New Zealand Employment Relations Authority Decisions

Hawkins Construction Ltd v Mathieson (Christchurch) [2016] NZERA 83; [2016] NZERA Christchurch 30 (11 March 2016)

Last Updated: 30 March 2017

Attention is drawn to the order prohibiting the publication of certain information.

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2016] NZERA Christchurch 30
5581267

BETWEEN HAWKINS CONSTRUCTION LIMITED

Applicant

A N D LYNDA MATHIESON Respondent

Member of Authority: David Appleton

Representatives: Chris Hogg, Counsel for Applicant

Respondent in person

Investigation Meeting: 23 and 24 February 2016 at Christchurch

Submissions Received: 24 February 2016 for the Applicant

24 February 2016 for the Respondent

Date of Determination: 11 March 2016

DETERMINATION OF THE AUTHORITY

A. Ms Mathieson did not breach her duty of fidelity to the applicant.

She breached her duty of confidentiality in a minor respect, and I

make no orders in respect of that breach.

B. Costs are to lie where they fall.

Prohibition from publication order

[1] Evidence was heard about a member of staff of the respondent who remains employed by it. This evidence included details of his remuneration at the start of his employment and of an insulting term that was allegedly used about him by one of his managers at the material time.

[2] As this staff member did not take part in the proceedings, I prohibit from publication the name of this individual. He shall be referred to in this determination as Mr X.

Employment relationship problem

[3] The applicant (Hawkins) alleges that Ms Mathieson breached her employment agreement (specifically, her duty of fidelity)

by incorrectly informing a quantity surveyor, Mr Ross Weymouth, that he was entitled to be considered for a loyalty bonus of $10,000 on an annual basis when she knew that he was only entitled to be considered for a one-off loyalty bonus of $10,000.

[4] Hawkins also alleges that Ms Mathieson breached the duty of confidentiality that she owed to Hawkins by disclosing confidential information to Mr Weymouth after her employment with Hawkins had ended in respect of his former colleague, Mr X; namely Mr X's entitlement to be considered for a loyalty bonus and his starting salary.

[5] Ms Mathieson denies that she breached the terms of her employment agreement.

Brief account of events leading to the claim

[6] This matter is linked to the Authority's matter designated by the case number

55526631. These two matters were investigated together. A more detailed account of the factual background is set out in the determination of that matter.

[7] Ms Mathieson was employed by Hawkins as a Rebuild Solutions Manager

(Human Resources and Administration Support) between October 2010 and August

2013. Mr Weymouth commenced employment with Hawkins on or about 9 January

2012.

[8] Ms Mathieson's evidence is that she was required to assist the recruitment managers in employing team members for the Hawkins' Canterbury Earthquake Rebuild Project. Her evidence was that the project was fluid by nature due to the circumstances that were ongoing at the time, including ongoing earthquakes and

associated stresses, and a significant shortage of skilled labour that existed in the

1 *Weymouth v. Hawkins Construction Ltd* [2016] NZERA Christchurch 29

marketplace. She says that Hawkins was also competing in the marketplace with other project management organisations, builders and recruitment agencies. Ms Mathieson said that it was not a *business as usual* operation but that it was unique, and fluctuated dramatically with the demands of the rebuild.

[9] Ms Mathieson said that each employee had an individual employment agreement with terms and conditions designed to attract that individual, and that not every employee had the same bonus or incentive package.

[10] Ms Mathieson said that she did not have the delegated authority to decide on the terms and conditions on which recruits were employed, and that it was her responsibility to prepare the intended individual employment agreements, with terms and conditions as instructed by the recruiting managers. She followed this process when preparing Mr Weymouth's intended employment agreement.

[11] Ms Mathieson says that, in approximately December 2011, Mr Weymouth was made an offer of employment by the recruiting managers. She believes that it was Ben Pritchard who would have made the offer of employment to Mr Weymouth on behalf of Hawkins. However, Ms Mathieson says that the recruiting managers at the time worked alongside each other and often provided input into each other's recruitment selection. Other recruiting managers at the time were Richard Jack, John Fraser and Mike Smith.

[12] After Mr Weymouth had received his intended individual employment agreement in December 2011, and had started working in January 2012, Ms Mathieson realised that she had not received a signed copy from him. This was, it turned out, because Mr Weymouth tried to send a signed copy to Ms Mathieson in December 2011, which was never delivered to her inbox. Accordingly, Ms Mathieson approached Mr Weymouth during working hours in late January 2012 to ask him to re-sign the agreement, which he did.

[13] During this encounter, Mr Weymouth sought clarification from Ms Mathieson that the $10,000 loyalty bonus referred to in the letter of offer was to be paid yearly. Ms Mathieson said that she checked this with Mr Pritchard and Mr Jack, and that the outcome of the conversation was that she was told that the loyalty bonus was intended to be paid to Mr Weymouth annually. She says she was also told that it was

unnecessary to amend the employment agreement that had been offered to

Mr Weymouth.

