

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 97
3002251

BETWEEN PAUL LAWRENCE CLARK
 Applicant

A N D QANTAS COURIER LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Hugh Matthews, Counsel for Applicant
 Gillian Service, Counsel for Respondent

Investigation Meeting: 26 February 2018, at Auckland

Submissions Received: 6 March 2018 from Applicant
 8 March 2018 from Respondent

Date of Determination: 26 March 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The applicant, Mr Paul Lawrence Clark was not contractually entitled to the payment of a bonus by the respondent, Qantas Courier Limited (Qantas Courier) for the 2012 financial year.**
- B. Mr Clark was not contractually entitled to the payment of a bonus by Qantas Courier for subsequent financial years.**
- C. Costs are reserved.**

Employment relationship problem

[1] The applicant Mr Paul Lawrence Clark was employed by the respondent Qantas Courier (“Qantas Courier”) Limited in May 2011 in the position of manager, New Zealand.

[2] Qantas Courier is an overseas registered company in Australia. It forms part of the Qantas group. Qantas Courier provides air freight services.

[3] Mr Clark has had a lengthy career, including international experience in the air freight, logistics and supply chain industries¹. Mr Clark’s experience includes being the owner of FLG Limited (FLG), a company which was in the business of marketing, handling and selling cargo capacity on flights from New Zealand.

Jetstar Limited, New Zealand

[4] In 2009, Jetstar Limited (Jetstar) replaced Qantas in respect of its domestic flight operations in New Zealand. Jetstar’s cargo capacity on flights from New Zealand was contracted by Qantas Freight to Freightways Limited (Freightways). FLG unsuccessfully attempted to secure the contract to market and handle Jetstar’s cargo in New Zealand. Freightways retained that contract.

[5] In 2010, FLG and Qantas Freight signed a memorandum of understanding that FLG would handle Jetstar’s cargo in Christchurch, New Zealand.

Employment discussions between Mr Clark and Mr Paul Pribula

[6] In 2011, Mr Clark says he and Mr Paul Pribula, the general manager for Qantas Courier, discussed a business plan in which Qantas Courier could secure all of the Jetstar cargo capacity business in New Zealand. The discussions also concerned the sale of FLG and the employment of Mr Clark by Qantas Courier.

[7] Mr Clark understood that Qantas Courier was in a financially precarious position and that Qantas Courier was not in a position to pay him a market salary. At the time of his negotiations with Mr Pribula, Qantas Courier had 50% of the Jetstar contract with the other 50% held by Freightways.

¹ Clark witness statement para 1

[8] Mr Clark says he was told by Mr Pribula that from 1 July 2011, the Freightways contract would be terminated and Qantas Courier would then secure that business. This would mean Qantas Courier would be able to market and manage all of the Jetstar domestic cargo capacity². Mr Clark understood that this would lead to an increase in revenue for Qantas Courier. Mr Clark says he agreed to accept a salary less than the market value on the condition he would be eligible for a bonus based on the increased revenues expected.

Employment Agreement

[9] Mr Clark says he agreed to employment by Qantas Courier following Mr Pribula's representations that Qantas Courier would acquire 100% of the Jetstar cargo business in New Zealand, he would be paid performance based bonuses and therefore his "overall remuneration would be closer to the market"³. Mr Clark says he believed that the performance based bonus system was to be a continuing part of his remuneration package.

Jetstar cargo capacity contract

[10] Qantas Courier did not acquire the Jetstar business Mr Pribula expected would be acquired. This meant Qantas Courier was unable to increase its revenues. Mr Clark was not able to achieve the financial targets agreed to and did not receive a bonus for the financial years ended 2012 to 2016.

Mr Clark's claim

[11] Mr Clark seeks an assessment and payment of amounts he says are payable to him by Qantas Courier under the bonus scheme for the financial years ended 2012 to 2016 inclusive.

Qantas Courier's response

[12] Qantas Courier disputes the claim. Qantas Courier says Mr Clark is not entitled to bonus payments for either the 2012 financial year or for the 2013-2016 financial years. This, it says, is because the bonus schemes in operation within Qantas

² Clark witness statement para 7
³ Clark witness statement para 10

Courier are discretionary. Qantas Courier exercised its discretion not to pay bonuses and there was no contractual entitlement for it to do so.

