**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

[2011] NZERA Christchurch 132
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| | BETWEEN | ROSS McFARLANE<br>Applicant |
| | AND | QUEENSTOWN ACCOMMODATION CENTRE LIMITED<br>Respondent |

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| Member of Authority: | Philip Cheyne |
| Representatives: | Ross McFarlane, Applicant<br>Dale Lloyd and Kate Logan, Counsel for Respondent |
| Investigation Meeting: | 6 September 2011 at Queenstown |
| Determination: | 8 September 2011 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ross McFarlane worked for Queenstown Accommodation Limited (QAC) as a property manager from February 2010 until he resigned on 1 February 2011 in circumstances which give rise to his claim of constructive dismissal. He also says that he should have been paid two incentive bonus payments in accordance with the terms of his employment agreement.

[2] For the most part the factual disputes between the parties are not relevant to determining whether Mr McFarlane has a personal grievance or whether there are any arrears of money payable under the employment agreement. I do not intend to canvass those irrelevant matters.

[3] I will first explain the basis of the constructive dismissal claim and then resolve the arrears point.

**Termination of the employment**

[4] On 17 November 2010 Mr McFarlane received a warning in writing about his alleged failure to properly record information about his dealings with tenants and landlords, his punctuality and his general attitude when given instructions. He responded in writing on 19 November (but not by way of raising a grievance) and received a response in writing on 22 November 2010 which states *This letter also serves as your third warning* although it seems to address only the issues raised on 17 November 2010. Next, on 24 November 2010 Mr McFarlane received a further written warning, this time about a new but related issue.

[5] Mr McFarlane's evidence is that he chose not to respond to these further warnings. He says that he felt bullied and that responding would only *fuel the fire*.

[6] Nothing further of relevance happened until January 2011. Mr McFarlane took several weeks leave. When he returned to work he apparently discovered that dealings in his absence with tenants and landlords for his portfolio of properties had not been properly recorded in the *A and C Diary*. Mr McFarlane's failure to record matters in the *A and C Diary* had been one of the matters of complaint in November 2010.

[7] Mr McFarlane's evidence is that he thought it would be only a matter of time before QAC made another attempt to manage his removal from the company. He therefore resigned.

[8] In November 2010 Mr McFarlane made inquiries about obtaining work as a real estate agent for another firm but there were no openings at that time. At some point that situation changed and Mr McFarlane was offered the opportunity to join this other business. It has a division that deals with property management and Mr McFarlane's experience in that work was one of the reasons for the offer although it was not intended that Mr McFarlane actually do any of that work. Mr McFarlane's evidence, no doubt correct, is that he was given the opportunity to start this new role whenever he wanted. In those circumstances Mr McFarlane waited until 1 February 2011 and gave QAC notice in writing of his resignation. The resignation included the following:

> *I feel it is important to advise you, on the basis that there may be possible conflict of interest, I will be working for Bayleys Real Estate and included in my role is being involved with Property Management.*

[9] Allan Baillie is a shareholder and director of QAC and is its general manager. Having received the resignation worded in this way he put Mr McFarlane on garden leave. At that stage Mr Baillie anticipated that the garden leave would last four weeks, the period of notice he thought was required by the employment agreement. Next day Mr Baillie discovered that Mr McFarlane had actually started work at Bayleys Real Estate. There was a meeting involving the two men later on 2 February 2011 which resulted in Mr Baillie accepting (or deferring to) Mr McFarlane's position that only one week's notice was required. Mr McFarlane was paid salary up to 8 February 2011.

[10] On 18 February 2011 Mr McFarlane lodged these proceedings with the Authority. In his statement of problem Mr McFarlane did not claim that his employment had been affected to his disadvantage by the unjustified action of QAC issuing him warnings. The statement of problem was served on QAC as usual on or after Monday 21 February 2011 and a reply was later lodged with the Authority.