[14] Ms Mathieson says that her conversation with the recruitment managers about Mr Weymouth's loyalty bonus was not a formal one and that, as they were under an extreme amount of pressure, she did not push the matter further. She said that she reported back to Mr Weymouth what she had been told by the recruitment managers.

[15] Ms Mathieson says that Mr Weymouth was employed at the same time as another quantity surveyor (Mr X). She says that

Mr Weymouth had advised her that Mr X would likely ask her to clarify his bonus structure too and, when she was talking to the recruitment managers about Mr Weymouth's annual bonus payment, she mentioned to them that Mr X would also likely ask the same question. She says that she was advised that the same bonus arrangement would apply for Mr X.

[16] Ms Mathieson says that she recalls the conversation well because she was shocked that one of the managers used an insulting epithet about Mr X and because their conversation about the likely future of the relationship with its commercial partner, IAG, was of relevance to her future in the company.

[17] Mr Weymouth emailed Ms Mathieson on 22 April 2015, after she had left Hawkins' employment under the terms of a confidential record of settlement, asking for her recollection of matters. He asked her the following:

Good morning Lynda

As discussed yesterday, please find attached my contract with

Hawkins.

I require confirmation that the Loyalty bonus was intended to be annually and not a one off bonus (item 6 salary). Also the EAD (first page), was a result of our discussion on this where you added the bonus to confirm this upon signing my contract.

Secondly, I had a pay increase in March 2013, and April 2013. Hawkins are also stating that one of these pay increases was to incorporate my loyalty bonus into my salary, although the documents only say my base salary is to be increased with no reference to the bonus. If you can cast your mind back to that time, you will remember that the only reason I received a pay increase was because John Fraser received a phone call from City Care for a reference (first increase in March). And then I handed my resignation in, which prompted the second increase (April) to get me to stay at Hawkins. My understanding was all bonus's are an extra to my contract due to the short term of contract, and no guarantee of job security.

Confirmation of the above will be greatly appreciated.

Thanks,

Ross Weymouth

[18] Ms Mathieson responded in the following terms by way of an email dated

6 May 2015:

Hi Ross – I've answered below in blue.

I'll try my best, but I have to be honest it's a difficult one to prove –

due to the way Hawkins have written the agreement.

I suspect that the argument from Hawkins will be that if it was intended to be a yearly arrangement the agreement would have stated clearly … "per year".

What I do recall is this:-

***Firstly**:-*

• The templates that Hawkins use for those letters are very prescriptive, with blank gaps for specific individual information to be entered. There is no option in the template for bespoke items. Hence, the detail that the bonus was to be paid annually is silent.

• The Agreements are based on the information provided in the EAD's – which in your case stated $10,000 bonus, but was silent regarding annual or one off payment.

• You did seek clarification with both Ben and I to whether the bonus was intended to be annual and I am certain it was.

• This also applied to [Mr X].

*I recall very clearly the "Wages spreadsheet for 2012" that definitely highlights your salary, plus "annual" bonus. Whether Hawkins will declare it to you is another thing … (also for [*Mr X].

***Secondly**:-*

I categorically confirm that the purpose of the two pay increases was

NOT to incorporate your annual bonus into your salary.

If Hawkins state that the pay increase was to incorporate your annual bonus into your salary, then they are indirectly confirming that the bonus was intended to be paid annually.

The reasons for you [sic] *pay increase were as follows:*

• You and [Mr X] *were the lowest paid QS's and possibly lowest paid employees. I recall this clearly as John Fraser was trying to get you a pay rise. He was trying to help you move out of your flat. He realised that your pay was low in comparison to what was being paid in the marketplace. An increase was authorised immediately. This can be confirmed by the "Wages spreadsheet" – if you can get your hands on it.*

• A month later in your effort to move out from your flat, you were offered a higher paid role elsewhere – to which Hawkins responded by raising your salary again.

In each of the pay increase letters, both state ... "Except where variations have occurred as stated in this letter, all other terms and conditions will remain as stated in your current employment contract". (As does the 12 month loyalty bonus.)

Hawkins will not be able to provide evidence that the purpose of one pay rise was to incorporate your annual bonus – it is incorrect.

The purpose of the annual loyalty bonus was to ensure that you would remain with the project to the end of each additional year. The project was unpredictable in regards to a finish date. It was perceived as being very stressful and unfulfilling role for a QS and there were plentiful opportunities with commercial construction companies to tempt QS's to leave. (and they did)

If there is anything that your lawyer would like to check with me, I am more than happy to help. I am also agreeable to providing an affidavit if required.