[13] Due to the financial position of Qantas Airways at the relevant time, Qantas Courier, as a member of the Qantas group, was not able to pay bonuses to Mr Clark for the financial years ending 2012 to 2016. Qantas Courier says that it fairly and reasonably exercised its discretion not to pay bonuses. It says the decision reached was justifiable in the financial circumstances of the overall Qantas Group.

[14] Alternatively, Qantas Courier says Mr Clark was not entitled to a bonus because the criteria necessary for the bonuses to become payable were not met. The employment agreement was clear. There was no provision for bonus payments if targets were not met.

The Investigation meeting

[15] Mr Clark and Mr Paul Pribula, former General Manager, Qantas Courier both filed witness statements. Mr Pribula did not attend the Authority's investigation meeting to give his evidence. The Authority was prepared to consider an adjournment to allow Mr Pribula to attend the investigation meeting and give evidence. Mr Clark confirmed to the Authority that he did not wish to seek an adjournment and asked that the investigation meeting proceed as scheduled, without Mr Pribula. In those circumstances, the witness statement provided by Mr Pribula was reviewed by the Authority but little weight accorded to it.

[16] For Qantas Courier, Mr Riki Cannon, Head of Network & Margin, Qantas Airways and Ms Sarah Magnussen, National Human Resources Manager, Qantas Freight both filed witness statements.

[17] Each witness confirmed by way of affirmation or on oath that their evidence was true and correct.

[18] As allowed under s.174 of the Employment Relations Act 2000 (the Act), this determination does not set out all of the evidence. Rather, relevant facts and legal issues are set out, along with the Authority's conclusions.

The issues

[19] The issues for the Authority to determine are:

- (a) Was Mr Clark contractually entitled to a bonus payment for the financial year ending 31 March 2012?
- (b) Was Mr Clark contractually entitled to any bonuses in the 2013 to 2016 financial years?

The First issue - Was Mr Clark contractually entitled to a bonus payment for the financial year ending 31 March 2012?**Employment Agreement**

[20] Mr Clark was employed by Qantas Courier on 23 May 2011 as Manager/New Zealand. He was offered and accepted a base salary of \$100,000 gross per annum and a bonus eligibility for a potential further \$30,000 in the financial year ending 31 March 2012.

[21] The employment agreement contains a number of relevant provisions. Firstly, in the introduction to the employment agreement it sets out its application:

APPLICATION

The terms and conditions contained in this agreement replace any terms and conditions of employment that may have applied prior to the date of this agreement.

[22] Page 3 of the employment agreement sets out remuneration:

REMUNERATION

- a) Your salary shall be \$100,000 per annum payable fortnightly at the rate of one-twenty-sixth of your annual salary for the period up to and including each second Tuesday, on the following Thursday, by direct credit to a bank account standing in your name or in your name and the name of some other person(s) jointly.
- b) In addition to the above remuneration you are eligible to participate in the bonus scheme outlined in annexure 1 of this agreement.
- c) This salary is in full consideration of the requirements of the position in respect of hours and times of employment.

[23] Page 4 sets out the bonus scheme as follows:

BONUS/INCENTIVE

The employer in its sole discretion may determine to pay you a bonus from time to time during the continuance of this agreement. However, nothing contained in this agreement either expressed or implied shall mean that any obligation exists for the employer to provide any bonus payments, except at its sole discretion.

[24] Annexure 1 is important and is set out in full:

ANNEXURE 1 – PERFORMANCE BASED BONUS SCHEME

You are eligible to participate in a performance based bonus scheme. You are eligible to receive a bonus up to the amount of \$30,000 for your performance carried out in the 2012 financial year. The details of your bonus are set out below.

Target/KPI's to be achieved for period 1 July – 30 December 2011	Bonus Payment (NZD), less tax paid 1 January 2012	Target – KPI's to be achieved for period 1 January – 30 June 2012	Bonus Payment (NZD), less tax paid 1 July 2012
Jetstar Domestic Revenue NZ\$0.9m with minimum 20% gross profit achieved		Jetstar Domestic Revenue NZ\$0.9m with minimum 20% gross profit achieved	
Forwarding Revenue NZ\$0.8m with minimum 20% gross profit achieved	\$15,000	Forwarding Revenue NZ\$0.8m with minimum 20% gross profit achieved	\$15,000
Safety KPI's set out below		Safety KPI's set out below	
People KPI's set out below		People KPI's set out below	

In **addition** to the above revenue targets the following Safety & People Key Performance Indicators must be met in order to qualify for a bonus:

Safety

Ensure a safe workplace for all Qantas Courier employees, contractors and customers by demonstrating and driving a genuine commitment to safety including:

- a) Achieve group management systems standard (QMS – Qantas Management System) safety and people implementation targets.

