

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 57
5393970

BETWEEN DAVID MOWATT LOW
Applicant

A N D LUND SOUTH LIMITED
Respondent

Member of Authority: David Appleton

Representatives: John Farrow, Counsel for Applicant
Ronelle Tomkinson, Counsel for Respondent

Investigation Meeting: 8 April 2014 at Dunedin

Submissions Received: 8 April 2014 from Applicant and Respondent

Date of Determination: 10 April 2014

**DETERMINATION OF THE AUTHORITY
ON A PRELIMINARY ISSUE**

**A. Mr Low's entitlement to earn a bonus continued until 7 September
2010.**

Employment relationship problem

[1] Mr Low seeks the payment of a bonus that he says is owing to him by the respondent, and which he says accrued during the period when Mr Low was the Manager of the Dunedin Branch of the respondent company. A five day investigation meeting has been set down for 4-8 August 2014 to investigate Mr Low's substantive claim, together with a substantial counterclaim against him, but a preliminary issue has arisen, the outcome of which will determine the period of Mr Low's entitlement to a bonus, and also dictate what documents need to be disclosed by the respondent.

[2] The narrow preliminary issue to be decided is when Mr Low's entitlement to the payment of a bonus ceased. Mr Low contends that he was entitled to a bonus, subject to relevant conditions being satisfied, for the period of 1 August 2003 until 7 September 2010. The respondent says that Mr Low was entitled to a bonus, subject to relevant conditions being satisfied, for the period of 1 August 2003 until 30 September 2008.

Background

[3] The respondent is a building company responsible for a number of reasonably large local government and commercial projects carried out in the Otago area during the period of Mr Low's employment. Mr Low was appointed by the respondent company as *Dunedin Manager*. He was employed pursuant to an employment agreement signed by Mr Low and by Mr Russell Lund on behalf of the respondent on 10 July 2003. This employment agreement described Mr Low's duty as follows:

1. *To manage the company so that opportunities are maximised, market share enhanced and relationships nurtured, all undertaken thoroughly in accordance with good practice, and in the long term interests of the company.*
2. *The employee shall have full autonomy to pay creditors and sign cheques and payments as they fall due.*

[4] It was also a term of the employment agreement that Mr Low would be entitled to a base annual salary together with:

Bonus of 8% of any profit on the Company's Dunedin contracts after recouping prior losses (excluding contracts current the Commencement Date)

Bonus of 15% as above on contracts handled from inception.

[5] Mr Low says that, during his employment, he was paid a substantial part of his then accrued bonus entitlement, but is owed a further sum, the exact amount cannot be quantified until further discovery has been effected.

[6] Mr Low gives evidence that, in mid-2008, a new director was appointed to the company (Mr McLauchlan) and that he was introduced to Mr McLauchlan in a meeting in early June 2008. He says that, during this meeting, Mr McLauchlan announced that the company wished to review the way his bonus incentive would be calculated or structured going forward. Mr Low says that it was his understanding that the company did not want to reduce his overall package, just structure it

differently. He says that, at the conclusion of the discussion, it was left that Mr Lund would come back to him with a proposal but that, when that did not happen, he assumed his existing employment terms would continue.

[7] Mr Low says that, on 18 March 2010, he was sent a memorandum by Mr Lund which referred to *the agreed restructured package*. I deal with this memorandum in greater detail below.

[8] Mr Low says that on 7 or 8 September 2010 he was called into a meeting at a local café by Mr Lund. He says that, at this meeting, he was handed a letter, which referred to his position as manager having been disestablished. The letter was accompanied by two organograms, one headed "*Existing*" and the other "*Proposed*". The organogram headed *Existing* showed Mr Low's position as manager directly under Mr Lund's position as owner, with three project managers reporting directly to Mr Low. A number of foremen reported indirectly to him through the project managers. Mr Low says that this organogram accurately reflected his position at the time of the meeting.

[9] In the proposed structure as shown on the second organogram, the project managers no longer reported directly to Mr Low and his position was re-named "*Senior Estimator & Project Manager*". I deal with the contents of the letter handed to Mr Low in greater detail below.