**Constructive dismissal**

[11] In *Auckland etc Shop Employees' etc IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963, the Court of Appeal held that constructive dismissal includes cases where the employer gives the employee a choice between resigning or being fired, or the employer embarks on a course of conduct with the deliberate and dominant purpose of coercing the employee to resign, or a breach of duty by the employer leads the employee to resign. The third category is in issue here. Not every breach of duty is sufficiently serious to give rise to a personal grievance of constructive dismissal. In *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW Inc* [1994] 1 ERNZ 168 the Court of Appeal said:

> *In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other*

> *words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.*

[12] I turn first to what caused the resignation. I note Mr McFarlane's evidence that he was able to start his new role at a time that suited him. Mr McFarlane controlled the timing of his resignation to ensure that any right to yearly bonus payments had accrued beforehand. It is clear on the evidence that when Mr McFarlane resigned it was because he had secured another position.

[13] I accept that Mr McFarlane started looking for other employment because of his dissatisfaction with the warnings and even his concern that a dismissal might follow. However, too much time had elapsed between the last of the warnings (24 November 2010) and the resignation even if I assume that QAC breached some duty owed to Mr McFarlane by its decision to give him the warnings. I conclude that the resignation was not caused by the warnings.

[14] Because Mr McFarlane's resignation was not caused by the warnings it cannot give rise to a valid constructive dismissal personal grievance.

**Bonus entitlements**

[15] There were two employment agreements, the first signed when the employment started and the second on 8 September 2010. Mr McFarlane says that he was bullied into signing the second agreement but these proceedings are not about unfair bargaining under s.68 of the Employment Relations Act 2000. I will treat the 8 September 2010 agreement as applicable.

[16] Clause 10 of the agreement states that the remuneration and benefits are set out in Schedule One. The relevant part of that schedule says *Bonus Package worth Maximum $15 000.* There are more details in Schedule Four which sets out four different bonuses. Only two are the subject of the present dispute. They are paid yearly. The relevant parts are:

> ***Bonus Schedule Ross McFarlane***
> …
> ***Number of houses in Property Portfolio Bonus ($3000)***
> *To increase total number of properties in Portfolio by 10%*
> *Total 1 February 2010 = 105*
> *Target by 1 February 2011 = 116 you receive $2000 of this bonus.*
> *You will receive $100 for every house above 116 up to $1000*

*Properties must be tenanted to collect this bonus*

***Gross Rental income in Property Portfolio Bonus ($3000)***
*Gross rental income for portfolio = $39 170*
*Target by 1 February 2011 = $43 087 you receive $2000*
*You will receive $100 for every $500 increase after that up to $1000*
*…*
***Bonus Payments***
*Bonus payments are made …within ten (10) working days of the anniversary of your employment, …*
*Bonus' are paid at the General Managers discretion.*
*Bonus schedules may be changed by the General Manager giving 30 days notice.*

[17] Mr McFarlane was paid $510.00 of the Gross Rental Income bonus. His position is that he should have been paid the maximum available under each of these limbs.

[18] When Mr McFarlane started employment in February 2010 he became one of three property managers. I infer that they each had similar bonus targets. In about June 2010 one of the property managers left and was not replaced. Instead, that work was reallocated to the remaining two property managers and their administrative work was reduced. At about that time Mr Baillie said to Mr McFarlane *Unless there should be some drastic change you'll have achieved your bonuses according to the schedule*. This was directed at the yearly bonuses now in dispute. That is the evidence given orally by Mr Baillie which differs a little from his briefed evidence and which is more consistent with Mr McFarlane's evidence. I find that this is what Mr Baillie told Mr McFarlane in about June 2010.

[19] As noted above Mr McFarlane signed a new employment agreement in September 2010. Schedule 4 setting out the criteria for bonus payments was not altered except that the last section set out above starting with the words ***Bonus Payments*** was added. In other words, the starting values and targets were not adjusted to take account of the extra properties assigned to Mr McFarlane as a result of the reduction from three to two property managers.

[20] It is common ground that, other than the exchange just mentioned in about June 2010, there was nothing said by Mr Baillie to Mr McFarlane about the yearly bonuses.