- b) Achieve LWCFR (Lost Work Case Frequency Rate) and TRIFR (Total Recordable Injury Frequency Rate) targets.
- c) Achieve occurrence risk index targets.

People

Lead by example by encouraging and role modelling positive people management strategies. Develop and support the team by providing coaching and ongoing feedback to assist in their growth and career development. Manage poor performers and ensure appropriate performance management is addressed. Drive engagement through communicating with employees regularly and compensating them with appropriate reward and recognition tools.

Performance Review

In order to determine if the people and safety KPI's have been met, the general manager of Qantas Courier will have a face-to-face meeting with you to conduct the performance review on these two areas. You will need to demonstrate that you have reached these KPI's. If the general manager determines that the safety and people KPI's have been met then a bonus will be paid, if these KPI's have not been met then a bonus is not payable to you.

Payment

If all targets and KPI's are achieved, the above total bonus payment would be paid in six monthly instalments, once after the first pay run after 1 January 2012 and again after the first pay run after 1 July 2012.

Please note that this bonus scheme is for the 2012 Financial Year only and will be reviewed year on year. There is no guarantee that this bonus scheme will continue after the 2012 financial year.

Position Description

[25] The position description set out Mr Clark's role as manager New Zealand reporting to the general manager. The overall purpose of the job was for Mr Clark to manage the New Zealand operation to achieve Qantas Courier's revenue and costs objectives.

Other relevant clauses

[26] The other relevant clauses in the agreement are the declaration clause in which Mr Clark declared that he had been provided with the intended individual employment agreement, had been advised to seek independent advice and had been given a reasonable opportunity to do so. The declaration concluded with Mr Clark agreeing that he understood the provisions and implications of the employment agreement and accepted them. The other relevant provision related to performance reviews. This is set out on page 4 of the employment agreement and provides as follows:

Performance Review

The employer shall review your performance in carrying out the responsibilities and duties of your position at 12 monthly intervals. The employer may also conduct other reviews from time to time. The employer shall determine if the system of performance review.

[27] Both Mr Pribula and Mr Clark signed the employment agreement on 16 and 23 of May 2011 respectively.

[28] Both Mr Pribula and Mr Clark initialled an amendment to the bonus table in the Appendix. The date by which targets/KPI's were to be achieved had been incorrectly dated 1 Jan -20 Jun 2011. 2011 was struck out and amended to 1 Jan -30 Jun 2012.

Events following Mr Clark's Employment

[29] In July 2011, Mr Stephen Cleary resigned as the head of Qantas freight. Ms Lisa Brock was appointed Qantas Freight Manager. Ms Brock decided not to cancel the contract between Qantas Freight and Freightways in respect of the handling of Jetstar cargo capacity on flights in New Zealand.

No cancellation of contract with Freightways

[30] This meant Qantas Courier retained only 50% of the Jetstar cargo capacity, the other 50% remained with Freightways.

[31] Mr Clark says:

“this was an unanticipated change in the business plan and that the business plan, the projected revenues and profitability for the 2012 financial year had all been based upon my being told that 100% of that capacity was going to be available for Qantas Courier. Likewise, the target set in my performance bonus were based upon that”.⁴

[32] Mr Pribula did not have the authority, in my view, to promise Mr Clark that Qantas Courier would be able to obtain 100% of the Jetstar cargo capacity contract. The Jetstar cargo contract was a contract between Qantas Freight and Freightways. Mr Pribula, may have believed that Qantas Courier was to secure the Jetstar business for itself. However, he was not in a position to make such a promise.

[33] In my view, Mr Clark was aware of the parties involved in the Jetstar cargo contract and that it was a matter outside Mr Pribula’s control. The contracts were between third parties.

[34] In his witness statement Mr Clark gave details of his experience in 2007 when he was a director of Jet Express.

[35] Mr Clark:

presented a proposal to Qantas Freight/Jet Connect to sell, market and handle the cargo capacity on all Qantas domestic flights within New Zealand. At that time, the capacity was contracted to the Freightways Group.⁵

[36] The proposal put forward by him was approved by Jet Connect NZ but rejected by Qantas Freight. Consequently, the capacity contract remained with Freightways.

