

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 99/09
5120773**

BETWEEN RICHARD JOHN ADAMS
 Applicant

AND NYK LOGISTICS LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Adrienne McLean, Counsel for Applicant
 Sam Wimsett, Counsel for Respondent

Investigation Meeting: 4 December 2008

Submissions Received: 11 and 18 December 2008

Determination: 31 March 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Richard John Adams ("Mr Adams") claims he is owed a bonus by his former employer NYK Logistics Limited ("NYK"). He also says NYK failed to review his salary. NYK says Mr Adams is not entitled to the bonus claimed and further, that his performance was regularly reviewed.

[2] The parties were unable to resolve the problem between them by the use of mediation.

The facts

[3] Mr Adams was employed by NYK as National Sales Manager. The terms of the employment were recorded in an individual employment agreement signed by the parties on 17 November 2006 ("the IEA").

[4] The IEA had annexed to it this "Remuneration Schedule":-

Remuneration Schedule

National Sales Representative(sic)

NYK Logistics operates a total cost to company remuneration system. Your remuneration comprises the following components:

<i>Gross annual salary</i>	<i>\$72,500.00 NZ (Seventy Two Thousand five hundred dollars)</i>
<i>Net Vehicle Allowance</i>	<i>\$25,000.00 NZ (Twenty Five thousand dollars)(based full use of a 2 Ltr vehicle)</i>
<i>Bonus</i>	<i>\$20,000.00 NZ (Twenty thousand dollars only)(The bonus calculations are set out below)</i>

Total Cost to company: \$117,500.00 NZ (One hundred and seventeen thousand five hundred dollars)

Bonus calculations

The calculation is based on the following and covers our main three main(sic) areas of business activity.

Used Vehicle Imports

<i>Monthly Average units per shipment</i>	<i>Monthly</i>	<i>Quarterly</i>	<i>Annual Total</i>
<i>>= 350 Vehicles</i>	<i>\$250.00</i>		
<i>>= 450 Vehicles</i>	<i>\$500.00</i>		<i>\$6,000.00</i>
<i>>= 400 Vehicles Average per shipment in any quarterly(sic)</i>		<i>\$1,000.00</i>	<i>\$4,000.00</i>
	<i>Total</i>		<i>\$10,000.00</i>

Freight Forwarding

\$30.00 for the introduction of a new customer that has a lifting of (to be agreed on) containers over the first 3 months.

Logistics & Warehousing

This is based a(sic) client being introduced, Contract negotiations being successfully completed and the client installed in the Warehouse.

<i>Operating Margin</i>	<i>Area Occupied</i>	<i>Bonus</i>	
<i>15%</i>	<i>500 mtr</i>	<i>\$1,000.00</i>	
<i>20%</i>	<i>500 mtr</i>	<i>\$2,000.00</i>	
<i>15%</i>	<i>1,000 mtr</i>	<i>\$2,000.00</i>	
<i>20%</i>	<i>1,000 mtr</i>	<i>\$3,000.00</i>	
<i>15%</i>	<i>>1,000 mtr</i>	<i>\$3,000.00</i>	
<i>20%</i>	<i>>1,000 mtr</i>	<i>\$5,000.00</i>	

The merits

[5] Mr Adams says that he increased NYK's car business from \$5.4 million to \$11.6 million. He is unhappy he was not paid the bonus element of his remuneration package.

[6] By his statement of problem Mr Adams articulates two issues. The first is said to be his wish the Authority make a declaration that his remuneration was made up of Gross Annual Salary, Net Vehicle allowance and a bonus calculation of \$20,000.00. Secondly, he desires a further declaration by way of determination that by the clause "annual review" in the IEA, he was entitled to an annual review and because it failed to review him annually, the respondent is in breach of the IEA and he claims remedies in respect of that breach as a personal grievance.

[7] With respect to the first issue, Mr Adams is not entitled to a declaration that he is entitled to a whole payment of \$20,000.00 as a bonus. I do not permit him the declaratory relief he desires because the remuneration schedule in defining the bonus element of his remuneration, clearly specifies the "calculations of the bonus are set out below". There is no entitlement to the sum of \$20,000.00 as an absolute sum. I find that \$20,000.00 is the specified maximum and the amount of the entitlement is determined by the application of specified criteria.

[8] Next, the IEA entitled Mr Adams to a review of his remuneration annually each March. That did not occur. I mark this breach by confirming Mr Adams' allegation in relation to it as correct. However, I cannot find that Mr Adams raised a personal grievance in relation to NYK's failure within 90 days of the review falling due in March 2007. Accordingly, I decline to make any formal orders in relation to a personal grievance. It remains however undisputed that there has been a breach of the IEA by NYK. But in the absence of established loss, I make no formal orders in that regard.

[9] With respect to the *Used Vehicle Imports* bonus component, I note the *Car Business Data* spreadsheet table produced by Mr Adams to the Authority. Immediately, I further note the bonus is based on monthly averages. The parties

agreed that basis for calculation. Adopting the figures apparent from the Car Business Data spreadsheet, Mr Adams does not qualify for the Used Vehicle Imports bonus because there are no months where monthly average units per shipment is equal to or greater than 350 vehicles.

[10] Despite the poor drafting of this IEA and the concurrence of both parties, this is not a case for a penalty. I decline to exercise my discretion to impose a penalty.

[11] I am not persuaded that Mr Adams is entitled to bonus in respect of Domtex and I decline to make any formal order in respect of 3rd party logistics warehousing. However, I find that Mr Adams is entitled to \$300.00 as the freight forwarding component of his bonus. **I order NYK Logistics Limited to pay Richard John Adams the sum of \$300.00. There will be no other formal orders by the Authority.**

Costs

[12] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Wimsett is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Ms McLean is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe without leave.

Leon Robinson
Member of Employment Relations Authority