[21] After Mr McFarlane's resignation Mr Baillie sent him a memorandum dated 3 February 2011 setting out the following position with respect to the now disputed bonuses:

> …
> ***Overall performance bonus:***
> *Increase number of house in the portfolio by 10% - total number of houses in portfolio decreased by 4 across the business. No bonus achieved.*
> *Increase value of portfolio by 10% - 1.7$ achieved. Bonus = 17% of possible $3000 therefore $510 paid.*
> …
> *When bonus schedules were written in the performance criteria of a 10% increase was set. Figures in the bonus schedule became redundant due to the move of changing from 3 to 2 property managers over the course of the year, splitting the 3rd portfolio and dividing it in to the 2 remaining managers.*
> *It decided that bonus' would be paid against the overall portfolio increase across the 2 remaining managers.*
> *Total number of houses declined from 368 to 364 therefore there was no increase in the number of houses in the portfolio, there no bonus awarded.*
> *17% of the bonus was awarded for increasing the value of the portfolio as this was the actual increase across the entire portfolio as described above.*
> *These bonus' have been awarded as per the General Managers discretion as outlined in your employment agreement.*

**Interpretation**

[22] Counsel characterised the issue for the Authority as effectively a dispute about the interpretation, application or operation of the employment agreement. That is the heart of the claim which is for the recovery of monies payable under an employment agreement.

[23] I am referred to *Silver Fern Farms Ltd v New Zealand Meatworkers and Related Trade Unions Incorporated* [2010] NZCA 317 where the Court of Appeal approved the approach taken by the Employment Court in applying the principles expressed in cases such as *New Zealand Tramways and Public Transport Union Incorporated v Transportation Auckland Corporation Limited* [2006] 1005 and *ASTE v Chief Executive of Bay of Plenty Polytechnic* [2002] 1 ERNZ 491. While those cases dealt with collective agreements I do not consider that the approach to interpreting an individual agreement (as here) differs in any material way. The starting point is always the words used to see if they are clear and unambiguous construed according to their ordinary meaning but with consideration to the contract as a whole. It is permissible to refer to the circumstances of entering into the agreement not to contradict or vary it but to understand the setting in which it was

made and to construe it against that factual background having regard to its genesis and, objectively, its aim.

[24] The words in both disputed bonus provisions are clear and unambiguous. If the number of properties or the gross rental income in Mr McFarlane's individual portfolio increases by 10% or more he is entitled to one or both bonus payments at the level stipulated. What I am being urged to do by the respondent is to reinterpret those words to have regard to QAC's overall position. The evidence is that there was a slight decrease overall in the number of houses and a slight increase overall in the gross rental income year on year. Hence the decision not to pay the former bonus and only to pay a portion of the latter bonus. However, to give that meaning to the provisions would be to contradict or vary the agreement, contrary to principle.

[25] Viewed objectively, the decision to amend Schedule Four but not adjust the bonus targets at the time the new employment agreement was signed, against the background of Mr Baillie's comments in June 2010, reinforces the view that bonus entitlements would be assessed on an individual portfolio basis. I note also that QAC could have given 30 days notice to change the bonus schedule but elected not to do so.

[26] Given this interpretation I find that Mr McFarlane met the targets for entitlement to the maximum bonus payments under the two disputed provisions. I also agree with Mr McFarlane's point that Mr Baillie had committed to exercising his discretion in favour of paying the bonuses by dint of his comments in June 2010 and the 3 February 2011 memorandum. Unfortunately Mr Baillie assessed the quantum of the bonuses on the basis of an incorrect interpretation of the provisions and paid only $510.00. QAC must now pay Mr McFarlane the balance of these bonuses amounting to $5,490.00.

**Summary**

[27] Mr McFarlane does not have a valid personal grievance.

[28] Queenstown Accommodation Limited must pay Mr McFarlane $5,490.00 being arrears of money payable under the employment agreement.

[29] Mr McFarlane represented himself so ordinarily the only relevant expense would be the lodgement fee. In case I am wrong about that or there is some other factor to consider I will reserve costs. Any claim for costs should be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority