

**Attention is drawn to the order
prohibiting publication of certain
information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 100/08
5091329

BETWEEN PAUL JAMES O'HAGAN
 Applicant

AND HELLMANN WORLDWIDE
 LOGISTICS LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 Peter Anderson for Respondent

Investigation Meeting: 12 February 2008 at Auckland

Determination: 18 March 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant seeks payment of a portion of a bonus he says was wrongfully not made to him after he left employment with the Respondent to work for a competitor. He denies having agreed to a new "threshold" of earnings that the division he managed must reach before he qualified for part of the bonus. Despite this he says the new required earnings level probably was reached, and although the Respondent's accounts show it was not, he is nevertheless properly entitled to a further bonus payment.

[2] The Respondent says the Applicant did agree to a change in the basis on which part of the bonus was to be paid and that the business did not generate the earnings required to trigger that payment.

[3] The Applicant did receive interim bonus payments in 2006 which are not in contest. These related to other aspects of a bonus payment scheme agreed with him but it is not necessary to set out further details of that here. The Respondent says interim payments made in 2006 in fact resulted in the Applicant being paid \$458 more than he was ultimately entitled to on end of year figures.

[4] The issues for resolution in this determination are:

- (i) whether the Applicant agreed to a criterion for paying him part of a bonus for the year ending 31 December 2006, being that his division's operating earnings total at least 75 per cent of targeted earnings; and
- (ii) whether that level of operating earnings was in fact reached, despite the Respondent's accounts showing it was not?

The investigation

[5] For the purposes of the Authority investigation witness statements were lodged by the Applicant; the Respondent's former finance manager, Paul Bray; the Respondent's present chief financial officer, Mark McLachlan; the Respondent's present managing director, Chris McCagney; and the Respondent's former managing director Mark East. Each witness also attended the investigation meeting and gave further evidence in answer to questions. Oral closing arguments were heard at the meeting.

[6] This determination records only the findings of fact and conclusions necessary to dispose of the issues requiring resolution. It does not record all the evidence heard or submissions made.

[7] There can be no certainty as to what occurred more than a year ago. The Authority determines matters on the basis of what is more likely than not to have occurred – that is on the balance of probabilities¹ – and takes into account both what witnesses reliably recall and what appears consistent with relevant documentary evidence.

¹ *Kostic v Dodd and Milligan* (unreported, EC Christchurch, CC 14/07, 11 July 2007, Couch J) at [79] citing *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 at [20].

[8] Much of the Applicant's case depends on suppositions or suspicions about measures that the Respondent may have taken to alter its accounts to report a lower level of operating earnings than was actually achieved for its freight forwarding division in 2006. He admits he can put these suspicions no higher than possibilities. In the absence of more substance to the Applicant's suppositions, I have, generally found the evidence of the Respondent's present financial controller Mr McLachlan more persuasive. In doing so I have not discounted a number of questions or concerns raised by the previous financial controller Mr Bray. He gave evidence in support of the Applicant's claim. However I found nothing in Mr Bray's evidence that raised the Applicant's suppositions to the necessary degree of probability, that is more likely than not.

Non-publication order

[9] I record here orders made in writing to the parties and orally at the investigation meeting regarding non-publication of certain evidence. The contents of financial accounts of the Respondent to the year ending 31 December 2006 and additional information regarding write offs, provided in evidence to the Authority's investigation, are both subject to orders under clause 10 of Schedule 2 of the Employment Relations Act 2000 ("the Act") to protect commercially sensitive information in the document.

[10] As noted in an earlier Authority Minute to the parties, in respect of confidential information already in his possession through his work for the Respondent, the Applicant remains subject to a confidential information clause in his former employment agreement with the Respondent.

Was an earnings "threshold" agreed for bonus entitlement?

[11] The Applicant worked as General Manager of the Respondent's Freight Forwarding Division operating from premises near Auckland International Airport. He resigned from this role on 26 October 2006.

[12] Under the terms of his employment agreement, the Applicant was placed on paid garden leave from 13 November 2006. He received his usual salary during the three month notice period through to 31 January 2007.

[13] His resignation occurred a few months after he unsuccessfully applied for the role of Managing Director, a post taken instead by Mr McCagney from mid June 2006. The Applicant acknowledges he was bitter about failing in his bid for that job.

[14] On 20 February 2006 the previous Managing Director, Mr East, had met with the Applicant to review his remuneration, including the bonus structure. The discussion included a proposal to change part of the bonus formula from paying 3.5 per cent of Net Profit Before Tax (“NPBT”) for the freight forwarding division to paying 1.5 per cent of the entire company’s NPBT.

[15] Mr East, candidly accepts that – two years on – he cannot recall with absolute certainty whether he and the Applicant discussed this revised bonus entitlement being dependent on meeting at least 75 per cent of budgeted operating earnings.

[16] However he is “*reasonably confident*” that the threshold of 75 per cent was discussed because of the content of two emails sent by him to the Applicant on the day following this meeting.

[17] The first email, sent at 5.10pm states its purpose as to detail “*our recent agreements*” and asks the Applicant to “*please confirm by return or otherwise*”. It then refers to aspects of changes to bonus and salary arrangements which are not in dispute now and then includes these sentences in note form:

*NPBT amended to 1.5% of the Hellman’s NZ NPBT. See attached.
PB to punch final numbers post audit.*

[18] The initials “PB” refer to Mr Bray.

[19] Despite the words “*see attached*” there was no attachment to that email. At 5.36 pm – some 26 minutes later – Mr East sent a further email with the subject line “*bonus 2006 review.xls*” and saying: “*other piece that should have been attached*”.