[10] Mr Low's evidence is that, whilst he felt shocked that he was being told that his position as manager was being made redundant, he was aware that the industry was very quiet at that time and that being given the Senior Estimator position, which would be on the same terms and conditions as his manager position, save that he would no longer be entitled to any bonus payment, was better than being *down the road without a job*. He therefore accepted the proposal at that meeting.

[11] Mr Low says that, following this meeting in September 2010, little changed in his day to day responsibilities and that most people remained unaware that he had been removed as manager because the company wished to keep it confidential. He says that the contents of the company website continued to show his position as manager, even as late as 5 July 2012 and that he did not get new business cards showing his position as Senior Estimator/Quantity Surveyor until June 2011.

[12] Mr Low says that, in mid-2010, before his position had been changed from manager, he had been booked on a Leadership Management Australasia (LMA) management course but that, because of various delays, the course did not start until June 2011. He says that he was required to bring a job description to the course and so asked Mr Lund for a job description, and Mr Lund subsequently presented him with a new employment agreement on 11 July 2011. He says that this agreement changed various terms and conditions and that, when he raised his concerns about this with Mr Lund, Mr Lund told him he should rewrite the agreement. Mr Low says he did not think that that was appropriate and so declined to do so.

[13] The Authority saw a copy of this *individual full time employment agreement* and note that Mr Low had written on it the words *RECEIVED 11/7/11 AT 4PM*” but that the employment agreement itself bore the date *17/09/2010*.

[14] It is Mr Low’s case that he remained entitled to receive a bonus up to 7 September 2010 when he agreed at a meeting with Mr Lund that he would cease to be Dunedin manager.

[15] Mr Lund’s evidence to the Authority is that the meeting at which Mr Low agreed to step down from his Dunedin manager role, and to relinquish the bonus component of his remuneration, was on 30 September 2008. He says that he and Mr McLauchlan were present at the meeting and that he outlined to Mr Low various concerns about his performance. Mr Lund gives evidence that a further meeting took place in November 2009 at which Mr Lund expressed concerns at Mr Low’s behaviour, attitude and statements that he had made to a member of staff and that, at that meeting, Mr Lund *summarised again why Mr Low had been removed from the position of Manager*.

[16] Mr Lund says that the company paid for Mr Low to undergo the LMA management course because they would have liked to see him return to the position of manager if he could just display improved attitude and management skills. Mr Lund says that Mr Low asked for a job description and company structure *repeatedly on the basis that the LMA course required these*. Mr Low denies that he ever asked for a company structure.

[17] With respect to the letter dated 7 September 2010, Mr Lund told the Authority that when Mr Low had asked for the job description and company structure he

decided to set out in writing what had happened in 2008. Mr Lund said in his oral evidence that *the letter should have been written in 2008 but it wasn't*. Mr Lund's evidence was that he wrote the letter in the terms that he did because the company had only ever dealt with a similar issue (the loss of a position through redundancy) once before and so they followed the same template with respect to Mr Low's letter.

Determination

[18] It is common ground that Mr Low's entitlement to a bonus ceased when he ceased to hold the position of Dunedin manager in the respondent company. The sole issue to determine therefore is when Mr Low ceased to hold that position. That the parties disagree by a margin of two years is, at first blush, surprising, although this disagreement is likely to be explained by the passage of time and the fact that the company did not put in place any documentation that confirmed definitively the change in status until, arguably, the individual full time employment agreement that was given to Mr Low in July 2011.

[19] If one puts aside, for a moment, all of the contemporaneous documentation that was created by the company, the respective positions of Mr Low and Mr Lund are equally plausible. It seems to be the case that Mr Lund had serious concerns about Mr Low's performance as a manager in 2008 and that those concerns could either have led him to require Mr Low to cease to hold the position of manager, as Mr Lund contends, or it could have led him to conclude that a restructuring of Mr Low's remuneration package was required, as is contended by Mr Low.

[20] Mr Lund's evidence is supported by the evidence of Mr McLauchlan. He states that the meeting at which Mr Low ceased to be Dunedin manager was on Thursday 21 September 2008. However, neither Mr Lund nor Mr Low took any notes at that meeting and the only documentary evidence available was Mr McLauchlan's diary which confirmed that a meeting did take place on Thursday, 21 September 2008 but not what it was about.

[21] The office manager for the respondent company, Ms Autridge, confirmed in evidence that she remembered Mr Low ceasing to be Dunedin manager but could not remember whether it was in 2008 or 2010.

