IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 183
EMPC 371/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	AUCKLAND TROTTING CLUB INCORPORATED Plaintiff
AND	GRAHAM JOHN PAYNE Defendant

Hearing:	12–13 and 19 June 2024 (Heard at Auckland)
Appearances:	S Langton and L Briffett, counsel for plaintiff R Rao and Cari Richardson, counsel for defendant
Judgment:	27 September 2024

JUDGMENT OF JUDGE KATHRYN BECK

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[1] These proceedings involve a challenge to a determination of the Employment Relations Authority, where it was determined that Graham Payne was entitled to be paid commission from 14 April 2016 to 21 August 2021 in accordance with the commission formula in his 2013 individual employment agreement (IEA).[1]

[2] The proceedings were initially filed as a de novo challenge but were later amended to a non-de novo challenge. The issues were narrowed by agreement.

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1 *Payne v Auckland Trotting Club Inc* [2023] NZERA 539 (Member Larmer).

Background

[3] Mr Payne worked for the Auckland Trotting Club Inc (ATC) from February 2005 as manager of the TAB betting outlet at ATC's raceway at Alexandra Park until September 2021, when he was redeployed into a new role on new terms. His employment ended on 21 July 2023.

[4] ATC receives an agency fee from TAB New Zealand for running the TAB outlet. That fee is calculated as a percentage on all racing and sports betting that goes through the outlet. Prior to 2015, the agency fee for racing fixed odds betting was 2.5 per cent, and the agency fee for sports fixed odds (tote) betting was variable.

[5] Mr Payne's remuneration package was made up of a salary of $45,000 per annum, together with a quarterly bonus arrangement calculated as a percentage of the agency fee that TAB paid to ATC after various deductions.

[6] Mr Payne did not initially have a written employment agreement. In June 2013, he and ATC's chief executive at the time, Dominique Dowding, agreed on the terms of a written employment agreement.

[7] The agreement provided for a base salary of $45,000 per annum, together with a performance incentive calculated in the following way:

> 50% of the commission payable to us by the NZ Racing Board in respect of turnover in the TAB (excluding on course turnover during Alexandra Park race meetings) in excess of $90,000 per week averaged over each quarter, with such performance incentive to be paid at the end of each quarter.

[8] In February 2015, ATC renegotiated its agency fee with TAB to a flat rate of four per cent across all revenue streams.

[9] It is not disputed that ATC did not pass on the benefit of the increase in the agency fee to Mr Payne via his bonus payments.

[10] On 14 April 2022, Mr Payne brought a wage arrears claim in the Employment Relations Authority, alleging that ATC did not apply the correct rate to calculate his bonus payment once it had been increased to four per cent in February 2015. He also

claimed that ATC had incorrectly applied the 2013 commission formula from the outset.

[11] As noted above, Mr Payne was successful in the Authority in terms of liability. However, the process to investigate and determine the quantum of his claim has been put on hold pending the determination of this challenge.

[12] It is now agreed that Mr Payne's bonus was not calculated correctly in accordance with the clause in the employment agreement.

[13] The parties are yet to quantify the arrears, but it is not a matter for this Court to determine.

[14] The issue for the Court to determine is whether there are arrears owing in relation to the increased agency fee.

[15] The plaintiff argues that Mr Payne is not owed arrears for the failure to pass on the increased agency fee. It advances two arguments:

(a) There was a verbal agreement between the parties to not apply the TAB agency fee increase to Mr Payne's commission calculations from February 2015 onwards; or

(b) Mr Payne is estopped from claiming, or has waived his contractual rights to claim, that the TAB agency fee increase applied to his commission calculations.

[16] The defendant says that there was no agreement, that Mr Payne did not waive his entitlements, and that there is no basis for an estoppel over his claim.

Issues

[17] The parties agree that if neither of the plaintiff's arguments is successful, the plaintiff is required to apply the TAB agency fee increase to Mr Payne's commission

calculations from February 2015 onwards. However, he is only able to claim arrears from 14 April 2016 due to the applicable limitation period.

[18] The parties have agreed on the factual and legal issues to be determined. These are set out below.

Factual issues

a. Did the plaintiff inform the defendant before and/or after it negotiated the TAB Agency Fee that it did not intend to pass on the increase to him by applying it to his commission calculations?

b. Was there an agreement between the plaintiff and the defendant in 2015 that the defendant's commission payments would not be calculated by refence to the TAB Agency Fee?

c. If the answer to b. is no, then did the defendant otherwise represent to the plaintiff (including by conduct or silence) that he would not insist on his commission being calculated by reference to the TAB Agency Fee, in 2015 and subsequently?

d. If the answer to b. is yes, then did the defendant subsequently and consistently raise issues about, and represent that he was not accepting of, the way the TAB Agency Fee increase was not being applied to his commission calculations?

Legal issues:

e. If the answer to b. is yes, was the plaintiff required to record that agreement in writing in order to be able to rely on and enforce it?

f. If the answer to b. is no, or e. is yes:

    i. Is the defendant estopped from insisting the TAB Agency Fee be used to calculate his commission from February 2015 onwards?

    ii. Did the defendant waive his entitlement to claim commission payments based on the TAB Agency Fee increase from February 2015 onwards?

Factual issues

Question a: Did the plaintiff inform the defendant before and/or after it negotiated the TAB agency fee that it did not intend to pass on the increase to him by applying it to his commission calculations?

[19] Both Ms Dowding and Mr Payne agree that he was told that the increase would not be passed on to him. There is some disagreement as to how the conversation

arose. However, for the purposes of this analysis, the key point is that both Ms Dowding and Mr Payne agree he was told.

[20] The answer to Question a is Yes.

[21] Of course, being unilaterally informed of something does not constitute agreement, and so the real issue is whether there was an agreement between the parties at this point or at any other point in the future.

Question b: Was there an agreement between the plaintiff and the defendant in 2015 that the defendant's commission payments would not be calculated by refence to the TAB Agency Fee?

[22] There is no evidence that Mr Payne agreed to ATC not passing on the increased agency fee to him in 2015.

[23] The employment agreement has an entire agreement provision and requires that all variations be in writing. Clauses 8.1 and 8.3 state:

> 8.1 This agreement contains everything the parties agreed on in relation to the employment. Neither party can rely on an earlier document, or on anything said or done by another party (or by a director, officer, agent or employee of that party) before this agreement was signed.
>
> …
>
> 8.3 The parties may only vary this agreement in writing.

