Employment Court of New Zealand

Wood v NZ Cupolex Ltd [2018] NZEmpC 81 (19 July 2018)

Last Updated: 23 July 2018

IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 81
EMPC 134/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TONY WOOD Plaintiff
AND	NZ CUPOLEX LTD Defendant

Hearing:	(on the papers dated 9 July 2018)
Representation:	T Oldfield, counsel for plaintiff No appearance for defendant
Judgment:	19 July 2018

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Mr Tony Wood, Business Development Manager of NZ Cupolex Ltd (NZCL), has brought a non de novo challenge in respect of one aspect only of a determination of the Employment Relations Authority (the Authority), issued on 23 April 2018.1

[2] That issue relates to whether Mr Wood has received his contractual entitlement to a tenure bonus of $10,000 gross, after working for NZCL for three years. After considering a range of evidence to which reference will be made shortly, the Authority determined that Mr Wood had in fact already received the tenure bonus; it declined relief accordingly.2

1 *Wood v NZ Cupolex Ltd* [2018] NZERA Auckland 124.

2 At [31]-[39].

[3] In this Court, Mr Wood asserts that there are factual errors in the Authority's reasoning, and that the sum of $10,000 should be paid to him, together with interest on that amount.

Procedural matters

[4] As in the Authority, NZCL has taken no steps with regard to the present challenge. An affidavit of service of the statement of claim has been placed before the Court, confirming that the company was served on 16 May 2018. No statement of defence was filed within the time limit provided for in the Employment Court Regulations 2000 (the Regulations), and the matter was accordingly set down for formal proof.3

[5] As is normal in such instances, affidavit evidence has been filed,4 and Mr Wood has appropriately requested that his challenge be resolved on the papers.

[6] Since the challenge was brought on a non de novo basis, I apply the following principles:5

a. A non de novo hearing is in the nature of an appeal. The challenger or plaintiff is required to show that the Authority's determination was wrong.
b. Thus, the challenger has an onus of persuading the Court of the existence of an error of fact and/or law by the Authority in its determination.

c. Making such an election does not indicate the way in which the appeal is to be heard. There may be evidence or further evidence about the matters at issue in the non de novo challenge. The Court must make its own decision, as required by s 183 of the Employment Relations Act 2000 (the Act). Section 182(3) requires that where an election states the

3 As allowed for under cl 16 of sch 3 of the Employment Relations Act 2000.

4. High Court Rules, r 15.9(4) should be applied via reg 6 of the Employment Court Regulations 2000.
5. Derived from *Xtreme Dining t/a Think Steel v Dewar* [2016] NZEmpC 136, (2016) 10 NZELC 79-069.

person seeking the election is not seeking a hearing de novo, the Court must direct, in relation to the issues involved in the matter, the nature and extent of the hearing.

[7] Following the initial directions conference, the Court confirmed that the sole issue was an evidential one relating to whether Mr Wood had been paid a tenure bonus.

The Authority's determination

[8] NZCL is the New Zealand distributor of Cupolex concrete slab foundations. These are based on modular plastic dome components which are used in residential and commercial buildings as a barrier to rising dampness from contact with the ground.

[9] Mr Wood has been employed by NZCL since 3 November 2014.

[10] Under his individual employment agreement (IEA), he is entitled to receive, inter alia, commission payments and a tenure bonus after three years of employment.

[11] The Cupolex business was originally operated by Cupolex Australasia Ltd (CAL) and Cupolex Building Systems Ltd (CBSL), companies in which Mr Wood had held shares since 2005.

[12] In August 2014, the business was sold to NZCL, with the vendors providing temporary finance as part of the transaction. It was only partly repaid according to the agreed timeframe. This led to CAL and CBSL making demand for settlement of the balance. When NZCL failed to meet that demand, the company was placed in receivership on 15 December 2017. The receivership was terminated on 23 January 2018, after the CAL and CBSL liabilities were met via the receivers. The company continued to trade during the receivership.

[13] Part way through that period, on 28 December 2017, Mr Wood went off work on ACC because he tore his Achilles' tendon.

[14] The Authority considered various issues. First, there was a question as to whether Mr Wood had suffered an unjustified disadvantage, through a discontinuance of access to company systems without explanation, which he said amounted to an unlawful suspension. The Authority found that the discontinuance arose because Mr Wood had stopped undertaking duties for NZCL after he suffered a non work-related injury, so that this application did not succeed.6

[15] The second issue related to whether commission was payable under the terms of Mr Wood's IEA. The Authority found that this was the case, directing the company to pay him $38,422.39.7 Interest on the unpaid commission at the rate of five per cent per annum was also ordered for payment.8

[16] Third, a successful claim was brought by Mr Wood for a penalty for breaching the IEA. The Authority found that the failure to pay commission was a qualifying breach, and directed the company to pay a penalty of $2,000, half of which was to be paid to Mr Wood.9

[17] As already indicated, the Authority dismissed the application in relation to the tenure bonus. It also rejected a claim that the company had breached s 4 of the Act through an alleged failure by it to communicate with him during his employment, particularly during the period of the receivership.10

[18] Costs were reserved.

