

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	PPCS Limited (applicant)
AND	John Loughlin (respondent)
REPRESENTATIVES	Victoria Donaghy for the Company John Langford for Mr Loughlin
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 12 July 2007
SUBMISSIONS RECEIVED BY	3 August 2007
DATE OF DETERMINATION	6 August 2007

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In its statement of problem filed on 25 July 2006 the Company seeks damages of \$224,665 plus interest from Mr Loughlin for a claimed breach of his employment agreement (and I understand costs).
2. In his statement in reply received on 21 August Mr Loughlin denies any liability.
3. The parties have undertaken mediation.

4. During a telephone conference on 20 October the parties agreed to an investigation on 15 February 2007. The Company subsequently sought an extension of the agreed timetable for filing witness statements. In a second conference on 14 December 2006 it was agreed to vacate the February 2007 investigation; the applicant undertook to contact the Authority to seek a fresh investigation date.
5. In a third conference on 19 March 2007 the parties agreed to a two-day investigation on 13 July, as well as a fresh timetable for witness statements and the preparation of an agreed bundle. As it happened, the investigation was concluded in half a day.

Background

6. I am satisfied that the following key background details are either not in dispute or, from the evidence produced during the Authority's investigation, can be properly summarised as follows.
7. Mr Loughlin was employed by Richmond Limited, then a Hawkes Bay-based meat processor, in 1997 as its Chief Executive.
8. Between 1997 and 2002 the applicant was party to several transactions which saw it acquire a sizeable interest in Richmond.
9. During this period the relationship between the two companies was strained, as were meetings of Richmond's Board.
10. In April 2002 High Court proceedings were lodged attacking several of the applicant's transactions: it's conduct was described as "*egregious*", but fault was also found with Richmond (pars 124 & 125, *Richmond Ltd v PPCS Ltd* [2004] 1 NZLR 256).
11. By 2002 it was apparent that the applicant was likely to succeed in its efforts to take over Richmond. On 27 February Mr Loughlin, Richmond's Chairman of the Board, Mr Sam Robinson, and another director, entered into an agreed termination of the respondent's employment, to take effect on 31 October.
12. Later that year, in June, Mr Loughlin agreed to a variation to the terms of the then chief financial officer (CFO). It provided verbatim as follows:

The redundancy policy applying to you shall be varied to the effect that you shall be entitled to be paid 12 months' remuneration at your then applicable rate upon:

- (a) your being made redundant at any time from your then current position; and*
- (b) you resigning within 90 days of a change in the CEO or effective management control of Richmond to which you object.*

13. In June 2002 the CFO's total remuneration was \$229,000.
14. Mr Loughlin says he acted at the behest of the applicant's Mr Robinson. The respondent says the purpose of the variation was, during a period of great uncertainty for the Company, to ensure the retention of the CFO so as to avoid ringing "*alarm bells ... at any of Richmond's (four) bankers*" (par 13, respondent's submissions of 27 July 2007), and thereby save any increase in borrowing rates which could have amounted to hundreds of thousands of dollars.
15. The applicant says that, because of a financial cap to Mr Loughlin's delegated authority of \$100,000, any monies in excess of that sum required the authority of the Richmond Board or relevant Remuneration Committee: by agreeing to the variation Mr Loughlin acted outside of his authority.
16. The applicant says that none of the then members of the Richmond Remuneration Committee had, or admitted to, any knowledge of Mr Loughlin seeking approval for the variation, and nor do any of the members recall having seen the memorandum dated 12 July 2002 purportedly being from the respondent to that committee, which is any way dated after the variation (document 5).
17. Mr Loughlin resigned his position effective from 31 October 2002.
18. By way of letter dated 24 September 2003 the CFO resigned and sought redundancy in accordance with the provisions of his variation.
19. As no member of the Remuneration Committee or the board admitted to knowledge of the variation, legal advice was sought as to whether the variation was binding on Richmond: further to its legal advice dated 6 October 2003, and despite "*two technical arguments against*" (document 10) making the payment, consistent with the provisions of the variation payment was made to the CFO on 24 December 2005.
20. The same legal advice suggested that damages could be recoverable against Mr Loughlin, for acting outside the bounds of his authority.

21. Richmond and the applicant formerly amalgamated on 30 January 2005.
22. The CFO and Mr Loughlin are now sole directors and joint shareholders of a separate company active in the wine industry.