[24] There is no evidence of any agreement or variation being recorded anywhere in writing at the time.

[25] Ms Dowding's practice appears to be to record matters in emails. There is no email or other correspondence at the time relating to the issue.

[26] Mr Payne raised a concern that the increased agency fee was not being passed on to him in conjunction with other matters in July 2017.

[27] Email correspondence from Ms Dowding to him on 8 July 2017 records that she "made it clear" to, and "was extremely clear" with, him when she obtained the four per cent commission, that it was not being passed on to him. She noted that his

business unit was not carrying its portion of the costs. The implication was that the increase in the agency fee was being used to defray the increased operating costs.

[28] In the same email, Ms Dowding stated: "When I asked obviously the business has to cover its costs and again being the professional you are you completely agreed." However, although the email refers to agreement, Mr Payne appears to have merely accepted or acquiesced at the time[2] that the business has to cover its costs. Ms Dowding does not say that she and Mr Payne had reached an agreement to vary Mr Payne's entitlements. Ultimately, there is a fundamental difference between an employer explaining something to an employee and agreeing something with an employee.

[29] Email correspondence from Ms Dowding to her human resources adviser, Sylvia Wood, also records that she had "reminded" Mr Payne that the true costs were now being taken out of the gross commission. She does not say there was an agreement between them.

[30] Ms Dowding's view was that the then current arrangement was not working because it did not take into account the real costs of operation. The amount of the weekly costs[3] that was deducted from the turnover before the commission was calculated had been the same for a number of years and was out of kilter with what she considered it should have been.

[31] There was no regular review of the amount built into the contract. Nor was there any evidence of attempts to review it previously. Ms Dowding saw not passing on the increased agency fee as addressing this issue. Unfortunately, it appears the strength of her belief in the merits of her solution to the problem impacted the way in which she approached Mr Payne and his entitlements.

[32] In answer to questions from Mr Rao, counsel for Mr Payne, she accepted that she did not think she needed Mr Payne's agreement; she was just "telling" him.

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2 It was confirmed by Ms Dowding, in answer to questions, that she was referring to his acceptance in the meeting on 7 July 2017 of the need to cover costs, and not an earlier agreement in 2015.

3 $90,000 in accordance with the clause in the IEA; see above at [7].

[33] Even so, Ms Dowding then still maintained that Mr Payne had agreed. However, in answer to questions from Mr Rao about what Mr Payne had said that led her to think this, Ms Dowding could not recall the words used at the time but believed Mr Payne "understood".

[34] While Ms Dowding's position may have seemed sensible and even fair to her, and Mr Payne may have tolerated it at the time, there is no evidence that he agreed to it.

[35] Mr Payne denies ever having agreed to anything. He says he was simply told that was how it would be. The evidence supports his position.

[36] A unilateral statement of intention by one party does not amount to a mutual agreement with the other party.

[37] Accordingly, I find there was no agreement between the plaintiff and the defendant in 2015 that the defendant's commission payments would not be calculated by reference to the TAB agency fee.

[38] The answer to Question b is No.

Question c: Did Mr Payne otherwise represent to the plaintiff (including by conduct or silence) that he would not insist on his commission being calculated by reference to the TAB agency fee, in 2015 and subsequently?

[39] The plaintiff says that Mr Payne represented to it that he would not insist on the increased agency fee applying to him by either separately or cumulatively:

(a) not raising a dispute in relation to the plaintiff's position that he would not receive the benefit of the four per cent rate in early 2015 when the rate was increased, and continuing with his employment on that basis thereafter;

(b) agreeing with Ms Dowding in 2016 that his team member's commission costs would come out of his 2.5 per cent (not four per cent) rate;

(c) after suggesting he should have a share of the four per cent rate in July 2017, accepting Ms Dowding's reminder that he had accepted the increase would not apply to him in 2015, and then not raising the four per cent rate again during the course of his negotiations with the plaintiff over a variation to his employment agreement;

(d) refusing to sign a variation agreement in September 2017 and accepting Ms Dowding's instruction by email to the finance team, to which he was copied, that he wished "to stay with his bonus payments as it is being paid now"; and

(e) when the plaintiff asked him how his commission should be calculated (on temporarily losing its commission spreadsheets), first suggesting his commission should be calculated based on a four per cent rate, but then accepting the way the plaintiff had been calculating his commission when it found the spreadsheets and continued to pay him as it had been paying him before.

Did Mr Payne represent that he would not rely on his contractual rights by not raising a dispute in 2015?

[40] It is correct that Mr Payne did not formally raise a dispute until July 2021 when his lawyers wrote to the plaintiff. However, to suggest that, as a matter of fact, failing to raise a dispute on its own amounts to a "representation" cannot be right.

[41] There is no general obligation on an employee to raise a dispute. In particular, the duty of good faith does not ordinarily require an employee to raise a dispute where they are not aware or are only vaguely aware of an issue or where they are not concerned about the issue.[4]

[42] Mr Langton, counsel for the plaintiff, referred to the mutual obligation of good faith to be responsive and communicative as well as not to mislead or deceive the employer.[5]

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4 See below at [188].
5 Employment Relations Act 2000, s 4(1) and 4(1A).

[43] However, there was nothing for Mr Payne to respond to in July 2015 when he was told that the increase was not being passed on. It was presented to him as a fait accompli, not a proposal. There was no deception or misleading conduct on his part.

[44] His decision not to "protest too loudly", in particular in March 2015, does not amount to a representation.

Did Mr Payne represent that he would not rely on his contractual rights by agreeing with Ms Dowding in 2016 that his team member's costs would come out of his percentage (not the four per cent rate)?

[45] In the second half of 2016, Mr Payne approached Ms Dowding about his concern that his assistant manager was not being paid enough and that she would leave ATC. An agreement was reached that she would be paid an annual commission on top of her salary.

[46] On 7 July 2017, when Mr Payne was paid his commission for that quarter, it was significantly less than he expected.

[47] When he asked for an explanation, he was told it was due to his assistant manager's incentive payment being deducted from his commission in accordance with what ATC says it thought was the agreement at the time. Mr Payne was directed to discuss any issues with Ms Dowding.

[48] Ms Dowding and Mr Payne met later that same day (7 July 2017).

