

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 9
5432601

BETWEEN ROBERT COYLE
 Applicant

AND GROUNDWORKS LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: John Porter, Counsel for the Applicant
 Ian Hard, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 5 & 20 December 2013 for the Applicant
 19 December 2013 for the Respondent

Determination: 28 January 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 31 July 2013 the applicant, Mr Robert Coyle, and the respondent, Groundworks Ltd (Groundworks), agreed and signed a Record of Settlement (the settlement agreement) pursuant to s.149 of the Employment Relations Act. The settlement agreement was subsequently certified and signed on 5 August 2013 by a mediator employed by the Ministry of Business, Employment and Innovation.

[2] Mr Coyle claims Groundworks has failed to comply with clause 2 of the settlement agreement and says it used an incorrect methodology to calculate the bonus monies owed to him. He seeks a compliance order¹, interest and costs.

¹ Section 137(1)(a)(iii) Employment Relations Act

Issues

[3] The issue for the Authority to determine is whether Groundworks has complied with clause 2 of the settlement agreement. In determining the matter the Authority needs to consider:

- what was the agreed methodology when calculating Mr Coyle's bonus;
- whether Groundworks is able to set-off net loss accrued in one financial calendar period against the net profit of another;
- if Groundworks is not able to set-off net loss accrued in one financial calendar period against the net profit of another, is Mr Coyle entitled to a pro-rata payment of the net profit of the 2013/14 year.

The Authority's investigation

[4] Having received Mr Coyle's statement of problem together with an attached sworn affidavit, and Groundworks statement in reply, the Authority convened a case management call with the parties' representatives on 28 November 2013.

[5] Counsel for both parties agreed that the matter was limited to determining the correct interpretation of the settlement agreement. I advised that if there were factual matters in dispute then an investigation meeting should be held. The parties' representatives each stated that the matter should be decided on the papers and arrangements were made for the exchange of submissions.

[6] Groundworks' submissions sought to introduce evidence not previously furnished to the Authority. I have referred to aspects of that information only where it is apparent that facts are not disputed.

Summary of factual background and relevant information

[7] On 14 December 2009 the parties agreed and signed the contents of Addendum 1 which provided in part for Mr Coyle's employment package, as follows:

- *Salary: \$90,000 per annum*
- ...
- *Bonus Scheme based on the company net profit*

The bonus scheme would be staggered over the first twelve months, after which the bonus percentage will be set at 15% after the first 12 month period.

The following will apply:

- 0-6 months 5% of net profit
- 7-12 months 10% of net profit
- From 13 months 15% of net profit

To give you an indication of the values of these we have based the figures below on an average net profit figures that we have obtained over the last four years. This is to give you an indication of the amounts.

- 0-6 months based on April to Sep figures 5%
of net profit \$8,327.25
- 7-12 months based on Oct to Mar figures 10%
of net profit \$59,481.57
- From 13 months based on Apr to Mar figures 15%
of net profit \$84,463,34

[8] Mr Coyle commenced his position as General Manager with Groundworks in or about February 2010. It is not disputed that the applicant received annual bonus payments in 2011 and again in 2012.

[9] As noted, the parties signed the settlement agreement on 31 July 2013. Despite the presence of a confidentiality provision within that document, it is necessary to set out the detail of the provision in dispute to establish whether enforcement action should be taken. Clause 2 of the settlement provides the following:

The employer will calculate and pay the outstanding bonus amount due to the employee in terms of the remuneration payable under his employment agreement (15% of the employer's net profit), up to the date of the employee's resignation. This will also be paid within 14 days of the resignation of the employee as general manager for the employer.

[10] On or about 20 August 2013 Groundworks received a letter from its accountant which was provided to Mr Coyle soon after. The letter advised:

Re Accounts for the year 2013 and April-July 2013 and bonus calculation

Below is the bonus calculation for Robert Coyle based on 15% of the net profit for the periods of:

*01 April 2012 – 31 March 2013 and
01 April 2013 – 31 July 2013*

- Net Profit to 31 March 2013 \$844,734

- *Net Profit to 31 July 2013* -\$706,701
- *Total Net Profit* \$138,033

The bonus is calculated at 15% of the total net profit and is subject to PAYE deductions.

