New Zealand Employment Relations Authority Decisions

Kahala Holdings Ltd v Taylor CA 33/06 (Christchurch) [2006] NZERA 677 (6 March 2006)

Last Updated: 25 November 2021

Determination Number: CA 33/06 File Number: CEA 287/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH OFFICE

BETWEEN Kahala Holdings Limited (Applicant)

AND Ross Henry Taylor (Respondent)

REPRESENTATIVES Graham Allan, Counsel for Applicant

Nicole Ironside, Counsel for Respondent

MEMBER OF AUTHORITY Philip Cheyne

INVESTIGATION MEETING 9 February 2006

10 February 2006

DATE OF DETERMINATION 6 March 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

> [1] Kahala Holdings Limited was previously Nalder & Biddle (Nelson) Limited and I will refer to the company as Nalder & Biddle for convenience. Ross Taylor commenced work for Nalder & Biddle in May 2002 and resigned from his employment as manager of the ENZED Division in September 2004. Nalder & Biddle made a payment of $30,000 net to Mr Taylor soon after he was employed and sought to recover that payment from him at or after the termination of the employment. Notwithstanding the written agreement entered into by Nalder & Biddle and Mr Taylor shortly before the payment was made, there is now a dispute about the terms on which the payment was made. The dispute centres on a discussion at Havelock prior to the commencement of the employment.

Havelock discussion

> [2] Mr Taylor, Mrs Taylor and Malcolm Price were all present. Mr Price is Nalder & Biddle's chief executive officer. There is one central factual dispute, although there are other peripheral disputes as one might expect, given the passage of time. In evidence, Mr and Mrs Taylor both say they were told that Nalder & Biddle would pay Mr Taylor $30,000 at the start of the employment as an advance against his annual bonus. Mr Price's evidence is that he told Mr and Mrs Taylor that the

$30,000 would be treated as an advance of discretionary bonuses and that repayment would be by way of such bonuses. Mr and Mrs Taylor say one or both of them asked what period of time the advance would cover bonuses for and Mr Price said

two years. Mr Price denies saying *two years* or indicating any particular timeframe. Both sides agree that Mr Price did refer to another manager known to Mr Taylor, saying that he had just received a substantial bonus.

[3] I find it likely that Mr and Mrs Taylor did ask about the period of time that the advance against bonus payments related and I prefer their evidence on that point. However, I do not accept that Mr Price referred to two years as a definitive timeframe. I accept his evidence that he referred to bonus payments as discretionary. He knew that most managers at the level of Mr Taylor's intended appointment did not get bonuses and any bonus could not be paid without the approval of the company owner. It is unlikely in those circumstances that Mr Price would commit Nalder & Biddle to a certain bonus of $15,000 net per year for the following two years.

Payment of the $30,000

[4] Mr Price prepared a document relating to the $30,000 and left it for Mr Taylor to sign, which he did. There is nothing improper or irregular about the preparation or the signing of the document, entitled *Heads of Agreement* and dated 16 May 2002.

[5] The relevant terms are:

1. *N&B will advance to RS the sum of $30,000 to assist in the sale of his home and the purchase of a vehicle.*
2. *The advance of $30,000 to RS is an 'interest free' advance.*
3. *The advance of $30,000 will be repaid to N&B from RS's annual bonus until it is paid back in full.*
4. *If RS ceases employment with N&B before the advance is repaid in full, he will be required to repay the outstanding amount immediately.*

[6] The $30,000 was paid to Mr Taylor on or about 21 May 2002. Later, Mr Taylor received a pay slip that showed a *performance bonus* of a gross amount with tax deducted giving a net payment of $30,000.

[7] It is common ground between Mr Taylor and Nalder & Biddle that no mention was made of the $30,000 or bonuses from May 2002 until after Mr Taylor gave notice of resignation, which he did on 27 August 2004.

[8] Mr Price also said, and I accept, that there was no discussion between him and the company owner for the entire duration of Mr Taylor's employment about whether or not Mr Taylor was entitled to any bonus based on his or his division's performance.

