

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 325/09
5138781

BETWEEN LEWIS FOULKES
 Applicant

AND GOOD START PROPERTY
 DEVELOPMENTS LIMITED
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Mr Foulkes in person
 Mike Austin, director, for Respondent

Investigation Meeting: 29 May 2009

Further information
received: 17 June 2009 from Respondent

Submissions received 18 June 2009 from Applicant
 and 2 July 2009 from Respondent

Determination: 10 September 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem arose when, upon making Mr Foulkes redundant in August 2008, the respondent failed to pay him final pay, bonuses and holiday pay.

[2] As its name indicates the respondent was involved in the property and construction sector. It was hit hard by the downturn in the property market and the decline in the construction industry. By June 2008 it had become clear that it needed to restructure and downsize if it was to remain solvent. This involved a decision to outsource the project management work that had been Mr Foulkes's job. On 23 June he received a letter giving him two months' notice that he was redundant. In the letter

Mr Austin, director of the respondent, stressed that the redundancy was not in any way Mr Foulkes's fault.

[3] In its statement in reply the respondent acknowledged its obligations to pay arrears of wages and holiday pay and in due course, when the resources became available, it did so. The claim for bonuses remained in dispute however and has now come before the Authority for determination.

[4] Mr Foulkes's written employment agreement contained the following:

"BONUSES

At the sole discretion of the Managing Director, the employer may operate (or withdraw at any time) an incentive or bonus scheme to promote the best interests of the business. The employee may be entitled to participate in such schemes.

Bonus elements determined so far are:

- *\$800.00 accountability incentive;*

Bonus elements will include, but are not limited to:

- *_% nett profit achieved per project above pre-determined target earnings*
- *_% of company Earnings before tax.*

TERMINATION

Bonus potential is intended to apply only so long as the employment relationship continues. If the employment relationship ceases or is subject to an act which constitutes instant dismissal, then any bonus payable will cease at the commencement of such act."

[5] Mr Foulkes claims accountability incentive payments for June and July 2008.¹ There is no claim in relation to the other two elements of the bonus scheme set out in the employment agreement. Although from time to time a percentage of net profit was paid, the only part of the bonus scheme that was fully operative during the employment was the accountability incentive. Both parties agreed that "fully operative" meant that it was paid on a monthly basis subject to specified criteria. A

¹ Initially he claimed for May also but after establishing that bonus was paid for that month he has withdrawn that claim.

bonus schedule which set out the criteria for the accountability incentive and the percentage of net profit was signed off by Mr Foulkes and Mr Austin on 13 June 2007, although I was told that incentive payments had been made from the beginning of the employment in 2006.

[6] Records were available for incentive payments for the period from July 2007 to May 2008 and showed that the payment varied from month to month. The maximum (\$800.00) was paid out twice (in July and August 2007) whilst in March 2008 there was a nil payment. I was told that the March bonus was forfeit because of serious timing overruns that month. Mr Foulkes initially estimated his claim at \$750.00 per month but after considering the records he quantified his claim at \$643.98 per month (the average monthly bonus paid in the period covered by the records.)

[7] Mr Austin told me that although, while operative, the accountability incentive worked on the basis of set criteria, it remained entirely up to his discretion whether he operated the scheme at all. He said it could be withdrawn at will at any time, and that the respondent's financial problems rendered it necessary to do so for the months of June and July.

[8] In the alternative he argued that even if this were not the case, the incentive would not (on the application of the set criteria) have been payable for June and July 2008.

Issues

[9] The issues for determination are therefore:

- i. the nature and extent of the respondent's discretion in relation to the bonus;
- ii. whether the bonus was payable in June and/or July 2008, and if so,
- iii. how it should be quantified.

The discretion to pay a bonus

[10] At the start of each project for which he was responsible Mr Foulkes was asked to sign off a budget and a timeline. He was then held accountable for keeping that project within the set parameters, and was required to demonstrate this in weekly reports. If he did not, he lost his \$800.00 per month or part thereof according to a scale set out in the bonus schedule. Each month one of the directors, Melanie Palmer, would prepare a summary spreadsheet setting out the progress of current projects (based on the weekly reports and on any customer feedback) as compared to the signed budgets and timelines.