[37] Again in 2010, as owner of FLG Limited, Mr Clark was requested by Jetstar Australia to present a proposal for the cargo capacity of Jetstar flights within in New Zealand. However, Qantas Freight rejected the FLG proposal in favour of Freightways.⁶

⁴ Clark witness statement para 15

⁵ Clark witness statement para 2

⁶ Paul Clark witness statement paragraphs 2 and 3.

[38] Counsel for Mr Clark, submitted that Mr Pribula made representations to him which enticed Mr Clark to accept employment by Qantas Courier at a salary less than market value.

[39] The claimed representation was that Qantas Courier would obtain 100% of the Jetstar cargo business from July 2011, the business plan had been prepared on that basis and provided for payment of a bonus if financial targets were achieved. As a result of the decision not to award Qantas Courier 100% of the Jetstar cargo business, the business plan was not achievable. Mr Clark was not able to achieve his financial targets and was therefore unable to achieve a bonus.

[40] Mr Pribula was not in a position to make any promises about whether the contractual relationship between third parties would continue or not. The decision to continue the contract with Freightways was a decision made by Ms Brock, not Mr Pribula. Mr Clark was aware through experience that proposals do not always result in binding contracts.

[41] I accept the submission by Counsel for Qantas Courier, that even if the representation was made by Mr Pribula, and the contract with Freightways was terminated, there was no guarantee the contract would have been granted to Qantas Courier.

[42] On the evidence available, it is not possible for the Authority to determine, but for the continuation of the contract with Freightways, Mr Clark would have achieved the required targets and a therefore a bonus.

Bonuses

[43] It is my view that the express terms of the employment agreement are that Mr Clark would be eligible to receive a bonus in the financial year ending 2012, if targets were met. They were not met. The employment agreement expressly states that payment of a bonus is in Qantas Courier's sole discretion. Mr Clark agreed and understood that to be the case.

Express terms of the employment agreement

[44] The plain wording of the employment agreement is clear. The wording of the bonus clause is:

Nothing contained in this agreement either expressed or implied, shall mean that any obligation exists for the employer to provide any bonus payments, except at its sole discretion.

[45] Counsel for Mr Clark argues that this clause is generic and that the more specific wording of Annexure 1 to the employment agreement prevails. I disagree. I agree with counsel for Qantas Courier's submission that such an interpretation renders the bonus clause meaningless which cannot have been the intention of the parties.

[46] Clause 4 is contained in the body of the employment agreement and has been signed by the parties on page 20. Annexure 1, comes after the declaration and signature page of the employment agreement.

[47] The amendment of the date from 2011 to 2012 in Annexure 1 has been initialled by both parties. However, Annexure 1 has not been signed by both parties, it has been initialled by one party, Mr Clark. Mr Pribula does not appear to have initialled those pages.

[48] It is my view that read together the intent of the employment agreement is that payment of any bonus is in Qantas Courier's discretion.

[49] Judge Shaw in *Terson Industries Limited v Loder*⁷ sets out the general rules of interpretation in employment agreements where there is a dispute as to interpretation: Judge Shaw says:

In a dispute about the interpretation and operation of an employment agreement, pursuant to s.129 of the Act, the Court applies normal contractual principles of interpretation but would also take into account the special features of employment relationships and the statutory regime of the Act. The following principles apply to the construction of an employment agreement:

- The Court must take an objective approach to interpretation.
- The starting point is the words written in the agreement but the Court is not limited to giving the words a purely literal meaning. The Court looks to find the meaning which the agreement would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation which they were at the time of the contract.
- Previous negotiations of the parties and their declarations of subjective intent are not admissible in interpreting the agreement.
- There is a difference between the meaning of the words in a grammatical sense and the meaning of the document being

⁷ *Terson Industries Limited v Loder* (2009) 6 NZELR 354 at [21]

what the parties using those words against the relevant background would reasonably have been understood to mean.

[50] Applying those principles it is my view that Qantas in its sole discretion was able to determine whether to pay the bonus.

[51] This interpretation is consistent with the way in which Mr Clark acted. During the course of the Authority's investigation meeting, Mr Clark told the Authority that he was aware that even if an amount for the payment of bonuses was budgeted for by Qantas Courier, he was aware that this did not mean the bonus would be paid.