The Authority's consideration of the claim for a tenure bonus

[19] It is convenient to set out the Authority's finding regarding this aspect of the relationship problem:

[31] The IEA provides that Mr Wood would receive a tenure bonus of

$10,000 gross after working with the Company for three years.

6 *Wood v NZ Cupolex Ltd*, above n 1, at [19]-[23].

7 At [24]-[30].

8 At [59].

9 At [40]-[53].

10 At [54]-[57].

[32] For the reasons that follow I am satisfied, on balance, that Mr Wood has already received payment of this sum from the Company.

[33] The receiver's report shows an unspecified payment being made to Mr Wood for wages. During questioning Mr Wood said that he did not receive any monies from the Receiver. However, he recoiled from this testimony after Mr Hoole, the Receiver, gave evidence.

[34] Mr Hoole's evidence was that during the receivership Mr Wood told him he was owed commission by NZ Cupolex. He said that during settlement discussions between CAL, CBSL, and NZ Cupolex he spoke with Mr Wood about what he was owed. He said Mr Wood told him he was owed $10,000 for commission. He said he factored this sum into the settlement figure to be paid by NZ Cupolex.

[35] Having heard this evidence Mr Wood then accepted he received

$10,000 from the Receiver but said this was not for commission or for his

$10,000 bonus. He says this payment was for unpaid salary for the month of December 2017. I find this unlikely.

a. The Company had paid Mr Wood his salary entitlements for the period up to 15 December 2017. Mr Wood's bank statements show he received salary of $7,546.38 net per month. The last payment he received from NZ Cupolex was on 20 December 2017. This was for the period up to December. Mr Wood only worked a further 8 days before he was incapacitated and went on ACC.
b. Mr Wood's bank statements show that he was paid a sum of

$7,871.37 for "salary for December 17" on 25 January 2018.

[36] For completeness I did consider, but do not accept, that the payment made to Mr Wood on 25 January 2018 relates to the payment of $10,000 paid under the Receiver settlement. This is because:

a. Mr Wood said that the payment of $10,000 was paid at the same time as his share of the settlement proceeds, as shareholder of CAL and CBSL, was paid i.e. a payment of a lump sum was made. The payment relied upon did not include any other sum.
b. Mr Wood said the $10,000 was paid into his Family Trust bank account. I accordingly directed him to provide me with a copy of the bank statement showing payment of this amount. He has failed, without excuse, to comply with my directions. The payment relied upon was paid into his personal bank account.
c. Mr Wood said the $10,000 was paid by the Receiver to CAL/CBSL who then paid him. The payment relied upon came from KGA Limited. I do not know who this entity is.

[37] During the investigation meeting I directed Mr Wood to provide me with the email correspondence exchanged between himself and relevant parties concerning the payment of the $10,000 so that I could satisfy myself what the reason for the payment was. Mr Wood, through his solicitors, informed me on 19 April 2018 that there is no correspondence. I find this

unlikely. With the number of entities involved in the settlement with NZ Cupolex, and the money involved, it is more likely than not that the payment of monies, and the reasons for the payments, would have been documented.

[38] I have viewed correspondence exchanged between NZ Cupolex and Mr Wood and his solicitors following the Receiver settlement. There is no mention in this correspondence on the tenure bonus. This was not raised by Mr Wood's lawyers in their demand letter of 9 February 2018 nor was it raised in the original statement of problem dated 16 February 2018. Mr Wood said this was because he only remembered that this bonus was due when it came time to file his witness statement on 28 March 2018. I find this unlikely. Especially in circumstances where Mr Wood would have the Authority believe that he had kept track of his commission entitlements "in his head" for a period of 3 years. I find it more likely that the issue of the tenure bonus was not raised because the bonus had been paid.

[39] In the foregoing circumstances, I find it more likely than not that Mr Wood has been paid the tenure bonus. I am satisfied that NZ Cupolex has not breached the IEA.

Evidence filed in support of the challenge

[20] Two affidavits were filed in support of the challenge.

[21] The first of these was from Mr Gareth Hoole, a chartered accountant; he and a colleague, Mr Clive Bish, were the receivers of NZCL. They are directors of Ecovis KGA Ltd (KGA).

[22] Mr Hoole confirmed that salary entitlements were paid to Mr Wood in January 2018 by KGA, based on a gross figure of $10,833.