[49] It seems there were no documents setting out how the assistant manager's commission would be funded. Nor was there any record of either the discussion between Ms Dowding and Mr Payne or the agreement they reached about her remuneration.[6]

[50] It is apparent from the email written by Ms Dowding on 8 July 2017, after the meeting on 7 July 2017, that there was confusion as to how the assistant manager's

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[6] Other than a written variation to the employment agreement between ATC and the assistant manager, recording the addition of the bonus, which was not before the Court.

commission would be funded. At the outset of the email, Ms Dowding apologised for the "confusion" and noted that they "both thought things were happening that are not".

[51] Ms Dowding noted that her recollection was that Mr Payne had offered for his staff member's bonus to come out of his commission but that he believed it would be paid on top of his commission.

[52] Subsequently, she recorded that as a result of this confusion, it had now been agreed that it would be paid on top.

[53] There is no reliable evidence of the discussions in 2016. The position of Ms Dowding in July 2017 was that there was confusion. There is certainly no evidence that Mr Payne agreed that his team member's incentive payment would come out of his commission.

[54] There is nothing in this situation that amounts to a representation from Mr Payne that he would not insist on the increased agency fee applying to him.

Did Mr Payne represent that he would not rely on his contractual rights in correspondence between July–September 2017

[55] On 7 July 2017, at the meeting to discuss what had happened with his assistant manager's incentive, Mr Payne also raised the concern that he was due more in terms of commission, due to the agency fee increasing to four per cent.

[56] A series of meetings and correspondence followed including attempts to vary the employment agreement which I deal with below.

[57] Ms Dowding's email sent on 8 July 2017 is a helpful contemporaneous record of the start of those discussions.

[58] She recorded that at the meeting on 7 July 2017, the discussion moved on from the assistant manager's incentive payment, and how it was being funded, to Mr Payne's own arrangements.

[59] Ms Dowding noted that Mr Payne expressed a concern that he was due more than he was being currently paid due to the increase in the agency fee. She reiterated that his business unit was not bearing the real cost of its operation and so the increased commission to four per cent was not being passed on to him.

[60] It seems that Mr Payne had not previously been provided with a breakdown of the profit and loss statement for his department, and they agreed he would receive this the following week.

[61] Ms Dowding raised the concern that an error had occurred with the costs figure of $90,000 per week.[7] She said it should have been adjusted yearly to reflect the actual costs. She noted that the $90,000 figure was based on an $8 million turnover in 2013/2014. The turnover had increased significantly since then, along with costs.

[62] She advised that this had created an anomaly that Mr Payne was now earning more than her, and while ATC was happy for him to achieve a healthy package, it was becoming unacceptable.

[63] Ms Dowding regarded the meeting as positive.

[64] She recorded that they mutually agreed to the following:

> 1) I will address firstly the P&L issue and sit down with Byron and yourself and take you through the budget and then take you through how they have arrived at your commissions. From now on you will do this in June every year with Byron and I and a variation to your contract will be made to reflect your commission structure for you and Carol for the following season.
>
> 2) Based on this budget if there is correction to be made on Carol and your commissions we will do so.
>
> 3) We will then create a new structure where you and Carol go on Salary and we will redesign your commission structure in accordance with the real quota that you are working to.

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7 See above at [7].

[65] Ms Dowding concluded by noting that the situation was "not fair and reasonable going forward and needs to be addressed and documented so there is no misunderstanding of the way forward."

[66] An email from Ms Dowding to Ms Wood on Monday 10 July 2017 confirmed that at the time Mr Payne advised that he considered he should be getting more money due to the four per cent increase. Ms Dowding said she had to "remind" him that the true costs were now being taken out of the gross commission.

[67] In her email to Ms Wood, Ms Dowding noted that the problem lay with the fact that when Mr Payne signed his contract, he was producing an income of $8 million, and that the weekly cost was $90,000. Since that first year, turnover had increased year by year until it had reached $22 million in 2017. However, the cost deduction had not been adjusted at all. Ms Dowding noted that in those circumstances, Mr Payne would be earning more than she earned, which was untenable. She wanted to sit down with him, discuss it, and then give him a new package which was "more fair and balanced to market and to ATC."

[68] From this correspondence, it is apparent that Mr Payne was not happy with how his commissions were being calculated to date, and that this included a concern about the failure to pass on the four per cent increase. This is consistent with my finding above that there was no agreement in March 2015 to the four per cent increase not being passed on.[8]

[69] An email from Ms Dowding to Mr Payne dated 10 July 2017 suggested a meeting on 12 July 2017 to take him through his actual budget so that he could understand the overhead costs, his commissions, and a forecast on commissions reflecting his commission of 2.5 per cent.[9] It also notes that in the meantime, ATC needed to revisit Mr Payne's and his team member's packages and quotas[10] as they

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8 See above at [22]–[38].

9 The figure of 2.5 per cent is consistently referenced in various documents between the parties. However, it is common ground that this was a shorthand reference, and Mr Payne's commission, after averaging, was calculated based on a figure more in the region of 2.9 per cent.

10 Ms Dowding uses the word "quota" when referencing the cost adjustment figure.

no longer reflected the $8 million turnover business back in 2013/2014. Ms Dowding noted it was an oversight by the chief financial officer at the time, as it should have been adjusted yearly in line with the quota.[11]

[70] On the same day, Ms Dowding confirmed to Mr Payne that he would be paid the amount that had been deducted for his team member that day.

[71] On 26 July 2017, Byron Waring, the chief financial officer, sent a draft proposal to Mr Payne for discussion. This proposal was based on a salary plus commission calculated on a percentage of profit after direct costs had been deducted with a cap on turnover. There was an increase in Mr Payne's base salary, but the effect was a significant decrease in his commission. In terms of annual remuneration, Mr Payne considered that it would result in a reduction of at least $100,000 per annum.

[72] On 21 August 2017, he wrote to Ms Dowding, concerned that his team member had still not been paid her incentive payment. It is apparent from the email that he was angry about the delay in payment to his team member, the initial attempt to deduct her payment from his, and then, in his words, the attempt to try and "rip [him] off 100K with the new contract option."

[73] On Friday 25 August 2017, a new proposal was put forward. This time, for the first and only time, there was also a proposed formal variation to sch 2 of Mr Payne's employment agreement.