[20] The attachment was a small spreadsheet setting out the Applicant's base salary, targets for business growth and NPBT, and the bonus percentage payments that would be made if those targets were reached. It includes a note stating:

*Company NPBT bonus to participate in the Company bonus FF
division must achieve greater than 75% of operating earnings.
[my emphasis]*

[21] The Applicant replied to the 5.10pm email on 28 February 2006 – some seven days after the first two emails were sent – with the words: “*As per our discussion, accept the below*”.

[22] He now argues that he did not see the attachment to the second email – with its note regarding the bonus of 1.5 per cent NPBT being payable only if the freight forwarding division reached more than 75 per cent of its earnings target.

[23] However I reject as unlikely the Applicant's contention of not having seen the attachment. The first email refers to an attachment and would not make sense without it. It is unlikely that the Applicant did not see the second email with the attachment, sent only 26 minutes later, some time in the seven days before he sent Mr East his reply email of acceptance. I prefer Mr East's evidence, and the conclusion to be drawn from it – that the Applicant did know about the threshold – as being more likely than not.

[24] I note that – before the present dispute arose – the Applicant had prepared in July and November 2006 some calculations of his bonus entitlements and that these did not include reference to the 75 per cent operating threshold. However these calculations were prepared for the purpose of interim bonus payments and do not assist either way in assessing whether the 75 per cent threshold was to be applied for the final bonus payment once the full year's figures were in – a payment usually made in February the following year.

[25] Accordingly I find that, on the balance of probabilities, the Applicant knew of and had agreed to a 75 per cent threshold applying to any entitlement for the 1.5 per cent NPBT bonus.

Did the freight forwarding division reach 75 per cent of earnings target?

[26] Mr McLauchlan's evidence was that the Freight Forwarding division achieved an operating profit that was 73.08 per cent of budget for the 2006 year ending 31 December.

[27] The Applicant doubts that percentage. He says his division's operating earnings were running at around 95 per cent of budget up to the end of September, the latest figures available to him before he resigned.

[28] Mr Bray recalls the figure as around 90 per cent. That accords with the evidence of Mr McLauchlan – relying on management accounts prepared by his predecessor Mr Bray – that divisional operating profit to October 2006 was 90.7 per cent of budget.

[29] However Mr McLauchlan says from around mid-June sales started dropping below budget and this trend continued after the Applicant's resignation. The result of falling sales was an operating profit for the last two months of the year of less than one-fifth of the budgeted amount. That – according to the Respondent – is the reason for the division failing to make 75 per cent of budgeted earnings for 2006 and, in turn, the Applicant not being entitled to a bonus of 1.5 per cent of NPBT.

[30] The Applicant attacked that conclusion with a number of suggestions about how earnings and profit figures had been manipulated to produce this result. These include:

- (i) Deduction of bad debts and write offs; and
- (ii) Increasing allocation to Freight Forwarding division of costs for premises shared with other divisions; and
- (iii) Increasing accruals for anticipated costs, so showing higher costs (and consequently lower total earnings) when the actual costs may come in lower making the actual picture better.

[31] Having heard all the witnesses, and some detailed discussion between the Applicant, Mr Bray and Mr McLauchlan on each point, I am not satisfied that any of those suggestions by the Applicant are well-founded.

[32] There was no evidence to support the allegation that the share of costs allocated to the Applicant's former division was increased. The Applicant himself could say no more than there was "potential" and "risk" for this occurring.

[33] I accept Mr McLauchlan's explanation regarding an apparent increase in the level of accruals. This largely represented amounts reserved for IATA payments due to be paid in December 2006 but held over to January 2007 – as is done each year. Taking those amounts out of the calculations, he said and I accept, showed there was no significant change in accruals between the years, despite the Applicant's allegations.

[34] It is correct that write offs made in December amounted to more than twice the write offs for all 11 preceding months in the year. It is also true that if these write offs had not been made, the apparent total earnings would have been more than 75 per cent of budget and the Applicant would have been entitled to the bonus claimed.

[35] However it would be highly artificial to ignore the reality of bad debts and need for write offs in assessing whether operating earnings were or were not more than 75 per cent of the budgeted target.

[36] The Authority's determination is made according to the "*substantial merits of the case*" (s157(1) of the Act.) In all the circumstances of this case, it would be, I find, unmeritorious to require an additional bonus payment on the basis of puffed up calculations ignoring the reality of bad debts and write offs.

[37] Standing back and looking at the overall picture, I also accept Respondent counsel's submission that it is quite unlikely that the Respondent would have gone to the elaborate lengths suggested by the Applicant to finesse the company's audited accounts of a business dealing with many, many millions of dollars in annual turnover just to avoid paying the Applicant part of a bonus worth less than \$10,000. I also accept Mr McLauchlan's evidence that, bound by certain rules and ethics as a member of the Institute of Chartered Accountants, he would not compromise his integrity in such a way and was not asked to do so by the Respondent.

[38] I note too that while earnings may have been at the level suggested by the Applicant up to September 2006, there was a sharp decline in the last quarter for 2006, as noted earlier. Significantly, the decline in earnings continued – on Mr McCagney’s evidence – through the following year with the division making only around one-fifth of its budget.

Determination

[39] For all these reasons I find, on the balance of probabilities, that the operating earnings for the Respondent’s freight forwarding division for 2006 did not reach the level at which the Applicant would have been entitled to any bonus payments additional to those he has already received.

[40] The Applicant’s claim is dismissed.

Costs

[41] Costs are reserved. The parties are encouraged to agree costs. This is likely to be a case where the Authority’s usual tariff-based approach to costs is appropriate: see *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EC). If the parties are not able to agree costs, the Respondent may lodge a memorandum as to cost within 28 days of the date of this determination. The Applicant will have 14 days from that date to lodge any memorandum of reply. The Authority will then determine costs.

Robin Arthur
Member of the Employment Relations Authority