[23] Significantly, he also confirmed he had no knowledge of any tenure bonus due and owing to Mr Wood at the time the company was in receivership.

[24] This account is confirmed to some extent by Mr Hoole's report as receiver in respect of the company. Specifically, he stated that the sum of $10,833 was "[d]ue to former staff in respect of holiday and redundancy pay and ranking as a preferential debt pursuant to the 7th schedule of the Companies Act 1993". There was no reference in the report to payment of a tenure bonus.

[25] Also produced was an email from Mr Hoole to the party who had paid settlement sums to the receiver which brought the receivership to an end, in which Mr Hoole stated:

Part of the settlement funds paid by you represent Tony Wood's salary for January; we will remit the PAYE to the IRD on that sum and the balance to [Mr Wood] ...

[26] In his evidence, Mr Wood's salary at the time of the receivership was $130,000 per annum, including a car allowance of $20,000. His monthly salary was therefore

$10,833.33 gross, the sum which was the basis of the payment made by KGA on behalf of the receivers to Mr Wood.

[27] This payment was the second of two relevant payments, as verified by Mr Wood's bank statements. The first was on 20 December 2017 for a sum that was also plainly for monthly salary, as the Authority found.

[28] It is evident that the evidence now placed before the Court differs in several material respects from that provided to the Authority both by Mr Hoole and Mr Wood.

[29] Both say that the information they provided was given at short notice. In particular, Mr Hoole says that he received a telephone call from the Authority Member, during which he was questioned on matters pertaining to Mr Wood's employment and the remuneration he was paid. He said he was unprepared for that call and did not refer to his records during the discussion. Mr Wood also said he was unprepared for questioning on this topic at the investigation meeting.

[30] It is apparent that incomplete information was provided to the Authority as to the second of the two payments.

[31] The most reliable information on this issue is that of the receiver himself, since he is a chartered accountant whose role it was to discharge the responsibilities of receivership professionally; and I infer he has now had access to his records.

[32] I accordingly make the following findings:

a. Mr Wood qualified for the tenure bonus three years after the commencement of his employment, that is, on 3 November 2017.
b. The evidence shows there were two material payments thereafter. The first of these was made on 20 December 2017. The evidence establishes that it was for salary for the month up until 15 December 2017. It did not include the tenure bonus.
c. The second was the payment made by the receiver, which the evidence clearly establishes was for salary entitlements. The

reference to “holiday and redundancy pay” in the receiver’s report is somewhat inaccurate since the evidence establishes that the sum equated to a monthly payment of salary, and Mr Wood had not been made redundant. But I am satisfied that the payment did not include Mr Wood’s right to a tenure bonus, since Mr Hoole confirmed he was unaware of this entitlement, and there is no other evidence to suggest that allowance was made for it in the second payment.

[33] In the absence of any contrary evidence from the company, the inevitable inference to be drawn from the information now before the Court is that NZCL did not pay the tenure bonus to Mr Wood on or after 3 November 2017.

Disposition

[34] The challenge is accordingly allowed.

[35] NZCL is ordered to pay Mr Wood the sum of $10,000, reduced by the appropriate amount of PAYE, for the tenure bonus which should have been paid to him on 3 November 2017.

[36] Interest on that sum is to be paid from that date until the date of payment under sch 2 of the Interest on Money Claims Act 2016.11

11 As provided for in cl 14 of sch 3 of the Employment Relations Act 2000.

[37] The parties are to calculate the correct amounts. If that has not occurred within 21 days, I reserve leave to Mr Wood to return to Court providing the information which will permit the necessary calculation to be made.

[38] The findings of the Authority relating to the tenure bonus are set aside.

[39] Costs are sought. I am not persuaded that NZCL should pay the costs of the challenge. It appears the Authority was not provided with all the documents it sought. In particular, the Authority Member recorded that Mr Wood had been directed to provide a copy of the bank statement showing payment of the sum which, he said, had been paid to his family trust bank account. The Authority Member commented that Mr Wood had failed, without excuse, to comply with that direction. A request was also made for relevant emails about the tenure bonus. An email regarding the second payment was able to be provided to the Court; it was not produced to the Authority. The Authority also stated that it had not been informed as to the identity of the entity which paid funds to Mr Wood in January 2018, KGA. Such matters as these and any other points relevant to the tenure bonus entitlement were well capable of clarification by Mr Wood following the investigation meeting. The opportunity to do so plainly existed because supplementary documents were filed on 19 April 2018 following the investigation meeting which took place on 13 April 2018.

[40] In these circumstances, I decline to make any order of costs in favour of the plaintiff against the defendant.

B A Corkill Judge

Judgment signed at 3.55 pm on 19 July 2018