[74] On Wednesday 30 August 2017, Mr Payne emailed Ms Dowding, unhappy with the proposal from 25 August 2017. He considered it did not represent the discussions he had had with her and that it amounted to bad faith on the part of ATC. He advised that he wished to "continue with [his] current contract with no alterations or variations."

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[11] I note there is nothing in the contractual provision that entitled ATC to adjust the costs figure. This is despite the provision being specifically discussed at the time of signing. There was an error in the costs figure (it was initially written as $80,000, not $90,000) which was drawn to ATC's attention by Mr Payne, and the figure was corrected by hand in the final version and initialled by Ms Dowding.

[75] Ms Dowding responded the same day, noting that he was upset. She advised that the formula was what ATC believed was agreed. She asked him to advise where the calculation provided was incorrect so that ATC could correct it.

[76] On 15 September 2017, Ms Dowding and Mr Payne met again. Ms Dowding followed up the meeting with an email setting out points to ensure they were "on the same page" and to "avoid confusion".

[77] She noted he had been given documents from the finance department to show him how his commission was currently being calculated. It is unclear from the email what these documents were. The contemporaneous documents were not available.

[78] Ms Dowding believed they were the same as the documents which were provided to the Court which set out how commission was calculated at that time.

[79] If that is the case, and I accept it likely is, these did not use the four per cent agency fee to calculate the turnover but, rather, used the varying rates resulting in an average agency fee of around 2.9 per cent.

[80] The email records a number of matters being discussed in the context of negotiating a varied and simplified commission.

[81] Ms Dowding also recorded: "I also explained that our true costs are $124K per week not 90K however our 1% we both agreed does covers (sic) this shortfall."

[82] Ms Dowding then asked Mr Payne to go away and see if he could come up with an easier and less complicated formula for the bonus payments. Finally, she stated: "Can you just confirm that we are on the same page now or if I have made any mistakes? Please let me know."

[83] On Friday 22 September 2017, Ms Dowding followed up by way of an email, asking whether Mr Payne had any further thoughts on how they could make it easier. Mr Payne responded that he should have something to report on Wednesday 27 September 2017.

[84] On 25 September 2017, Ms Dowding reiterated that Mr Payne could stay the way he was and that she simply wanted to make the process easier.

[85] On 27 September 2017, Mr Payne emailed, advising that "based on the unfortunate circumstances that have transpired over the past few months, I have been advised to avoid any amendments at this stage."

[86] Ms Dowding responded, apologising that due to his experience, they could not reach an agreement on something simpler.

[87] On the same day, she followed up with an email to the finance department and to Mr Payne, stating that "Graham Payne has confirmed that he wishes to stay with his bonus payment as it is being paid now and as itemised by Byron in the sheet that I gave him."

[88] There was no further correspondence on this point.

[89] The plaintiff says that in the context of the discussions leading up to this point and, in particular, the failure by Mr Payne to correct Ms Dowding's statement to the finance department, amounts to a representation by him that he was happy to stay with his bonus payment as it was being paid at that time – that is, without incorporating the increase to four per cent.

[90] It says that if he intended to pursue the four per cent, he had an obligation to say something but did not do so.

[91] Ms Dowding says at this stage she understood Mr Payne to be confirming that he would stay on his current commission payments.[12] She says that remained her understanding until she left ATC in March 2019.

[92] I accept that was her understanding. Whether that was reasonable in the face of a clear contractual provision that said otherwise remains to be seen. I deal with that below.

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[12] That is without applying the full four per cent agency fee.

[93] The statements by Mr Payne that he wished to "avoid any amendments" and his previous statement that he wished to "continue with his current contract with no alterations or variations" were against the background of fraught negotiations that had been wholly unsuccessful.

[94] On reviewing the proposals, it is apparent that, through the negotiations, ATC had been trying to address its own concerns about the provision, as well as achieving the simplicity that both parties wanted. This included, amongst other things, dealing with the four per cent by having a fixed (as opposed to varying) and lower commission rate, incorporating profit and loss targets, setting an appropriate (and adjustable) allowance for costs, and reducing the general size of the remuneration package (which it considered to be expensive, and above market rates).

[95] Those proposals were unsuccessful. No changes were agreed. Mr Payne was emphatic in his rejection.

[96] Accordingly, prior to the email from Ms Dowding on 27 September 2017, there is no basis to claim that Payne had represented he would not insist on his commission being calculated by reference to the TAB agency fee. The parties were in the midst of negotiations.

[97] The question is then whether Mr Payne's silence on receipt of the email to the finance department on 27 September 2017, and his conduct in not pursuing the increase (at least until May 2020), amounted to a representation.

[98] Silence, for the purposes of a claim of equitable estoppel, cannot be a representation unless there is an obligation to respond.[13]

[99] There was no ambiguity in the statement by Ms Dowding. I agree that this is a situation where, if Mr Payne considered ATC was mistaken in its understanding,[14] he had a duty of good faith to correct it.[15]

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13 See below at [147]–[149].

14 That he wished to stay with his bonus payment as it was then and as itemised by Mr Waring in the sheet that he had been provided.

15 To be responsive and communicative pursuant to s 4(1A)(b) of the Act.

[100] I find that Mr Payne's silence did amount to a representation in late September 2017 that he was not insisting on his commission being calculated using the four per cent agency fee at that point in time.

[101] Whether that can be said to extend indefinitely is questionable and must also be considered in the context of what both Mr Payne and Ms Dowding described as an exhausting and, in the end, fruitless process.

Did Mr Payne represent that he would not rely on his contractual rights in correspondence between May–July 2020?

[102] On 25 May 2020, following the appointment of a new chief executive, Mauro Barsi,[16] Mr Payne again raised issues about his salary and bonus payments.

[103] Mr Payne sent an email to Mr Barsi, inquiring as to when he was likely to receive his March bonus. Mr Barsi responded that he was unaware that the bonus had not been paid. He noted that it was a mistake which had occurred as a result of the new finance team being unaware of it or unable to process it. He noted that the team was attempting to source the system and the process for the calculation and would do so as soon as it was rectified. In the meantime Mr Payne was asked to send the details of the bonus calculation.

[104] On 1 June 2020, Mr Payne sent an email to both the human resources manager for ATC and the deputy chair of the board.[17] In that email, he noted that the bonus had changed from being quarterly to monthly for some time. He also noted his surprise that the new team in the finance department had been unable to action it. He then provided what he described as "a simple formula below the best I can as to how I understand it".

