It is the evidence of Mr Metaxas that he was first told about the existence of the bonus scheme by a recruitment agent who interviewed him. Essentially, his evidence was that he was told that the bonus had been paid in previous years and that the company was tracking well and was expected to continue to pay bonuses in the following years. He was told that the bonus was dependent upon targets being met and that payment was made in the year following the bonus year. He was also told that the bonus operated on a calendar year basis.

[4] He also had an interview with Ms Teresa Dowd, to whom he was to report and who held the position of National Contracts Manager. Ms Metaxas said that the bonus scheme may have been mentioned by Ms Dowd, but he could not remember the detail.

[5] Mr Metaxas said that he kept all documentation in relation to his employment with the respondent, including, for example, Kiwisaver documentation, but that he had no information in relation to the bonus scheme or its rules. He says that his performance was good throughout his employment with the respondent (which is not denied by the respondent) and that towards the end of 2013 he decided to leave the employment of the respondent company in order to pursue other interests.

[6] It is Mr Metaxas' evidence that, prior to leaving, he spoke to both Ms Dowd and to an HR adviser, Ms Anila Chand, to ask whether he would be paid the bonus for 2013 despite him leaving at the end of that year. He says that Ms Chand confirmed his understanding that he would be eligible for a bonus because he had been employed by the respondent company for more than one year. He also says that Ms Dowd had

told him that she had referred to Ms Chand herself and that Ms Dowd had also confirmed that it was her understanding that the bonus would be paid.

[7] In addition, the Authority saw a copy of an email from Ms Laughton-Hill to Mr Metaxas, the respondent's accountant, dated 21 October 2013 in which she said *If there is a bonus to be paid it would be paid around Feb/March*. This wording is not, however, sufficiently unequivocal to support Mr Metaxas's position.

[8] Mr Metaxas said in evidence that he knew that the bonus payment would not be paid until sometime in 2014 and it was not until after he had left the respondent and chased for payment around March 2014 that he was told that he was not eligible for the bonus in accordance with the rules of the 2013 bonus scheme.

[9] Mr Bruce Borthwick, Regional Human Resources Director, then sent Mr Metaxas the rules for the 2013 bonus scheme, which contained the following statement:

If you leave Marley NZ for any reason then you will not receive any Bonus payment for the year if your actual departure date is before the end of the Bonus year.

[10] It is Mr Metaxas's evidence that he effectively relied on the statements made to him by Ms Chand and by Ms Dowd that he would be eligible for the bonus when deciding when to depart prior to the end of the 2013 calendar year. He said that he could easily have stayed until the end of the year as he was not under any specific time pressure, as he was planning to be self-employed, and that he would have stayed had he known that the bonus was dependent upon him working throughout the entire year.

[11] It is the evidence of Ms Dowd that she sent Mr Metaxas a copy of the 2013 Bonus scheme rules, together with a memorandum from a director of the respondent company, Don McKenzie, inviting Mr Metaxas to take part in the 2013 bonus scheme, by way of an email on 8 May 2013. The text of Ms Dowd's email, a copy of which was shown to the Authority, was:

Hi Phil

Please find your formal invitation to the bonus scheme.

Cheers

T.

[12] The text of the memorandum, which was dated 7 May 2013, confirmed Mr Metaxas's participation in the 2013 Bonus scheme and stated that his bonus unit allocation for 2013 was 5,000. It also stated *you will find the detail on how the Bonus System works in the attached notes*. It is Ms Dowd's evidence that she enclosed the Bonus Scheme rules with the memorandum as an attachment to the email.

[13] Ms Dowd's evidence was that she had initially intended to give a hard copy of the memorandum and rules to Mr Metaxas when she had been in Christchurch prior to 8 May (Ms Dowd was, and is, based in Auckland) but had forgotten. That is why she had emailed Mr Metaxas a scanned copy. She says that she then gave a hard copy to Mr Metaxas at a later date when she next saw him, and that the invitation and the rules (which together would have covered three A4 pages) were contained in a small envelope marked *Private and Confidential*.

[14] It is Mr Metaxas's evidence that he neither got the email nor received a copy of the scheme rules. The Authority directed the respondent to obtain metadata relating to the email showing when it was sent and received, but the respondent states that such metadata are not available because of the software used by the company.

[15] Ms Chand's evidence was that she prepared the 2013 memorandum to Mr Metaxas in March 2013, along with memoranda for other staff who were participating in the bonus scheme that year. She says that she sent these memoranda to Ms Dowd immediately afterwards, together with the 2013 bonus scheme rules, and expected Ms Dowd to have sent them to the staff immediately afterwards. She could not account for why Ms Dowd had not given or sent a copy to Mr Metaxas immediately she had received these documents.