Kind regards, Lynda Mathieson

[19] It was only when the email from Ms Mathieson to Mr Weymouth was disclosed to Hawkins after he had resigned, once legal proceedings had come on foot, that Hawkins became aware of the information that Ms Mathieson had given him. It was then that it lodged the current proceedings against Ms Mathieson.

The issues

[20] The following are the issues that must be determined by the Authority:

(a) Did Ms Mathieson breach her duty of fidelity in advising Mr Weymouth that he was entitled to receive a loyalty basis on an ongoing basis?

(b) Did Ms Mathieson breach her duty of confidentiality by disclosing to

Mr Weymouth remuneration information in relation to Mr X?

Did Ms Mathieson breach her duty of fidelity by telling Mr Weymouth that he was entitled to a loyalty bonus on an annual basis?

[21] I do not accept that Ms Mathieson deliberately lied to Mr Weymouth about her conversation with the recruitment managers, although I do believe she innocently

mistook the intentions of those managers2. I found Ms Mathieson to be a credible witness who was candid about the many errors she made while carrying out her duties in a very hectic and challenging environment. Also, she had no cogent reason to lie to Mr Weymouth about her belief about his entitlement when she sent her email to him on 6 May 2015.

[22] Furthermore, Ms Mathieson was an HR manager who had been asked a question by an employee about his terms and conditions and who was duty bound to seek to answer it. She was therefore not only entitled to seek clarification from the recruitment mangers, but she was obliged to. She was also obliged to communicate back to Mr Weymouth what she understood those managers' intentions to be.

[23] Therefore, Ms Mathieson did nothing that fell outside of the scope of her contractual duties, both express and implied, by seeking clarification and communicating what she had learned to Mr Weymouth.

[24] She did not, therefore, breach her duty of fidelity to Hawkins.

Did Ms Mathieson breach her duty of confidentiality by disclosing information in relation to Mr X?

[25] Ms Mathieson's individual employment agreement with Hawkins contained

the following clause:

*7. **Confidentiality***

7.1 All transactions, records and information pertaining to the business of the company, including (but not limited to) details of suppliers, customers, clients, profit margins, pricing structures, business quoted, business forecast, and design and technical

knowledge, are to be held in strict confidence by the Employee both during the period of the Employee's employment and also after termination, for whatever reason.

7.2 Details of the Employee's salary and terms of employment shall be confidential between the Company and the Employee.

[26] First, I accept that Ms Mathieson was under an express duty, pursuant to the above clause, to keep in strict confidence confidential information relating to the

business of Hawkins. I also accept that information about the salaries of employees

2 See paragraphs [55] et seq. of the determination referred to in footnote 1 above for an explanation about this conclusion.

which she had learned about during the course of her employment falls within the category of information intended to be protected by that clause. Finally, I accept that the duty of confidentiality continued after the termination of her employment, by virtue of the express terms of her employment agreement.

[27] There are two pieces of information about Mr X that were disclosed to Mr Weymouth by Ms Mathieson in her email of 6 May 2015 that could be confidential information. The first was that Mr X had been entitled to receive a loyalty bonus. The second was that Mr X had been the lowest paid quantity surveyor, alongside Mr Weymouth, from which Mr Weymouth would have been able to have worked out Mr X's starting salary.

[28] I accept the evidence of Ms Mathieson and Mr Weymouth that it had been Mr X who had already told Mr Weymouth that he was in receipt of a loyalty bonus, and that Ms Mathieson knew that Mr X had told Mr Weymouth that. Therefore, she had not revealed anything to Mr Weymouth in that respect that she believed he did not already know. That cannot, therefore, be a breach of her duty of confidentiality.

[29] However, it is not clear that Mr X had told Mr Weymouth what salary he had started on. Whilst he may well have, no evidence was led that that had been the case. I therefore conclude that Ms Mathieson did breach her duty of confidentiality in this respect.

Remedies

[30] Hawkins sought an enquiry into damages and payment of its costs against Ms

Mathieson. It did not seek penalties.

[31] Mr X has made no complaint about Ms Mathieson revealing, in 2015, what Mr X's salary had been in 2012, and so no damages arise from my finding that Ms Mathieson breached her employment agreement in respect of this.

[32] I make no orders in respect of my finding.

Costs

[33] I have found that Hawkins has been only partially successful, and that the breach by Ms Mathieson I have found was minor in nature, and had no adverse effect. I do not, therefore, believe that it would be just for costs to be awarded against Ms

Mathieson. Ms Mathieson represented herself at the investigation and was represented only briefly when proceedings were first issued against her. The costs are therefore unlikely to be significant. I therefore order that costs should lie where they fall in respect of this matter.

David Appleton

Member of the Employment Relations Authority