Attempts to recover the $30,000

[9] There are disputes about when Mr Price first sought recovery of the $30,000, what he said and what Mr Taylor said in response. Mr Price and Mr Taylor have different recollections about these matters but it is unnecessary to resolve the disputes. Both men agree there was a discussion about the matter shortly before the end of Mr Taylor's notice period.

[10] Mr Taylor then sought advice from someone he wrongly thought was a lawyer. That representative wrote to Mr Price on 21 October 2004. The letter says that there is no dispute about the *Heads of Agreement*, and *Mr Taylor intends to repay any money outstanding but there needs to be proper consideration about any bonus due during the employment*. Another letter from the representative, dated 22 November 2004, says that Mr Taylor accepted that two years had been mentioned but not as a definitive time scale, and that he was prepared to repay an agreed sum taking account of bonuses.

[11] There is also an affidavit apparently prepared by the representative but sworn by Mr Taylor in which he states that he would repay the outstanding amount of the $30,000 after consideration of the bonus due to him. It also says *I accept there is a sum of money to be repaid to the company and I have always accepted this but the sum should be less than $30,000*.

[12] To the extent that these statements create a problem for Mr Taylor's current defence, he sought to criticise the representative for exceeding instructions. He also says that the communications and the subsequent affidavit refer to an attempt to negotiate resolution. However, the statements accord with the view I have formed about the Havelock discussions so I reject Mr Taylor's attempt to avoid the clear meaning that must be taken from those statements, including the affidavit.

[13] Nalder & Biddle sought summary judgment against Mr Taylor who defended that application, in part saying

that jurisdiction over the dispute between the parties about Nalder & Biddle's obligation to pay a bonus and thereby reduce the $30,000 advance lies with the Employment Relations Authority. Nalder & Biddle then lodged a statement of problem with the Authority. In an amended statement in reply, lodged on 14 November 2004, Mr Taylor initiated action in the Authority in respect of an unjustified disadvantage grievance and an unjustified constructive dismissal grievance. These actions are intended as a set-off against Nalder & Biddle's claims but, if valid, they have a life of their own.

[14] During a conference shortly before the amended statement of problem was lodged, counsel for Mr Taylor foreshadowed the reference to the Authority of a grievance and counsel for Nalder & Biddle asserted that any grievance would be out of time. During a subsequent directions conference, the issues for the investigation meeting were limited to the applicant's original claim; whether Mr Taylor raised an unjustified disadvantage grievance or an unjustified constructive dismissal grievance within time; and, if not, whether leave should be granted for out of time grievances.

The jurisdiction of the Authority

[15] The Authority's role is to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case: see Employment Relations Act 2000 s 157(1). It has exclusive jurisdiction to make determinations about employment relationship problems generally, including disputes, matters related to a breach of an employment agreement and any other action (not directly within the jurisdiction of the Employment Court) arising from or related to the employment relationship. An employment relationship problem includes a personal grievance, a dispute and any other problem relating to or arising out of an employment relationship.

[16] In resisting the summary judgment application, Mr Taylor referred to *Waikato Rugby Union (Inc) v. New Zealand Rugby Football Union (Inc)* [2002] 1 ERNZ 752. That case held that words such as *arising from or related to the employment relationship* are sufficiently wide to confer jurisdiction when the proceedings concern the interpretation of a secondment agreement between an employer and a non-party to the employment relationship. In the present case, even if the written agreement about the $30,000 is not part of the employment agreement, it was closely related to that agreement. There would have been no employment relationship but for the arrangement about the

$30,000 – it was a central part of the formation of the relationship.

[17] Nalder & Biddle's attempt to recover the $30,000 is an action arising from or related to the employment relationship. Accordingly, the Authority has jurisdiction over the applicant's claim as it undoubtedly does over the issues raised by the respondent's amended reply.

$30,000 as an advance or a bonus?