[22] Save for Mr Lund's evidence about certain documentation created in 2010 and 2011, no single witness seemed inherently less credible than any other in their oral

testimony to the Authority and both Mr Lund and Mr Low gave their evidence earnestly and, as far as I could tell, candidly.

[23] Therefore, in light of this, and in light of the distinct likelihood that the passage of time has caused memories to fade or become distorted, the Authority is, as is very commonly the case, most assisted by the contemporaneous documents that were created in 2010 and which were produced in evidence. It is my view that there are three documents that are of particular importance. The first is what has been referred to as a memorandum dated 18 March 2010 from Mr Lund to Mr Low headed up *Management*. This, however, appears to be an email, although Mr Lund did not deny that this document was produced by him and sent to Mr Low in March 2010. The email commences as follows:

David, as discussed yesterday, as a first step in improving morale, and how we are set up and operating, Stuart & I would like you to take responsibility for the following tasks:

[24] There then follow several paragraphs. The first commences as follows:

1. A strategy and a plan for 2010 and 2011. You and I have a very general strategy, we need to flesh this out in the following key areas, so we can monitor our progress;

1.1 What is our competitive advantage, how do we maintain/develop that. ...

1.2 Specific projects that we are targeting

1.3 Target turnover for 2010, 2011

1.4 Staff development ...

1.5 Technical staff training

[25] Item 2 of this email refers to Job Cost monthly meetings and reporting and project manager's responsibilities. This section of the email to Mr Low stated the following:

Thus it is important that you lead by example on the above items.

[26] Under the heading of "*Active supervision of the PM's [Project Managers] and Foremen*", Mr Lund writes:

As discussed, with your experience you will be offer [sic] very valuable advice on how to tweak or alter on site operations for maximum efficiency.

[27] Under the heading of “*REMUNERATION*” Mr Lund wrote the following:

We acknowledge that since our last meeting with Stuart, some 18 months ago, that I have been remiss in acting on providing a restructured package, and that you did discuss this with me at Christmas. I confirm that the agreed restructured package will be backdated to the original meeting as we originally discussed. Stuart and I undertake to have this done and on the table for discussion by April 15.

[28] Mr Lund explains this memorandum as him exhorting Mr Low to deploy his many years of experience to assist the much younger project managers. Mr Low says that it supports his evidence both that he was still the manager as at 18 March 2010 and that the meeting 18 months previously had been to discuss a restructured package, not him ceasing to be manager. On balance, whilst this document is not definitive, it does tend to support Mr Low’s evidence in my view.

[29] By far the most important document shown to the Authority is the letter of 7 September 2010, together with the attached organograms marked “*existing*” and “*proposed*” respectively. The letter does, in my view, provide very strong evidence to support Mr Low’s position and it is therefore necessary to set it out in full:

September 7, 2010

David Low
[address omitted]

Dear David

*LUND SOUTH – CURRENT MARKET CONDITIONS –
RESTRUCTURING – POSSIBLE REDUNDANCY*

For a number of reasons, I believe it is in the best interests of the company that a restructuring be given serious consideration.

These include:

- *The current difficult market*
- *The lack of success in securing new work over the past 12 months*
- *Low morale within the company – several key staff have either ceased full time employment or have indicated that unless there are significant changes, they will leave the company.*

It is without question that the current roles and structure of the company are not working, or suited to the current environment. I have had concerns for a considerable time, and have held off making changes as long as possible, in the hope of positive improvements, but

in the absence of those I believe I now have to act to protect the company.

Please refer to the organization charts that show the current and the proposed structure.

In formal terms, the proposed chart shows that your position as manager has been disestablished, and/or become redundant.

The proposed re-structure is based upon the premise that as Owner, I want to take a more active role in the company to guide it through the current difficult conditions. It also resolves the gaps left by John Satterthwaite with his decision to reduce his working hours from full time to 12-15 hours a week.

Although the position of manager will not exist if the proposed chart is adopted, we envisage that there will be a Senior Estimator position available that may be of interest to you. The terms and conditions are yet to be agreed. However as part of current best employment practice, the job description will contain key accountability items, a list of competencies required and expected behaviours.