[16] It is to be noted that the memorandum to Mr Metaxas prepared by Ms Chand was dated 17 March 2013, whereas the one sent by Ms Dowd to him was dated 7 May 2013. However, I accept the evidence of the respondent that this is due to the document automatically updating the date of it whenever it was opened.

[17] Ms Chand denies that she spoke to Mr Metaxas about the 2013 bonus scheme once he had resigned. Ms Chand also says that she has worked for the respondent for six years and has dealt with the bonus scheme throughout her employment. She is familiar with the rules and knew at the time of Mr Metaxas' resignation that one had to have been employed until the end of the bonus year to be eligible to receive a

payment. Therefore, she says she would not have told Ms Dowd that Mr Metaxas would have been eligible for a partial bonus, as that would have been at the discretion of the managing director. She says that, at the time of Mr Metaxas' resignation, it was unknown whether a bonus would be paid for 2013 as the year end had not yet arrived. She could not, therefore, have made any promises to Mr Metaxas via Ms Dowd.

Discussion and determination

[18] Mr Metaxas accepts that, had he received a copy of the scheme rules prior to his departure, he would not now be seeking payment of the bonus as he accepts that he is not entitled to a bonus in accordance with the scheme rules. However, his argument is that he relied in good faith upon statements made to him by Ms Dowd and Ms Chand.

[19] Essentially, Mr Metaxas is running an estoppel argument, saying that he reasonably relied on information given by Ms Chand and Ms Dowd (that he would get paid a bonus or partial bonus even if he left at that point) and that the respondent has since reneged on the position set out by Ms Chand and Ms Dowd on behalf of the respondent. Mr Metaxas is essentially pleading that it would unconscionable to allow the respondent to resile from the position represented to him by Ms Chand and Ms Dowd, which he relied upon to his detriment when he left before the end of 2013.

Does the Authority have the jurisdiction to consider an applicant's argument founded in estoppel?

[20] Although the respondent does not argue that there is no jurisdiction, it is necessary to consider this question first. Section 161(1)(r) of the Employment Relations Act 2000 (the Act) provides the Authority with jurisdiction for *any other action (being an action that is not directly within the jurisdiction of the Court) arising from or related to the employment relationship or related to the interpretation of this Act) (other than an action founded on tort).*

[21] The Employment Court in *Newick v. Working In Limited*¹ analysed a number of authorities relating to the jurisdiction of the Authority and the Employment Court, and held that employment relationship problems are not limited, under the Act, to contractual causes of action. In *Newick* Her Honour Judge Inglis adopted the

¹ [2012] NZEmpC156

approach set out by the High Court in *Pain Management Systems (NZ) Ltd v. McCallum*² requiring that the essence of a claim (not the entire claim) be one relating to or arising from an employment relationship.

[22] In adopting this approach Her Honour Judge Inglis accepted that a claim based in equity, such as estoppel, which satisfies the *Pain Management* principle falls within the jurisdiction of the Employment Court. By extension, in accordance with the same principles, and in the absence of an express exclusion from its jurisdiction of estoppel claims, (such as exists in relation to tort claims) I accept that the Authority also has such jurisdiction.

[23] Accordingly, I am satisfied that the Authority has the jurisdiction to consider a claim by Mr Metaxas which is based upon the principle of estoppel.

Can Mr Metaxas' claim succeed?

[24] Mr Metaxas' estoppel claim can only succeed if:

- a. Mr Metaxas was not already aware, or there was no reason for him reasonably to have been aware, prior to him leaving the employment of the respondent, that the rules of the 2013 bonus scheme required him to work for the entirety of that year before being eligible to receive payment under the scheme; and
- b. Mr Metaxas was told by Ms Chand and/or Ms Dowd that he would be eligible to receive a bonus or partial bonus even if he left before the end of the 2013 bonus year; and
- c. Mr Metaxas relied on the statements of Ms Chand and/or Ms Dowd to decide to leave the employment of the respondent prior to the end of the 2013 bonus year.

Was Mr Metaxas already aware, or ought he reasonably have been aware of the need to remain the entire bonus year prior to his departure?

[25] With respect to whether Mr Metaxas received the bonus scheme rules or not prior to his departure, there is a direct conflict of evidence between the parties, and the crucial question is whether or not Ms Dowd emailed and handed over to Mr Metaxas

² HC Christchurch CP72/01, 14 August 2001

the memorandum dated 7 May 2013, together with the rules of the 2013 bonus scheme, prior to his resignation.