[105] Notably, he employed the four per cent agency fee in the calculation as opposed to the varying fee that had been applied to his calculation to that point.

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16 Mr Barsi was employed as the chief executive from August 2019 until February 2022.

17 Who was also the previous acting chief executive officer.

[106] It is fair to say that the email was disrespectful towards the accounting team and terse in tone. Commissions made up the vast majority of Mr Payne's remuneration. With the COVID-19 lockdown there had been no commission for a period, and his salary of $45,000 had also been reduced.

[107] Mr Barsi responded on 3 June 2020, having had the email forwarded to him. He took issue with various comments Mr Payne had made, including reference to the accounting team's incompetence. He had previously advised that the reason for the delay was that before the new finance team took over the system, much of the information had been deleted and the team was having to recover files by various means. He also provided Mr Payne's email (including his version of the formula) to the finance team.

[108] By 11 June 2020, the team had managed to recover some information,[18] and Mr Barsi sent it to Mr Payne, asking for his assistance in terms of where to find various figures and asking for clarification of a wages adjustment figure.

[109] Mr Payne responded on 12 June 2020, In answer to the question about the figure relating to the deduction of extra wages, he noted that there had always been a mention of extra hours but that his roster was steady.

[110] In his evidence before the Court, Mr Payne said he had never really understood why that figure was there. His evidence throughout was that he had never understood how his commission was calculated and no-one could ever explain it to him. He did, however, know that the four per cent agency fee was not being passed on to him.

[111] I note that this wages deduction does not form part of the calculation in the employment agreement. It is a hangover from how the commission was calculated prior to the signing of the employment agreement in 2013. It seems it continued to be deducted throughout the entire period of the commission payments. This, along with other adjustments, is now accepted by the plaintiff as having occurred in error. As noted above, with the exception of the four per cent issue, the plaintiff

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[18] Spreadsheets of previous calculations.

accepts that the commission had not been calculated in accordance with the agreement.[19]

[112] Mr Payne also noted that in the future, he would like to have a simple calculation that he and ATC could clearly understand, and that he would be willing to sit down with David Foley, ATC's corporate services manager, to work it out.

[113] On 22 June 2020, Mr Payne had still not received his bonus payment and wrote to Mr Barsi and Mr Foley. He copied the email to various members of the board. He was clearly concerned with what he referred to as the lack of urgency and ignorance around the matter.

[114] Mr Payne made a further inquiry of Mr Foley on 24 June 2020. Mr Foley's response was that although Mr Payne had indicated that the figures were sent through on a Monday, he did not say where he could find them. He noted that once they were provided, or Mr Payne actually pointed him to them, he would process the bonus.

[115] On 1 July 2020, Mr Foley provided the spreadsheet he had located which was used to calculate the bonus for Mr Payne. The agency percentage earned referred to in that document is the varying agency percentage. It did not use the four per cent agency fee.

[116] On 6 July 2020, Mr Payne emailed Mr Foley, stating that he had had time to look over the bonus summary and noted that it "seems to be reasonable."

[117] Having looked back through the records, Mr Foley then asked about a 2017 variation of agreement to the individual employment agreement he had found. He noted that there were communications from the then chief executive that referred to "your 2.5%" and that the variation was "discussed and agreed with you." However, he noted that the commission rate used since August 2017 had been greater than 2.5 per cent (normally 2.94).

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[19] See above at [12].

[118] Clearly, his view that there may have been an agreed variation was mistaken, but he then asked "What is your understanding of the rate that should be used and, if it's different to 2.5%, is there any supporting documentation?"

[119] There was no evidence before the Court of a response to this email.

[120] Mr Barsi's evidence was that he understood that Mr Foley and Mr Payne worked together and that the commission payments were then calculated and paid following the formula in the previous spreadsheets.

[121] That appears to be the case until the restructuring in 2021.

[122] For the purposes of a claim of equitable estoppel, it is necessary to establish that a belief or expectation was created or encouraged by some action, omission, or failure to act.[20]

[123] Mr Barsi said the issue of four per cent was not raised with him at the time or subsequently until the arrears claim was made a year later. Mr Payne said he raised it frequently with board members who he assumed would have spoken to Mr Barsi. However, none was called to give evidence. Nevertheless, if Mr Barsi had no knowledge of it, he cannot be said to have had any particular belief or expectation.

[124] The Court did not hear from Mr Foley.

[125] It is not clear from the correspondence whether the four per cent was even on Mr Foley's radar despite it being in the initial formula that Mr Payne provided. There was no record of the understanding Ms Dowding had in relation to the four per cent agency fee. Mr Foley appears to have looked at the spreadsheets, not the 2013 employment agreement, to ascertain what the calculation was and therefore what was owing.

[126] Any discussions Mr Payne had at the time were with Mr Foley, not Mr Barsi. There is no evidence of what Mr Foley's understanding was.

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[20] See below at [146].

[127] Clearly, there was some discussion between Mr Foley and Mr Payne after Mr Foley's email on 6 July 2020 because Mr Foley did not act on the variation he had found or the "2.5%". The commission was paid as before.

[128] However, the continued receipt of the payments as previously is not sufficient in and of itself to amount to a representation at that time by Mr Payne that he would not insist on applying the four per cent to his commission.

[129] There is no evidence that he made such a representation by silence or otherwise.

[130] Further, there is insufficient evidence that he breached his obligation of good faith by failing to respond to Mr Foley's email. As noted above, clearly some form of discussion took place. There was no evidence of its content before the Court.

[131] The onus is on the plaintiff to prove the alleged representation. It has not done so.

Mr Payne represented that he wished to rely on his contractual rights in correspondence in 2021

[132] On 10 May 2021, Mr Barsi sent a proposal to Mr Payne which outlined that ATC was considering a restructuring which could result in the disestablishment of his role. Mr Payne took the opportunity to obtain legal advice.

[133] On 30 June 2021, Mr Payne's lawyers wrote to ATC, advising that he was on sick leave and would not be able to work until 9 July 2021.

[134] On 5 July 2021, the restructuring proposal was altered and Mr Payne was offered automatic redeployment as general manager of gaming and wagering.