[18] It is argued for Mr Taylor that the payment was a bonus not an advance and that Nalder & Biddle cannot now revisit the terms on which the payment was made. The latter point is undoubtedly correct but the former point does not reflect my findings on the evidence. The written agreement accurately reflects the tenor of the Havelock discussions, in turn summarised in Mr Price's email dated 29 April 2002. The written evidence consistently describes the $30,000 as an advance, as do the communications from Mr Taylor's former representative and his affidavit.

[19] The link between the advance and bonuses is that the advance was to be repaid from Mr Taylor's annual bonus. That is clearly stated in the email and the *Heads of Agreement* and it is consistent with the Havelock discussions. If it had not been, one would have expected Mr Taylor to make an issue of that at the time, but he did not.

[20] Given that the $30,000 is an advance not a bonus, it must be repaid by Mr Taylor.

Raising grievances?

[21] I found that Mr Price did explain that any bonus was discretionary but the *Heads of Agreement* says that the

advance *will be repaid ... from RS's annual bonus until it is paid back in full*. That means that Nalder & Biddle would pay Mr Taylor a bonus annually of an amount to be determined. The express terms of the agreement give no guidance about the factors relevant to determining the quantum of any bonus.

[22] Mr Taylor learned of Nalder & Biddle's failure to pay him any bonus in late September, shortly before the end of his notice period. In his representative's letter dated 22 November 2004, Mr Taylor puts forward his view that bonus payments should have been applied to reducing the

$30,000 advance, despite the division's financial performance. Mediation was proposed as a way of resolving the differences between the parties. Earlier correspondence does not go as far as this towards raising a grievance. The issue for determination now is whether that or the earlier written communications are sufficient to amount to raising a grievance about the failure to assess or pay a bonus.

[23] In *Goodall v. Marigny (NZ) Ltd* [2000] 2 ERNZ 60, the Employment Court held that the correct test to be applied is whether to an objective observer the communication was sufficient to elicit a response and enabled the employer to remedy the grievance. That approach is consistent with the current s 114(2) which provides that a grievance is raised as soon as the employee has made the employer aware that the employee alleges a personal grievance that they want the employer to address. In the present case, while the words *personal grievance* were not used, I accept that enough was said to elicit a response and enable the employer to remedy the grievance. The remedy sought was the reduction or extinguishment of the $30,000 advance by application of Mr Taylor's accrued bonus payments. Accordingly, I hold that Mr Taylor did raise his grievance on this point within time.

[24] The dismissal grievance is based on Mr Taylor's claim that he could no longer stay with Nalder & Biddle because its treatment of him had caused him to become bad-tempered and contributed to his marriage breakdown. However, no complaint was ever made by Mr Taylor about the termination of his employment until a brief statement in his affidavit lodged in April 2005 as part of his defence to the summary judgment proceedings. Taken on its own, the reference was not sufficient to provoke or require a response from Nalder & Biddle.

[25] The argument for Mr Taylor is that Nalder & Biddle impliedly consented to his raising a grievance out of time by participation in mediation in June 2005. I am referred to *Jacobson Creative Services Ltd v Findlater* [1994] 1 ERNZ 35. That case was decided under the Employment Contracts Act 1991 and held that an employer to whom a grievance was submitted out of time impliedly consented to that submission by purposefully seeking to resolve the contended grievance through a process of negotiation or mediation.

[26] To establish that Nalder & Biddle purposefully sought to resolve a contended dismissal grievance by a process of mediation in June 2005, Mr Taylor must tell me about what happened at the mediation. However, s 148(1) and (3) prevents him from doing so without consent from Nalder & Biddle. Nalder & Biddle has not consented to waive confidentiality. In *Findlater*, the only issue for mediation was the contended grievance and that was apparent from the correspondence between the parties preceding the mediation. In the present case, there was a dispute between the parties about the $30,000, the right to a bonus and Nalder & Biddle's attempts to recover the full $30,000 which drove the mediation proposal.