[52] Mr Clark also produced a memorandum to the Authority, dated 18 July 2012, that he says he sent to Mr Pribula seeking clarification of his employment agreement with Qantas Courier. As counsel for Qantas Courier has pointed out in closing submissions, there is no evidence before the Authority to show that this memorandum was received by Mr Pribula. However, on its face, Mr Clark expressed in the memorandum, that at the time of his employment, Mr Pribula "clearly outlined the poor financials of the previous years for Qantas Courier, and the uncertainty going forward, a risk I was prepared to take..."

[53] At the Authority's investigation meeting, Mr Clark agreed that he was aware that bonuses were paid at the sole discretion of Qantas Courier.

[54] Mr Clark had the opportunity to strike out the bonus clause on page 4 when he signed the employment agreement. He did not do so.

[55] It is my view that Qantas Courier acted in a manner which was consistent with the terms of Mr Clark's employment agreement when it decided not to pay a bonus to Mr Clark for the financial year ending 2012.

The plain wording of the employment agreement, which is set out at paragraph 23 of this determination, is clear. Payment of bonuses was at the sole discretion of Qantas Courier.

Exercise of discretion

[56] Mr Clark argues that in exercising its discretion an employer must do so in a fair and reasonable manner, it cannot act arbitrarily. I agree with that proposition of the law.

Financial targets not met

[57] Mr Clark did not meet all of the key performance indicators (KPI's) specified in his employment agreement. Appendix A to the employment agreement set out a domestic revenue target for the financial year ending 2012 of \$0.9 million. The actual domestic revenue achieved was \$744,746. Mr Clark accepted this to be the case. In his memorandum to Mr Pribula dated 18 July 2012, Mr Clark himself referred to the inability to obtain expected revenue. In that memorandum, Mr Clark says that he achieved domestic revenue NZ of \$744,046 being 73% of gross profit.

[58] As the domestic revenue did not reach the target set out in the employment agreement, Mr Clark was not eligible for the bonus for the financial year ending 2012.

[59] Counsel for Mr Clark argues that in exercising its discretion not to award a bonus to Mr Clark, Qantas Courier acted unfairly and unreasonably. I do not agree.

[60] Mr Clark did not achieve the prescribed targets so was not eligible for a bonus. Qantas was facing significant financial challenges and in those circumstances, it decided not to pay the discretionary bonus to Mr Clark.

[61] Mr Clark appears not to have raised the bonus issue for the financial year ending 2012 with Qantas Courier until his memorandum of 18 July 2012. In his memorandum to Mr Pribula on that date, Mr Clark accepts that both he and Mr Pribula were aware:

achieving the bonus for Jetstar Domestic revenue was not possible given Qantas Freight Australia decision to keep 70% of the capacity to sell and handle under the Freightways Group in New Zealand and only allowing 30% of the capacity to Qantas Courier New Zealand.

[62] In the memorandum, Mr Clark requests a strategic review of Qantas Courier NZ for the financial year ending 2013. Mr Clark also seeks a salary and bonus agreement for the financial year ending 2013 based on the actual capacity available for Jetstar Domestic given his understanding that Qantas Courier in New Zealand was to sell 100% of the capacity on Jetstar Domestic from July 2012.

[63] This confirms my view that Mr Clark understood that a bonus for the financial year ending 2012 was not payable.

[64] The answer to the first issue is that Mr Clark was not contractually entitled to a bonus payment for the financial year ending 31 March 2012.

Second Issue**Was Mr Clark contractually entitled to any bonuses in the 2013 to 2016 financial years?**

[65] Annexure 1 of the employment agreement is clear and expressly states that eligibility to receive a bonus is for the 2012 financial year. Relevant wording includes, “You are eligible to receive a bonus ...for your performance carried out in the 2012 financial year”. The table setting out the criteria to achieve the bonus refers to the financial year ending 2012. Mr Clark, initialled an amendment to the year set out in the table of Appendix 1 from 2011 to 2012.

[66] The final paragraphs of Appendix 1 states:

“Please note that this bonus scheme is for the 2012 Financial Year only and will be reviewed year on year. There is no guarantee that this bonus scheme will continue after the 2012 financial year.”

[67] Due to the financial challenges faced by the Qantas group in the years 2013 to 2016 which lead to a “wage freeze”, Mr Clark was not invited to participate in the bonus scheme. There was no obligation on it to do so.

[68] The answer to the second issue is “No”

Costs

[69] Qantas Courier has 14 days from the date of this determination to file a memorandum in the Authority as to costs. Mr Clark has 14 days from receipt of the memorandum to file a memorandum in reply as to costs.

Anna Fitzgibbon
Member of the Employment Relations Authority