- *Total net profit \$138,033 X 15% = \$20,704.95*

...

[11] Groundworks paid Mr Coyle his outstanding bonus (\$20,704.95) according to the calculations contained in the accountant's letter.

Mr Coyle's position

[12] Mr Coyle submits that Groundworks has not applied the methodology agreed in his employment agreement to calculate his bonus entitlement.

[13] Prior to the settlement agreement Mr Coyle says Groundworks had calculated net profit according to a financial calendar year beginning 1 April and ending 31 March. He says following the settlement agreement, Groundworks calculated his bonus by setting off its net losses accrued in the 2013/14 financial year² against the total net profit obtained in 2012/13 financial year.

[14] Mr Coyle claims he was owed \$126,710; 15% of net profits for 2012/13, and that this entitlement crystallised on 31 March 2013. He submits there is no provision in his employment agreement which allows Groundworks to set-off net profit against a subsequent financial year or period.

[15] Additionally Mr Coyle challenges Groundworks' claims of a net loss between the beginning of the 2013/14 financial year and his resignation date.

Groundworks' position

[16] Groundworks denies it is in breach of the settlement agreement and says clause 2 does not allow for separate calculations according to the financial year.

[17] Groundworks says it calculated Mr Coyle's bonus according to the wording in the settlement agreement and has paid 15% of net profit for the period 1 April 2012 through to the date of the respondent's resignation on 31 July 2013.

² For the period 1 April 2013 until the end of Mr Coyle's employment on 31 July 2013.

Discussion and analysis

[18] Given the parties in this matter dispute the interpretation and application of provisions contained in clause 2 of the settlement agreement, the Authority must take an objective, common sense approach and look to find the meaning which the settlement agreement would convey to a reasonable person having all the background knowledge reasonably available to the parties at the time of entering the agreement. The objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear.³

What was the agreed methodology when calculating Mr Coyle's bonus?

[19] Groundworks' submissions focused on the settlement agreement. It states the words of clause 2 are clear; the bonus was required to be calculated to the point of Mr Coyle's resignation and the provision did not allow for quantification based on separate financial periods.

[20] I agree that the settlement does not expressly record a requirement for separate calculations. However, I am unable to accept Groundworks' interpretation concludes the matter. Clause 2 of the settlement agreement records that the outstanding bonus is to be calculated and paid "*in terms of the remuneration payable under [the applicant's] employment agreement*"... In these circumstances Groundworks cannot rely exclusively on the words of the settlement agreement. It is clear that the settlement agreement required Groundworks to calculate the bonus in accordance with the addendum attached to Mr Coyle's employment agreement.

[21] The issue then requires an examination of what the terms of the remuneration payable under the employment agreement were.

[22] It is not disputed that the addendum provided Mr Coyle with a contractual entitlement to a bonus scheme based on Groundworks' net profit. Groundworks however, submits that the addendum does not state that it would calculate the bonus from 1 April to 31 March.

[23] I accept that there is no overt assertion as to when the calculation of Mr Coyle's net bonus would begin and end. However, I note that the addendum referred

³ *Vector Gas v Bay of Plenty Energy Ltd* [2010] NZSC 5; [2010] 2 NZLR 444; (2010) 9 NZBLC 102,874 (SCNZ) at [19]

to the average net profit value Mr Coyle might expect “*based on Apr to Mar figures*”. There is no other statement contained in the employment agreement to indicate over which periods of time Mr Coyle’s contractual bonus entitlement would be calculated.

[24] In the absence of any other express account as to how Groundworks would calculate Mr Coyle’s contractual bonus, and although used in an illustrative context, I consider the words contained in his employment agreement are indicative of an underlying assumption held by both parties that the bonus would be calculated from 1 April to 31 March.

[25] Alternatively, if I ignore the illustration contained in the employment agreement, Mr Coyle’s contractual entitlement becomes increasingly uncertain and inoperative for want of an agreed methodology as to calculation. I do not accept that the parties agreed to such an arrangement and there is extrinsic evidence that in practice Mr Coyle’s annual bonus entitlement was calculated on the financial year end date of 31 March in each of the two years prior to 2012/13 financial year.

