

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 114
5519037

BETWEEN DION MARCUS HOKAI
 Applicant

A N D SHAREMILK LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: R Alspach, Advocate for Applicant
 B Guest, Advocate for Respondent

Investigation Meeting: On the papers

Submissions Received: 29 and 31 March 2015 from Applicant
 25 March 2015 from Respondent

Date of Determination: 20 April 2015

INTERIM DETERMINATION OF THE AUTHORITY

- A. I decline to deal with the issue of liability for payment of the performance bonus from 2009/10 onwards on the papers. It shall be dealt with at hearing following the filing of further evidence.**
- B. Pursuant to s160(3) of the Act an additional issue for hearing shall be whether the respondent has breached its duty of good faith and/or clause 8 of the employment agreement by failing to turn its mind to payment of the performance bonus for the 2010 to 2014 milking seasons.**
- C. Costs are reserved.**

Employment relationship problem

[1] Dion Marcus Hokai seeks payment of wage arrears arising from holiday pay, child support and bonus payments.

[2] On 12 March 2015, the issue of liability for the payment of a performance bonus for the 2010/11 milking seasons onwards appeared to be capable of being determined on the papers with quantification (if any) determined at the hearing. This was on the basis of respondent submissions the employment agreement did not provide for payment of a performance bonus in subsequent years to the 2009/10 milking season. I directed the parties to file submissions on the issue of whether the applicant was legally entitled to receive the bonus after the 2009/ 10 milking season. The matter is now before me for determination.

Is the respondent employer liable to pay a performance bonus?

[3] The respondent submits that the employment agreement provided for remuneration including a “*discretionary*” bonus linked to meeting objective performance criteria for the season. It further submits Schedule 2 specified “*any performance bonus will be renegotiated annually*”. It accepted a performance bonus was paid in 2009/10 but submits no further performance bonus was negotiated or agreed. No renegotiation of the performance bonus occurred. Therefore there was no contractual entitlement.

The Employment Agreement

[4] The parties entered into an employment agreement on 30 May 2009.¹ Clause 1.1 of the individual employment agreement provided:

1. Terms of Agreement

1.1

This agreement will come into effect on 1 June 2009 and will remain in force until renegotiated or terminated pursuant to any provision of this agreement.

[5] Clause 7 set out the remuneration payable:

7. Remuneration Details

7.1

¹ Individual Employment Agreement pp28 – 56 Statement of Problem

The gross annual salary shall be \$40,000/year plus the accommodation allowed at \$5,200 (\$200/fortnight). Details of this and Performance Bonus are found in Schedule 2.

All wages or salary will be paid fortnightly by direct credit to the Employee's nominated bank account.

7.2

Employees will be supplied with details of their wage/salary calculations.

7.3

At termination of this Agreement the Employee will receive their final pay on the day following termination after the inspection of any Employer-provided accommodation.

7.4

The remuneration will be reviewed annually on or about 31 May each year. In no event will the Employer be obliged to increase the remuneration beyond this as a result of such a review.

[6] The agreement also provided for performance appraisals in clause 8:

8. *Performance Appraisals*

8.1

The Employee agrees to participate fully in any formal performance appraisal programme that will be conducted by the Employer. The Employee also agrees to fully participate in various business strategies formulated by management to enhance the growth of the business through the generation of inquiries, conversion to sales and productivity. This may include the setting of goals for individual employees to help achieve such productivity.

8.2

The Employee's performance will be reviewed two monthly but with the first review after four weeks of employment.

[7] Schedule 2 dealing with remuneration and performance bonuses is a table.² The first column is headed "*responsibility areas/tasks/duties*" setting out various tasks for the employee to complete. The second column is headed "*performance measures*" which sets out how the items in column one shall be measured or achieved. The four remaining columns headed "*Employee rating*", "*Employer rating*", "*Agreed rating*" and "*Additional Comment*" give the appearance of a performance appraisal document where the parties 'rate' the employees performance. The only reference within Schedule 2 to a performance bonus is on p 21 in the second column where there is a comment about a "*Performance bonus page for milk quality criteria*".

² See above pp.21-26

Determination

[8] This dispute is about the interpretation and application of the bonus clause in the agreement and the cause of action that arises.

[9] The necessary inquiry in interpreting an agreement is what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear.³

[10] Where the contractual intention is clear from the words used, the Authority must give effect to it.⁴ The first and often the last port of call will be the language that the parties chose to adopt. Such language must be read and understood in the context of the agreement as a whole.⁵

[11] It is fundamental that words can never be *construed* as having a meaning they cannot reasonably bear. This is an important control on the raising of implausible interpretation arguments. Furthermore, the plainer the words, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say.⁶

[12] Section 160(3) of the Employment Relations Act 2000 (the Act) provides the Authority is:

... not bound to treat a matter as being a matter of type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described.

[13] Schedule 2 does not specify that the performance bonus shall be renegotiated annually.

[14] The only reference to renegotiation is in clause 1.1. It plainly does not deal with the performance bonus. It refers to the agreement and emphasises it “*will remain in force until renegotiated or terminated.*”

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

⁴ *Lowe Walker Paeroa Ltd v Bennett* [1998] 2 ERNZ 558 (CA) at 566 -567

⁵ *Secretary for Education v New Zealand Educational Institute Te Riu Roa* [2002] 2 ERNZ 470 (EmpC) at [26]

⁶ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [23]

[15] The payment of performance bonuses are usually discretionary. The exercise of the discretion to refuse to pay a performance bonus must be done on a reasonable basis. A failure to consider payment of a bonus may not be reasonable in the circumstances. The respondent appears to admit it has not considered payment of a performance bonus since 2009.

[16] The submissions also infer that no performance appraisal in terms of Schedule 2 may have occurred. Clause 8 of the agreement mandates regular performance appraisals occurring. The structure of the performance appraisal is set out in Schedule 2. While the applicant may not have been entitled to payment of a performance bonus, he would have been entitled to have regular performance appraisals set out in clause 8 and Schedule 2.

[17] This may give rise to an alternative cause of action for breach of implied duty of good faith under s4 and/or clause 8 in the employment agreement under s134 of the Act. Given Mr Hokai's employment ended in May 2014 he appears to be within the 12 month time limitation for the filing of a breach application pursuant to s135(5) of the Act.

[18] I will require further evidence about why the respondent declined to pay any performance bonus from 2009/10 onwards before determining the issue of liability for payment of the performance bonus. I decline to deal with the issue of liability for payment of the performance bonus from 2009/10 onwards on the papers. It shall be dealt with at hearing following the filing of further evidence.

[19] Pursuant to s160(3) of the Act an additional issue for hearing shall be whether the respondent has breached its duty of good faith and/or clause 8 of the employment agreement by failing to turn its mind to payment of the performance bonus for the 2010 milking season onwards.

[20] Costs are reserved.