[11] The Authority was supplied with the bonus schedule signed on 13 June 2007. 35% of the monthly accountability incentive payment depended on timing, 35% on budget and 30% on “*other*” identified as being at the total discretion of the Managing Director and relating to “*build as designed, quality, relationships, regulatory compliance etc.*” Timing overruns of 25.01% or more, and budget overruns of 4.1% or more, led to progressive reductions in the bonus payable.

[12] Mr Foulkes told me that he accepted that the accountability incentive might be withdrawn, just as he had accepted the respondent’s decision not to implement the other two elements of the agreed bonus scheme. However he told me that he expected that any decision to withdraw would have been subject to consultation and the giving of reasons and would not have been implemented without notice. He told me that he worked out the two month notice period his employer had given him (a month more than the contract required) in the belief that the accountability incentive remained in place, and continued to furnish the weekly reports that were required of him under the terms of the scheme.

[13] Mr Austin’s view was that he was entitled to withdraw the scheme at any time without giving reasons or notice, but believed in any event that by June the financial difficulties facing the respondent provided ample reason to withdraw the scheme. He provided evidence to the Authority to show that the respondent had creditors who have remained unpaid since that time. He acknowledged that at no time during the employment did he tell Mr Foulkes expressly that he was withdrawing the

accountability incentive. He said that he thought the withdrawal of the scheme should have been an obvious and inevitable corollary of the June notice of redundancies.

Determination

[14] Mr Austin now asserts a withdrawal that took effect from the beginning of June, but he did not advise Mr Foulkes then that he was withdrawing the scheme, nor did he do so at any time before the employment ended. Throughout June and July Mr Foulkes acted in reliance on a belief that the accountability incentive remained in place. He worked on, completing an extended notice period, in the expectation that he would be paid on the same basis as he had been since the start of his employment. Since he had never been told otherwise this was reasonable. (Even the advice of redundancy, from which Mr Austin says Mr Foulkes should have inferred that the scheme would be withdrawn, did not come until the latter part of June, well after the event.)

[15] I am satisfied that the withdrawal of the scheme could not take effect without Mr Foulkes being advised of it. After all, the purpose of the payment was to incentivise certain aspects of performance, which depends on knowledge of the incentive. The written employment agreement permitted Mr Austin to withdraw the bonus scheme, but not retrospectively.

[16] Since the scheme was not withdrawn during the employment, Mr Foulkes is entitled to be paid his incentive bonus on the agreed terms for the months of June and July.

Was the bonus payable for June and July?

[17] As we have seen, normal weekly reports were furnished for the months of June and July. Mr Austin told me that he accepted that Mr Foulkes met the budget and timing criteria for all projects underway in those months. However he said that problems coming under the “other” category were such that no bonus was payable for those months. He said Mr Foulkes’ failed to bill clients correctly, with consequent loss of revenue and that this was such a serious matter that it outweighed any benefit from meeting targets relating to time and money spent.

[18] Although I was shown an example of what was agreed to be a typical monthly spreadsheet, spreadsheets were not produced for either June or July. Ms Palmer cannot recall completing spreadsheets or find any record of having done them. I conclude that spreadsheets were not completed for June or July.

Determination

[19] Given the fact that spreadsheets are not available to support his evidence, I am not prepared to accept Mr Austin's assertion that there were serious problems in the "other" category. Given also that it has been conceded that budget and timing criteria were met, I must conclude, on balance, that the accountability incentive was payable in full for the months of June and July. However Mr Foulkes has not claimed the full \$800.00. I therefore order payment of the sum claimed.

[20] The respondent is ordered to pay to the applicant, Mr Foulkes, outstanding incentive payments in the sum of \$1,287.96 gross in total.

Yvonne Oldfield

Member of the Employment Relations Authority