[26] I find in all the circumstances that the parties agreed as a term of Mr Coyle’s remuneration that net profit would be evaluated on a financial year commencing 1 April and concluding 31 March. Even if it can be argued that the term is not sufficiently stated I consider the term is implied. The Court of Appeal in *Attorney General v NZ Post Primary Teachers Association*⁴ set out the practical or business efficacy test to determine whether a term or condition is to be implied. For a term to be implied it must:

- Be reasonable and equitable;
- Be necessary to give business efficacy to the contract;
- Be so obvious that it goes without saying;
- Be capable of clear expression;
- Not contradict the express terms of the contract

[27] I consider the term meets the above criteria.

[28] As a term of employment then, Groundworks was required to calculate the bonus entitlement based on a financial calendar year beginning 1 April and ending 31 March. The settlement agreement, by its requirement to have the bonus calculated and paid in accordance with the employment agreement, obliged Groundworks to do so based on that financial calendar year.

⁴ [1992] 1 ERNZ 1163

Was Groundworks able to set-off loss accrued in one financial calendar period against the net profit of another?

[29] I am unable to accept any argument on behalf of Groundworks that it was able to determine Mr Coyle's bonus payment pursuant to the settlement by deducting net loss incurred in one financial year from net profit obtained in another financial year to establish Mr Coyle's outstanding bonus payment. There is simply no provision in the employment agreement which permits the employer to take that action and it was not entitled to do so.

[30] Nor am I able to accept the suggestion that the parties agreed to a variation of Mr Coyle's employment agreement as a consequence of their agreement to the settlement. There is nothing recorded in the settlement to reflect that this was the intention of the parties. I have already found, in accordance with the provisions contained at clause 2, that Mr Coyle's bonus was to be calculated and paid in terms of the remuneration payable under his employment agreement.

Is Mr Coyle entitled to a pro-rata payment of the net profit at the end of the 2013/14 financial year?

[31] Mr Coyle submits that given that the employment agreement provides for calculation of his bonus payment over a defined financial calendar year, the proper method of calculating his bonus payment for the four month period he was employed in the 2013/14 financial year, is to defer the calculation of that bonus until the end of the financial year⁵ and calculate his bonus based on 15% of one third of net profit. In essence Mr Coyle says he is entitled to a pro-rata payment of Groundworks' annual net profit.

[32] I am not persuaded by this aspect of Mr Coyle's claims. There is nothing in the employment agreement that obliges Groundworks, on termination of employment part way through a financial year, to pay a proportionate payment of its annual net profit. While I have already found that the calculation of his bonus must be in accordance with employment agreement, that agreement is silent as to what should occur on termination. In these circumstances the Record of Settlement prevails and it is clear that the calculation of bonus extends only "*up to the date of the employee's resignation*". Mr Coyle is entitled only to 15% of net profit accrued by Groundworks between 1 April and 31 July 2013.

⁵ 31 March 2014

The accountant's information

[33] Surprisingly, in its submissions Groundworks now appears to contend that the accuracy of its accountant's calculations⁶, in particular that the net profit for year-end 2012/13 may be inflated. I am unable to accept that position. Groundworks states it has complied with the contractual and legally binding settlement agreement and paid Mr Coyle according to its accountant's calculations. Groundworks cannot now resile from that financial information.

[34] Mr Coyle accepts the annual net profit figure for the 2012/13 financial year as stipulated by Groundworks' accountant. He has raised generalised doubts as to Groundworks' claim that it has made no net profit between 1 April and 31 July 2013 and questions its accounting practices. Mr Coyle seeks an order that he be allowed to inspect the financial records of 2013/14. I have insufficient evidence to conclude that the accountant's record is mistaken and I am unwilling to grant the order requested. I note also that the words used in the settlement agreement state that "*the employer will calculate*" the bonus payment. Groundworks has complied with that obligation.

Orders

[35] Groundworks Ltd is ordered to pay Mr Coyle the difference between \$20,704.94 (the sum already paid), and his bonus entitlement for year end 2012/13. I calculate this sum as \$106,005.15 (gross). I consider it is appropriate to order interest on the outstanding bonus due by 14 August 2013. Calculated at 5% per annum from that date until final submissions to the Authority, this sum equals \$1,887.76. Both sums are to be paid within 14 days of this determination.

Costs

[36] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority

⁶ Refer to para [10]