[26] First, I am satisfied that Mr Metaxas is telling the truth when he says that he can find no such documentation. However, the key is whether he was given a copy of the rules, not whether he read them or retained them. If he was sent and given a copy of the rules prior to his resignation, it would have been entirely reasonable for the respondent to have expected Mr Metaxas to have read and retained them. In other words, giving Mr Metaxas a copy of the rules would have been reasonable and sufficient notice to him by the respondent of the requirement to be employed until the end of the 2013 bonus year in order to be eligible to receive a bonus.

[27] When I balance the conflicting evidence of the parties on this matter, whilst the respective evidence of Mr Metaxas and Ms Dowd was equally credible, I find that Ms Dowd was telling the truth when she said that she had initially forgotten to give him the memorandum and rules, and when she found them later, emailed a copy of them to Mr Metaxas on 8 May 2013 and later handed them over to him in a small envelope.

[28] My reason for this finding is twofold. First, it is consistent with Ms Chand's evidence that she had prepared the memorandum in March 2013. Second, it is more likely that Mr Metaxas forgot about receiving the memorandum and rules, and mislaid them, than it is that Ms Dowd fabricated the copy email she handed to the Authority and then lied to the Authority on oath.

[29] Although I have found that Mr Metaxas was given a copy of the 2013 bonus rules prior to his resignation, it is still necessary to consider whether Mr Metaxas was nonetheless told that he was eligible to receive a bonus or partial bonus and, if so, whether that supports his estoppel claim.

Was Mr Metaxas told that he was likely to be eligible to receive a bonus?

[30] I am satisfied that Mr Metaxas was given this assurance by Ms Dowd (if not by Ms Chand) in view of an email that Ms Dowd sent to Mr Metaxas on 7 May 2014, which stated the following:

RE: Bonus payment as you recall I was not aware of the policy regarding leaving prior to the bonus payment being pay (sic) out. At the time I spoke to Anila and she thought there would be a partial

payment made based on when you left Marley. In good faith I advise [sic] you of this however this was not correct and you are required to be employed with Marley as per Bruce Borthwicks verbal discussion with you.

[31] This email effectively confirms that Ms Dowd had made an oral assurance to Mr Metaxas some time before his departure that he would receive a partial bonus. Having established this, the next question to consider is whether Ms Dowd's oral statement to Mr Metaxas that he would receive a partial bonus overrides the 2013 scheme rules that state *If you leave Marley NZ for any reason then you will not receive any Bonus payment for the year if your actual departure date is before the end of the Bonus year.*

[32] First, this statement is expressed in unequivocal terms. It does not impose any obligation on the respondent to exercise a discretion, and does not envisage a pro rata payment based upon the length of time during the bonus year that the employee was employed.

[33] Second, the 2013 bonus scheme rules set out reasonably complex criteria for receipt of a bonus payment, and for calculating the amount. The rules then state at the end of the document:

Towards the end of each year we will review [the Scheme] and as a consequence may change it for the following year. Once the Scheme has been signed off for a financial year it will not be changed.

[34] This statement does not allow for any variation of the scheme rules once they have been signed off. It is safe to assume that the rules had been signed off by the time Mr Metaxas had resigned and so an oral variation by Ms Dowd would have had no effect.

[35] In conclusion, having found that Mr Metaxas was given the 2013 bonus scheme rules prior to his resignation, and taking into account the unequivocal statement in the rules that the scheme rules would not be changed once they had been signed off, I cannot find that Ms Dowd's statement to Mr Metaxas overrode the requirement to be employed up to the end of the bonus year. Accordingly, Mr Metaxas is not entitled to receive a bonus under the 2013 scheme rules.

Did Mr Metaxas rely on the statements by Ms Chand and/or Ms Dowd to decide to leave the employment of the respondent prior to the end of the 2013 bonus year?

[36] Whilst I find that Mr Metaxas did rely on Ms Dowd's statement in deciding when to leave, that statement did not bind the respondent, for the reasons explained above.

Determination

[37] Mr Metaxas is not entitled to be paid a bonus payment for the 2013 financial year.

Costs

[38] Costs are reserved. The respondent was self-represented and so it is unlikely to have incurred any legal costs. However, if it believes that costs have been incurred which should be recovered from Mr Metaxas, it should first seek to agree them with him. If the parties are unable to reach agreement on the issue of costs within 28 days of the date of this determination, then the respondent may serve on Mr Metaxas and lodge with the Authority a memorandum setting out the costs it seeks within a further 14 days, and Mr Metaxas may serve on the respondent and lodge with the Authority a reply within a further 14 days. The Authority would then determine that matter on the papers, without the need for a further meeting.

David Appleton
Member of the Employment Relations Authority