Mr Loughlin's Position

23. The respondent says that, in 2002, he and Mr Robinson, discussed measures by which to secure the ongoing services of the CFO and that it was agreed Mr Loughlin would offer to increase the CFO's redundancy entitlement to 12-months salary. A committee speaks through its chairman: Mr Loughlin had no reason, and was under no requirement, to challenge Mr Robinson's authority.
24. Mr Loughlin says he initiated discussions with the CFO who advised he was sick of "*the dysfunctional environment*" (Mr Loughlin's oral evidence), that he had had an approach from a potential employer and that the offer of increased redundancy compensation did not meet his concerns as he might never be made redundant: he proposed instead 'triggering' the redundancy provision in the event of a change in control of Richmond. Mr Loughlin says he spoke to Mr Robinson and obtained his approval to agree to such a mechanism. Mr Loughlin says he also prepared a draft paper for the Remuneration Committee (document 5) and signed off an agreement with the CFO on 14 June (document 4): he cannot account for the applicant's claim it was not received or the July date on document 5. Mr Loughlin says by that time he had been informed of the appointment of an interim chief executive and that, effectively, he had been terminated. He says he worked from home from around that time until his departure on 31 October.
25. The respondent said he was not sure of the relevant dates as he left his electronic diary at Richmond at the time of the termination of his employment, but that he thought the events with the CFO took place all on the one day, following his obtaining telephone authority from Mr Robinson to offer the agreed variation.
26. In a letter dated 28 May 2005 (document 28), and in his evidence to the Authority, Mr Robinson said he had destroyed most of his records relating to Richmond, that the events during 2002 were "*very difficult*" and "*involved a lot of stress at senior management and Board level*" (document 28). He also said he "*never had a good memory for detail (and) I tend to concentrate on the 'big picture'*" (above). Mr Robinson confirmed the respondent was asked to put in place a mechanism to retain the CFO, but could not recall the particular details of the variation or them being reported back to himself or the Richmond Board:

But, that is not to say it did not happen ... I simply do not recall the conversation. If (Mr Loughlin said) that he communicated the ... agreement back to me and/or the Board ... then he may well have done so.

(above)

27. Mr Robinson had no issue with Mr Loughlin's witness statement.
28. Mr Robinson acknowledged he could not find any Remuneration Committee or Board minutes outlining the arrangements agreed to, but nor could he locate minutes of the Remuneration Committee at which it discussed the CFO's request to exercise his redundancy variation.
29. He said that had the variation gone to the Remuneration Committee a majority would have endorsed the CFO's variation.
30. During the Authority's investigation Mr Robinson confirmed he stood by the contents of his "considered" letter of 28 May 2005 and had no changes to make to it (oral evidence). He also agreed that he did not tell the Richmond Board, at the time of its discussion about the CFO's request and its decision to direct the witness to obtain a legal opinion about it, of his conversations with Mr Loughlin during which he approved the respondent putting in place measures to retain the chief financial officer. Mr Robinson attributed his silence to the ongoing tensions in the Richmond Board, resulting from the Company's takeover efforts: in particular, and because of the various agendas being pursued at the time, he "didn't see any point in trying to save" the money that would be spent in seeking a legal opinion about the CFO's redundancy claim (oral evidence).
31. Mr Robinson also said that, "Because I didn't disclose it at the time it's not to say I didn't authorise the arrangements – I stand firmly by my comments" (oral evidence). Mr Robinson said the money spent on retaining the CFO represented real value because it secured his services for 9-10 months after Mr Loughlin had left: it was a "reasonable mechanism, effective – it worked" (oral evidence). It was his view that there was some doubt, because of past (non)practice as to whether an employment agreement variation had to go before the Remuneration Committee. He also disputed the description of the retention variation as a redundancy payment and said it was "a retention payment" (oral evidence).
32. Mr Robinson recalled seeing at the time a document "like" (oral evidence) Mr Loughlin's 12 July 2002 memorandum to the Remuneration Committee. He confirmed that the detail of documents 4 & 5 in the agreed bundle was consistent with the intent of his discussions

with Mr Loughlin as to securing the CFO's services but that he had no understanding at the time of the actual retention mechanism. He accepted that Mr Loughlin "*would have*" (oral evidence) initiated discussion with the CFO and reported to him the latter's unhappiness with the original offer, and that another offer was put. In his discussions with the respondent Mr Robinson agreed he would have used words "*we've got to retain him*" or words to that effect (oral evidence).

33. Both Mr Robinson and the respondent agreed that the retention of the CFO likely saved the Company significant monies particularly interest on various bank loans, because of the personal relationships and reputation the CFO enjoyed with those lenders: a slight increase in borrowing rates, resulting from uncertainty arising out of the CFO's departure, could have amounted to hundred of thousands of dollars.
34. In his submissions to the Authority Mr Loughlin, amongst other things, repeated his claim that the retention arrangement entered into with the CFO did not involve any adjustment to his annual remuneration and therefore did not require signing off by the Remuneration Committee. It was a one off retention arrangement which might never have been triggered.
35. The Company relied on legal advice in making the redundancy payment to the CFO but without thoroughly reading or analysing that advice. It appears the CFO wrongly assumed he was entitled to take redundancy when the available evidence shows that the right to payment was not, and could not be, triggered.