[135] On 7 July 2021, his lawyers wrote to ATC, noting that Mr Payne was not receiving his bonus payment as per his contract. They asked that they be provided with TAB sales figures, the date on which the four per cent commission came into force, a copy of the formula that ATC was using to pay the bonus, and an

explanation for the deductions, adjustments for sports increases, extra working hours and holidays which the contract does not explain.

[136] On 29 July 2021, Mr Payne accepted the new position created under the restructuring proposal.

[137] In September 2021, his position as TAB manager was formally disestablished, and he was redeployed into the role of general manger of gaming and wagering. The new position did not have any bonus structure.

Question d: If there was an agreement between Mr Payne and ATC, did the defendant subsequently and consistently raise issues about, and represent that he was not accepting of, the way the TAB agency fee increase was not being applied to his commission calculations?

[138] I found the answer to Question b was No.[21] There was no agreement. Accordingly, it is not necessary to make findings in relation to this question.

Legal issues

Question e: If there was an agreement between Mr Payne and ATC, was the plaintiff required to record that agreement in writing in order to be able to rely on and enforce it?

[139] As with Question d, it is not necessary to make findings in relation to this question because I have found that there was no agreement between the parties in 2015.[22] Nor was there any subsequently.

[140] I deal with the issue of recording a variation below.

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21 See above at [22]–[38].
22 See above at [22]–[38].

Question f(i): Is Mr Payne estopped from insisting the TAB agency fee be used to calculate his commission from February 2015 onwards?

Legal principles

[141] In *Harris v TSNZ Pulp and Paper Maintenance Ltd*, chief Judge Colgan summarised the doctrine of estoppel in the following way:[23]

> The equitable doctrine of estoppel applies where it would be unconscionable to allow a party to succeed in light of its previous stance which has induced the other party to act, or to omit to act, in a manner which is now compromised. Estoppel can operate as a sword (cause of action) as well as a shield (a defence to a cause of action). An estoppel may provide a remedy to prevent unconscionable conduct by another party including the enforcement of that other party's representations made to the claimant.

[142] He then set out four distinct requirements for an estoppel defence to be successfully invoked:[24]

(a) A belief or expectation must have been created or encouraged through some action, representation, or omission to act by the party against whom the estoppel is alleged;

(b) the party relying on the estoppel must establish that the belief or expectation has been reasonably relied upon by the party alleging the estoppel;

(c) detriment will be suffered if the belief or expectation is departed from; and

(d) it must be unconscionable for the party against whom the estoppel is alleged to depart from the belief or expectation they created or encouraged.

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23 *Harris v TSNZ Pulp and Paper Maintenance Ltd* [2015] NZEmpC 43, [2015] ERNZ 580 at [75].

24 At [76], relying on James Every-Palmer "Equitable Estoppel" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 601 at 613–614. See also *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 (CA) at 86; *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 at [44]; and *Thornley v Ford* [2024] NZCA 154 at [119].

[143] Estoppel by silence is a recognised category of estoppel but is generally accepted as being difficult to establish.[25] In the employment context, Chief Judge Inglis noted in *Stormont v Peddle Thorp Aitken Ltd* (a case also involving a claim for underpaid bonuses) that silence will seldom found an estoppel argument.[26]

[144] The essence of estoppel by silence is that the party estopped should, in good conscience, have spoken up to correct an evident misapprehension on the part of the other party.[27] In the absence of a duty to speak, mere silence will not suffice to establish an estoppel.

[145] In the employment context, this Court has previously held that the statutory duty of good faith may give rise to a duty to speak.[28] However, whether it does or does not will depend on the particular facts of each case.

[146] Turning to the second element of reasonable reliance, commentary indicates that whether a belief or expectation is reasonable is judged in three senses: "the belief or expectation must have been reasonably held; it must have been reasonable for the representee to have relied on the belief or expectation; and ongoing reliance must be reasonable."[29]

[147] Whether a party has reasonably relied on a belief or expectation depends in part on the nature of the party's conduct which gave rise to that belief or expectation; that conduct must be sufficiently unequivocal to justify the other party's reliance on it. What amounts to sufficient clarity depends on the context of each case.[30] Relevant factors include the nature of the relationship between the parties and whether the parties have pursued a common course of conduct on the basis of the belief or expectation.[31]

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25 *Infinity Enterprises NZ Ltd v Kinara Trustee Ltd* [2020] NZCA 309, [2020] 3 NZLR 626 at [112].
26 *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, [2017] ERNZ 352 at [43], citing Every-Palmer, above n 24, at 631.
27 *Infinity Enterprises NZ Ltd v Kinara Trustee Ltd,* above n 25, at [98] and [112]; and *Thornley v Ford,* above n 24, at [124].
28 *Aviation and Marine Engineers Assoc Inc v Air New Zealand Ltd* [2013] NZEmpC 172 at [330] and [344].
29 Every-Palmer, above n 24, at 614.
30 At 625, citing *Thorner v Major* [2009] UKHL 18, [2009] 3 All ER 945 at [56].
31 Every-Palmer, above n 24, at 625.

[148] In terms of detriment, no estoppel will arise if the plaintiff has not or will not suffer detriment as a consequence of the other party resiling from the promise or assurance. Commentary again indicates: "Mere disappointment from an unfulfilled promise is not a sufficient detriment". Detriment can take at least two forms: wasted effort in reliance on a belief or expectation or opportunities foregone as a result of such reliance.[32]

[149] Finally, the issue of unconscionability provides the overarching framework to equitable estoppel.[33] As Walker LJ noted in *Gillett v Holt*:[34]

> … the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round.

[150] Therefore, where the first three elements are made out, it will normally be unconscionable for the party against whom the estoppel is alleged to resile from the belief or expectation they encouraged. However, whether unconscionability is viewed as a fourth element or as the overarching framework, it is still necessary to consider whether the principle is engaged when the situation is considered as a whole.

Analysis

[151] As set out above,[35] I have found that in September 2017, Mr Payne encouraged a belief or expectation that he would not insist on his commission being calculated using the four per cent agency fee at that point in time, or at least a belief or expectation that he was content with the status quo at the relevant time.

Reasonable reliance

[152] Was it reasonable for ATC to rely on that belief? I do not consider that it was.

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32 At 616–617.
33 See *Gold Star Insurance Co Ltd v Gaunt,* above n 24, at 86.
34 *Gillett v Holt* [2001] Ch 210 (CA) at 225.
35 See above at [100].