[27] A comparison can also be made of the communication in this case said to amount to raising the dismissal grievance and the communication in *Findlater*'s case which was unequivocally a grievance submission. Here, I do not accept that a statement in an affidavit opposing summary judgment that the defendant employee *... was not happy with the company and the job was not as expected so I sought another position* was sufficient to raise any grievance about the termination of the employment. Given that finding, a dismissal grievance was not raised until the lodging of the amended statement of problem or possibly during the preceding phone conference. Participation much earlier in the June 2005 mediation could not amount to implied consent for the later raising of the out of time grievance.

[28] There being no implied consent to the late raising of dismissal grievance, can or should Mr Taylor now be granted leave to raise a grievance out of time? Section 114(4) empowers the Authority to grant consent if satisfied that the delay in raising the grievance was occasioned by exceptional circumstances and if it considers it is just to do so. Mr Taylor says that the facts of his case are unusual and uncommon and therefore exceptional. He also points to the absence from his employment agreement of a plain language explanation of problem resolution services including reference to the 90 day requirement.

[29] In *GFW Agri-Products Ltd v Gibson* [1995] NZCA 317; [1995] 2 ERNZ 323, the Court of Appeal said of the 90 day limit:

That is a requirement of the law which is to be given effect and which cannot be abrogated by invoking equity and good conscience. Similarly, for the grant of leave an applicant must show exceptional circumstances having a causative effect upon the delay in submitting the grievance. The Legislature has set the burden at the high level by requiring that circumstances be exceptional and that must be given proper application.

[30] Applying that standard, I do not think it can be said that the delay in raising a dismissal grievance was occasioned by exceptional circumstances. Mr Taylor's employment agreement stated that provisions relating to personal grievances were detailed in an attachment but nothing was attached. However, its absence did not contribute at all for the reasons for the delay. Mr Taylor could have earlier raised any contended dismissal grievance as part of an attempt to deter or defray Nalder & Biddle's claims which were first raised well within the 90 day period. After all, he did enough to raise a grievance about unpaid bonuses. He did not raise a dismissal grievance as he saw no reason to complain about the circumstances of his resignation until pressed to defend the summary judgment application or the present proceedings.

Summary

[31] Mr Taylor did not raise a dismissal grievance within 90 days and the delay in raising that contended grievance was not occasioned by exceptional circumstances. He is not now able to pursue any complaint about the termination of his employment.

[32] Mr Taylor did raise an unjustified disadvantage grievance within time about Nalder & Biddle's failure to assess or pay him a bonus during his employment. There will need to be a further investigation meeting to focus on the merits of that grievance claim and what (if any) remedies are appropriate. The Authority will contact the parties to make appropriate arrangements.

[33] The express terms of the *Heads of Agreement* concerning the $30,000 are consistent with my findings about the arrangements discussed at Havelock so Mr Taylor cannot rely on a collateral contract containing extra terms to resist the obligation to repay the remainder of the $30,000. The estoppel argument also fails for the same reason. The $30,000 must be repaid and Nalder & Biddle is entitled to an order to that effect. I note Nalder & Biddle's undertaking set out in paragraph 22 of counsel's submissions.

[34] The *Heads of Agreement* obliged Nalder & Biddle to assess and pay Mr Taylor an annual bonus and apply that sum to reducing the $30,000 advance. It is silent about whether *annual* relates to Nalder & Biddle's financial year or each 12 month period of Mr Taylor's employment. Nalder & Biddle's argument is that, by necessary implication, it is the former. On that basis, there would be only one full financial year for which a bonus should have been assessed. However, the drafting was Nalder & Biddle's and the ambiguity should be resolved against them. Accordingly, I find *annual* means each complete 12 month period of Mr Taylor's employment. More words would have been required for that assessment to be made on a pro rata basis for less than a 12 month period, but such words are absent.

Costs

[35] Costs are reserved.

Philip Cheyne

Member of Employment Relations Authority