Company's Position

36. Amongst various arguments, the Company describes this matter as a breach of contract claim. What were the limits on Mr Loughlin's authority under his employment contract? Did he exceed those limits without the necessary authorisation? If so, what was the loss to the Company?
37. In summary the Company said Mr Loughlin had no authority to enter into the variation and he cannot hide behind a purported sanction by the then Chairman of the Board when he was aware that such an amendment required the sign-off of the Remuneration Committee: he cannot argue he was misled as to the Chairman's authority.
38. Mr Loughlin acted outside his express delegated authority, did not act in good faith and breached his obligation to act in the best interests of the Company.

Discussion and Findings

39. I do not accept the argument that an enhanced redundancy provision is not remuneration and therefore does not have to comply with Company directives that enhancements above a certain level require Remuneration Committee approval: that argument is playing with words as any increase stands to cost the employer.
40. However, I also do not accept the Company's claim that, but for Mr Loughlin's actions in entering into the variation, the Company would not have paid the departure payment and he is thereby liable to pay damages. I reach this conclusion because I do not accept the Company has proven, on a balance of probabilities basis that Mr Loughlin acted outside of his authority in entering into the variation or that he is responsible for the payment or that the Company has been damaged. I make this finding for the following reasons.
41. It is not clear from the CFO's letter of resignation (document 8) that – consistent with the provision negotiated by the respondent – the CFO was in fact redundant **and** that he objected to a change in the CEO or effective management control of Richmond: neither is evidenced by document 8, the CFO's letter of resignation. Having elected to pay out the full redundancy variation, despite apparent question marks and uncertainty as to the CFO's actual contractual entitlements *vis a vis* the realities of his situation, I do not accept that the Company can now recover the same from Mr Loughlin.
42. The amount of damages occasioned the Company by its electing to pay the CFO enhanced redundancy is not clear. The evidence available to the Authority provides no fair and reasonable certainty that there was no benefit to the Company arising out of the continued employment of the CFO from the date of the variation, in June 2002, until 24 September 2003. The respondent and Mr Robinson both claim, plausibly, there were benefits accruing to the Company during this period as a result of the retention of the CFO. If they are correct, any damages claim would have to be offset somehow by regard to that period of service and the benefits resulting therein. The Company, while minimising the CFO's value, is not arguing his retention was of no value.
43. Other considerations need to be borne in mind. These include the effects of the longstanding hostile takeover initiative by Richmond's major shareholder, the applicant. The evidence is agreed: it was an enterprise under siege and the board was divided against itself. The atmosphere within Richmond was particularly difficult with future employment uncertain for all.

44. I note here that the variation was entered into in June 2002 and that shortly afterward, from early July, Mr Loughlin worked from home until his formal departure on 31 October of that year.
45. Did these fast moving events impact on accepted Board and CEO operating procedures? That is the import of Mr Robinson's evidence. It is clear that record keeping at a senior level was less than comprehensive, a situation arguably made worse by records being subsequently destroyed (Mr Robinson), left at the work place (Mr Loughlin) or lost or never recorded in the first instance (an absence of Board and Remuneration Committee minutes).
46. In the absence of evidence from all members of the Remuneration Committee, and the minutes of its meetings at that time, I am also not prepared to conclude it was not consulted about the variation to the CFO's employment package and did not sanction the variation or that – had it been asked to do so – it would have voted down the variation.
47. Can it be safely concluded any way that past practices were such that Mr Loughlin was clearly aware the variation to the CFO's employment package required the sign-off of the Remuneration Committee? From the evidence available to the Authority I am not prepared to conclude that there was a prior course of referrals to the Remuneration Committee so certain that it can be safely said Mr Loughlin knew or ought to have known that the Chairman was not permitted by it to authorise him to offer and vary the CFO's employment agreement.
48. I am therefore satisfied Mr Loughlin fairly and reasonably relied on Mr Robinson's direction to offer a variation to the CFO's and to implement the same. I accept there was no reason for Mr Loughlin to challenge either the direction or to question Mr Robinson's apparent authority; it was, and is, not clear that Mr Robinson had no express authority to sanction the change.
49. In reaching this conclusion I note another instance of Mr Robinson seemingly taking another initiative on behalf of the board: document 40, i.e. approvals for termination arrangements for the respondent. There is no evidence of this action being challenged by the Company as it has the matter at the heart of this investigation.
50. Finally, I am satisfied there is no evidence of the respondent indirectly 'helping himself' or of him directly 'helping a mate', by helping the CFO. Nor is there evidence of Mr Loughlin acting in this matter without equity and good conscience and otherwise than in the best

interests of the Company (as represented by his Chairman), as the applicant then understood them to be.

Determination

51. For the reasons set out above the Company's damages claim against Mr Loughlin is dismissed.

52. Costs are reserved.

Denis Asher
Member of Employment Relations Authority