[153] Schedule 2, which outlined how the performance incentive would be calculated, was a key provision of Mr Payne's employment agreement that had caused considerable angst to both parties.

[154] ATC knew in September 2017 that it was not complying with the letter of the agreement in relation to the agency fee. It was, in essence, relying on Mr Payne's silence, in the face of its refusal to pay the four per cent, to operate as a variation.

[155] The employment agreement, drafted by ATC, required all variations to be in writing. Any variation would have also had to meet the requirements of s 63A(2) of the Employment Relations Act 2000 (the Act) which states:

> **63A Bargaining for individual employment agreement or individual terms and conditions in employment agreement**
>
> …
>
> (2) The employer must do at least the following things:
>
> (a) provide to the employee a copy of the intended agreement under discussion; and
>
> (b) advise the employee that he or she is entitled to seek independent advice about the intended agreement; and
>
> (c) give the employee a reasonable opportunity to seek that advice; and
>
> (d) consider any issues that the employee raises and respond to them.

[156] I accept that ATC may not have had much appetite for such a process after the previous few months. However, while it might have been difficult, it should have formally recorded in writing what it believed the position to be, allowing Mr Payne to obtain advice and then either confirm or reject it.

[157] Accepting a variation would have been a significant concession on Mr Payne's part. Because ATC is relying on silence, there is much that is unknown about the alleged concession.

[158] Was Mr Payne just leaving it for the moment,[36] or did he accept the position indefinitely into the future? What about any arrears up to that point?

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[36] He was exhausted by the process of the previous few months.

[159] It was not reasonable for ATC to rely on its belief in the absence of clarity as to what was being conceded.

[160] ATC was critical of Mr Payne's silence, but the reality is that it went equally quiet on the point, despite being aware of issues with the clause. As with Mr Payne, ATC also had a duty of good faith to be responsive and communicative.

[161] Ms Dowding at the time noted that the situation needed to be addressed and documented so there was no misunderstanding of the way forward.[37]

[162] Despite this, however, she did not formalise or document the position she believed had been reached.

[163] To allow ATC to rely purely on its belief, particularly one generated by silence, would essentially be to allow circumvention of the provisions of the Act.[38] This would be inconsistent with the objects of the Act, which includes such provisions to address the inequality of power in employment relationships.[39]

[164] Following the process set out by s 63A(2) would have flushed out any issues, including whether Mr Payne actually intended to create the belief or expectation.

Detriment

[165] The plaintiff says it will suffer a detriment if the belief created by Mr Payne in 2017 is departed from.

[166] The detriment it claims is the lost opportunity to restructure Mr Payne's remuneration package earlier than 2021. It says if it knew it had to calculate the bonus based on the full agency fee of four percent, it would have restructured or possibly terminated Mr Payne's employment earlier.

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37 See above at [65].
38 Employment Relations Act, s 63A.
39 Section 3(a)(ii).

[167] In her evidence, Ms Dowding indicated that it would have been inconceivable for ATC to pay Mr Payne at the four per cent rate, given that he was already earning more than she was as chief executive at the 2.5 per cent rate. Her evidence was that if the four per cent rate applied, his position would have been restructured. Mr Waring, the chief financial officer in 2017, gave the same evidence.

[168] ATC could not unilaterally impose a variation to Mr Payne's terms of employment by consultation and so would have had to follow a proper process for any proposed restructuring. Such a process requires an open mind as to alternatives. Accordingly, it is not possible to say with certainty what the outcome of such a process would have been, including the terms on which Mr Payne might have continued in his employment.

[169] However, even though the outcome of any possible restructuring is unclear, it is fair to say that initiating a restructuring process in this situation was a foregone opportunity that would likely have been explored in 2017 if Mr Payne had been more forceful in pursuing his rights.

[170] Accordingly, the evidence of detriment is established.

[171] However, if restructuring was genuinely an option that ATC would have pursued in 2017 but for the belief formed, it should have formalised its understanding. This illustrates, once again, why it was not reasonable to rely on the belief in the circumstances.

Unconscionability

[172] The plaintiff says it would be unconscionable for Mr Payne to depart from his representations, given that the duty of good faith required him to be responsive and communicative, and to raise a dispute over his commission calculations, and that he did not do this until 2021.

[173] I accept that an employee has a duty of good faith to be communicative with their employer where they consider themselves to have a dispute with the employer.

However, where an employee raises an issue and an employer rejects that employee's claim, it is not necessarily always inconsistent with the duty of good faith for an employee to continue without pursuing the matter further, even if they are unhappy with the outcome. Similarly, the duty of good faith does not ordinarily require an employee to raise a dispute where they are not aware of, or only vaguely aware of, an issue or where they are not concerned about the issue. In the circumstances of the present case, it is correct that Mr Payne's failure to respond in September 2017 was inconsistent with his duty of good faith. It is perhaps even correct, in a sense, that his failure to be communicative in that situation was unconscionable.

[174] However, the question for the Court to determine is not whether it was unconscionable for Mr Payne to remain silent. Rather, it must determine whether it would be unconscionable for him to depart from the belief or expectation which he created.

[175] I have already set out above why I consider it was not reasonable for ATC to rely on its belief in the circumstances. In light of its own failures to be communicative and to follow statutory procedures, I do not consider it would be unconscionable for Mr Payne to seek to enforce his strict contractual rights.

[176] As a matter of policy, Mr Langton argued that if employees are able to knowingly sit on their hands, then employers like the plaintiff will be led into believing there is no dispute and will lose the chance to address those disputes by either resolving them promptly or restructuring contractual entitlements to avoid contractual liabilities they cannot afford.

[177] However, ATC also sat on its hands.

[178] n the face of Mr Payne's silence in response to Ms Dowding's email of September 2017, there was nothing preventing it from addressing the issue more formally. That may well have brought matters to a head. If ATC was strongly of the view that it could not afford what it had agreed to in the employment agreement, it could have sought a simple variation. It did not do so.

[179] ATC argues that on several occasions over a long period of time, Mr Payne consciously made decisions to continue his employment on different terms to which he was entitled. That implies that he was given choices or options on those occasions. That is not the case. There was no evidence of ATC threatening the continuation of his employment if he pursued his contractual entitlements.