We would like to meet with you and hear any thoughts or suggestions you have to the proposed re-structure and any suggestions on increasing the work flow or an alternative revenue stream before we make a decision. You are welcome to bring a support person, advisor or representative with you to the meeting. We stress that no decision has been made, but we must do what is in the best interests of the company, and with the current situation, doing nothing is not an option. We would like you to meet with us on Friday please, at 3pm, in the new meeting room.

You are expected to keep this issue confidential because the company may be harmed by any loose talk.

*Yours sincerely
Russell Lund
Director*

[30] This letter, save for where it states that Mr Low's position as manager *has been disestablished, and/or become redundant* is expressed materially in the future and conditional tenses, and expresses intentions rather than things that had already happened.

[31] Mr Lund's explanation that he simply used a template that he had used for the only other staff member who had been made redundant is not impossible, but is not very plausible either. Mr Lund is clearly an experienced and intelligent individual who runs a significant building operation and who, I am convinced, will be well aware of the importance of accurately recording important terms and conditions. The employment agreement issued to Mr Low in 2003 is a professionally produced document for example. I have little doubt that the company enters into properly

drafted and executed contractual documentation with respect to the projects it undertakes. For Mr Lund to say that he wrote and issued a letter to Mr Low two years after Mr Low ceased to be a manager but which was expressed in terms which clearly indicate that such a change is only proposed, stretches my sense of credibility very thinly.

[32] The final document that is of interest is the individual full time employment agreement given to Mr Low on 11 July 2011 which bears the date of 17 September 2010. This document clearly purported to record Mr Low's position as Senior Estimator. It contains a job description bearing that position name and setting out Mr Low's overall duties in that position. Whilst it is not beyond the bounds of possibility that this agreement was given to Mr Low nearly three years after Mr Low took on the role of Senior Estimator, the fact that it bears the date of 17 September 2010 is strongly corroborative of Mr Low's evidence that it was not until September 2010 that he took up the position of Senior Estimator.

[33] Taken altogether, this documentation strongly supports Mr Low's evidence. Mr Lund does not question the authenticity of these documents. Mr Lund relies upon a spreadsheet of projects for which Mr Low was responsible during his employment, which appears to show that, prior to 2008, Mr Low was responsible for far more and larger projects than he was after 2008. Mr Lund says that this supports his argument that Mr Low ceased to be the manager in 2008. However, the probative value of this spreadsheet is strongly outweighed by the corroborative value of the three documents I have examined above, and especially the letter dated 7 September 2010.

[34] In conclusion, therefore, I accept the evidence of Mr Low that he ceased to hold the position of Dunedin manager with effect from 7 September 2010 and that his entitlement to earn a bonus continued until that date.

Directions

[35] It is my understanding from a comment made by Mr Farrow at the investigation meeting on 8 April 2014 that the parties have not fully complied with the Notice of Directions issued by the Authority on 3 December 2013. I understand that the parties' respective experts are yet to meet. It is possible, also, that the list of issues for the respective accountants to discuss has not yet been agreed between the parties. I am also aware that the parties have yet to complete full discovery of all

documents that will be relevant for the disposal of the substantive issue set down for August 2014.

[36] Given that this matter was first raised with the Authority in September 2012 and that the issues to be investigated date back many years, the parties are reminded that the Authority will not be prepared to vacate the substantive investigation meeting set down for 4-8 August 2014 except under the most exceptional of circumstances. Therefore, insofar as the parties are behind in the actions that they have been directed to take in preparation for the substantive investigation meeting, they are strongly urged to expedite those actions. As a substantive investigation meeting has already been vacated at the request of the parties once before, a lack of preparedness for the substantive investigation meeting in August 2014 will not be accepted by the Authority as a reason to vacate it again.

[37] If the parties require assistance from the Authority in any matter, they are to contact the Authority without delay.

[38] Finally, I understand that the parties have already been to mediation in an attempt to resolve their differences. However, the parties are reminded that a mediated resolution of their differences through the Mediation Services is likely to result in a much less costly outcome than will result from a five day investigation in the Authority. The parties are therefore strongly urged to return to mediation with a view to resolving their respective differences.

Costs

[39] Costs in this matter are reserved until the substantive investigation has been completed or the matter otherwise resolved.

David Appleton
Member of the Employment Relations Authority