[180] When Mr Payne suggested he did not raise the issues for fear of repercussions, it was strongly refuted by ATC witnesses.

[181] It is correct that Mr Payne essentially tolerated the underpayment and that he wanted to stay employed. However, there was no evidence of the conscious decision making submitted by counsel for ATC. Further, there was no evidence of any intention to deceive or mislead ATC.

[182] The plaintiff also relies on Mr Payne having legal advice in support of its argument that it would be unconscionable for him to depart from the belief he created. While Mr Payne stated that he had the benefit of legal advice in 2017, the evidence was that he spoke to a law student, who was on his team at the time, about the negotiations.

[183] The plaintiff also asserts that Mr Payne knew it could not afford such sums. There was no evidence to support its submission that Mr Payne knew it could not afford the full commission payments to him. What was apparent from the evidence was that he had little or no involvement in the profit and loss of his particular department. His focus was on getting revenue through the door.

[184] Further, there is a difference between not being able to afford something and thinking that something is expensive or above market. There was no evidence that ATC could not actually afford the amounts.

[185] In any case, ATC's failure to pay commission according to the agreement, having been alive to these contractual provisions, resulting in a significant contingent

liability, does not amount to unconscionable behaviour on Mr Payne's part. As noted in *AsureQuality*:[40]

> Unconscionability relates to the party against whom the estoppel is asserted. It is not directed at some general assessment of impact on the company. Such impact will always be suffered (to a greater or lesser extent) by an employer where an employee has delayed (for whatever reason) in pursuing their legal entitlements, such as correct payments under the Holidays Act 2003 or, by way of an example …, correct overtime payments under the collective agreement.

[186] Overall, I find it would not be unconscionable for Mr Payne to depart from the expectation or belief that he encouraged.

[187] Accordingly, ATC does not meet the four elements of equitable estoppel.

[188] I find that Mr Payne is not estopped from relying on his contractual rights to claim that the TAB agency increase applied to his commission calculations.

[189] While my reasons may differ from those of the Authority, it did not err in its finding on this issue.

Did Mr Payne waive his entitlement to claim commission payments based on the TAB agency fee increase from February 2015 onwards?

[190] A waiver involves one party to a contract giving up their strict legal right to enforce a contractual obligation against the other party, particularly where that obligation provides a benefit to the party waiving it.

[191] The requirements to establish that waiver has occurred are as follows:[41]

(a) the party against whom waiver is claimed, by their conduct, leads the party claiming waiver to believe the first party's strict rights under the contract will not be insisted upon; and

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[40] *AsureQuality Ltd v New Zealand Public Service Assoc Inc* [2018] NZEmpC 70, (2018) 15 NZELR 896 at [33] (citations omitted).

[41] *Connor v Pukerau Store Ltd* [1981] 1 NZLR 384 (CA), citing *W J Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 All ER 127QB 189 (CA) at 213.

(b) the party against whom waiver is claimed intends that the party claiming waiver will act on that belief; and

(c) the party claiming waiver acts on that belief.

[192] The representation that strict rights will not be insisted on must be clear and unambiguous to constitute a waiver.[42] No consideration is required.[43] Nor is the party claiming a waiver required to establish they have suffered a detriment by acting on the belief created.[44]

[193] The waiver argument is the alternative to the estoppel argument (which is the alternative to the agreement argument). The plaintiff submits that the same considerations arise when applying the doctrine of waiver as when applying the requirements of estoppel. However, that is only true to a point. Waiver requires an element of intention on the part of Mr Payne such that he intended ATC to rely on his conduct.

[194] I accept that, given the duty of good faith discussed earlier in this decision, Mr Payne, by his conduct, led ATC to believe that he would not insist on his rights. However, any representation must be clear and unambiguous. That is not the case here. The plaintiff relies on silence. As already noted above, it is not clear from Mr Payne's silence in September 2017 what the terms of an alleged waiver were. Was it ongoing until the end of the employment relationship? Was it for a period of time? Was it dependent on maintaining a certain level of income?

[195] I also accept that ATC acted on its belief that it was not required to pay Mr Payne according to his contract by forgoing the opportunity to restructure his role. However, as discussed previously with estoppel, it was not reasonable for ATC to rely on Mr Payne's silence as waiving any of his contractual rights.

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42 *Neylon v Dickens* [1978] 2 NZLR 35 (PC) at [38], citing *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia* [1977] AC 850 (HL) at 871.

43 *W J Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 All ER 127QB 189 (CA) at 213.

44 At 213.

[196] There is no evidence that Mr Payne intended ATC to act on the belief that he had waived his rights to enforce the contract or even that he intended for ATC to believe that he would not enforce the terms of the contract. Further, for the same reasons as it was not reasonable for ATC to rely on Mr Payne's silence, an objective person would not have understood Mr Payne to have been intending ATC to believe that he was not going to enforce the contract.

[197] An intention could potentially be inferred from an objective perspective if Mr Payne had been aware that, if he did not waive his rights, his position would be restructured. However, he was not told that restructure was a consideration. It does not feature anywhere in the various exchanges between the parties over that period. The evidence clearly indicates that he was merely tolerating the forceful position adopted by ATC.

[198] I find that Mr Payne did not waive his entitlement to claim commission payments based on the TAB agency fee increase from February 2015 onwards.

[199] Again, while my reasons may differ from those of the Authority, it did not err in its finding on this issue.

Outcome

[200] There was no verbal agreement between the parties to not apply the TAB agency fee increase to Mr Payne's commission calculations from February 2015 onwards.

[201] Mr Payne is not estopped from relying on his contractual rights to claim that the TAB agency fee increase applied to his commission calculations.

[202] Mr Payne did not waive his contractual rights to claim that the TAB agency fee increase applied to his commission calculations.

[203] Mr Payne is owed arrears for the failure to pass on the increased agency fee from 14 April 2016 to 21 August 2021.

[204] Although I have reached the same conclusions as the Authority in relation to agreement, estoppel and waiver, I have come to them through different findings and reasoning. Accordingly, the decision of the Authority on the limited issues that were before the Court is set aside and this judgment stands in its place.

Costs

[205] Costs are reserved. In the event the parties are unable to agree on costs, the defendant will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with the plaintiff having a further 14 days within which to respond. Any reply should be filed within a further seven days.

Kathryn Beck
Judge

Judgment signed at 3.30 pm 27 September 2024