

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Kerry Paul (Applicant)  
**AND** Waikato Honey Products Limited (Respondent)  
**REPRESENTATIVES** Christopher Gudsell for applicant  
Agnes McKay for respondent  
**MEMBER OF AUTHORITY** Janet Scott  
**CONSIDERATION ON PAPERS** 19 May 2006  
23 May 2006  
**DATE OF DETERMINATION** 6 June 2006

**DETERMINATION OF THE AUTHORITY**

This is an application to re-open an investigation under Schedule 2, Clause 4 of the Employment Relations Act 2000. The relevant employment relationship problem has already been the subject of a determination of the Authority in *Kerry Paul and Waikato Honey Products Ltd* dated 4 April 2006 (AA 109/06).

**Background**

The original Determination in this matter resolved the claim brought by the applicant Mr Paul that the respondent had failed to pay him an agreed payment in the sum of \$200,000.

In essence the problem between the parties related to the interpretation of the words of an agreement reached between them to settle any rights Mr Paul had to a shareholding in the respondent company; any rights to a cash bonus he might have been entitled to and to settle any potential claims that might arise from the termination of his employment. There was a subsequent disagreement between the parties as to the interpretation of the agreement particularly as to whether or not the agreed settlement (in its entirety) was contingent on a successful outcome of the varroa bee mite claim the company had submitted to MAF.

The Authority investigated the matter and on 4 April issued its Determination as follows (see para 41 -43).

*“I find that on 13 May 2003 an agreement was reached between Mr Paul and WHPL, that in return for Mr Paul forgoing all rights that he may have had to a shareholding in WHPL and forgoing any cash bonus that may have been due, and for terminating his employment agreement with WHPL, Mr Paul was to be paid unconditionally the base sum of \$200,000. Any further monies that may have come to Mr Paul as a result of the agreed formula were conditional on a substantial sum of money being paid as result of the varroa mite being successful.*

*Because the varroa mite claim was not substantially successful, Mr Paul is only entitled to be paid the sum of \$200,000.*

*Waikato Honey Products Limited is ordered to pay to Mr Kerry Paul the sum of \$200,000.00 plus interest at the rate of 7% from the commencement of these proceedings, as actioned by the Amended Statement of Problem received by the Authority on 31 May 2005, until date of payment”.*

On 13 April 2006 the respondent filed an application to reopen the investigation and on 26 April 2006 a challenge to the whole of the Determination was lodged in the Employment Court.

## **Application to Reopen Investigation**

### The respondent company’s position

The respondent submits that new evidence has come to light which impacts on the finding of the Authority and the outcome of the Determination. Two letters are attached to the application:

1. Signed copy of the letter dated 18 June 2003 from Peter Rogers to the BNZ headed *“Clarification of the BNZ Position with Regard to the Restructuring of Waikato Honey Products Ltd”*
2. Letter dated 10 July 2003 from Simpson Allan Law regarding the ongoing varroa compensation claim.

The Authority’s attention was drawn to the statement of the letter writer (Peter Rogers) on page 2/ para 2 where he writes.

*“...A settlement has been reached with Kerry Paul under the terms of his contract and he will no longer be a shareholder of Waikato Honey and all management of the company will revert to Bryan. **The payment to Kerry will be funded entirely from the proceeds received from the Government for the varroa mite claim”.** (Emphasis mine).*

It is submitted for the respondent in support of the application that this (the highlighted statement) contradicts the “unequivocal” evidence (para 38 of the Determination] of the applicant and Peter Rogers given at the Investigation Meeting and raises serious issues in relation to the credibility of these witnesses.

It is submitted in respect to the document referred to in 2 above, that it confirms that the MAF letter referred to in para 30 of the Authority's Determination only related to Part 1 of the varroa mite claim and that at the time of Peter Roger's letter to the BNZ on 18 June the varroa mite claim was still current. The sum of \$691,781 attached to the outstanding parts of the claim and it is the respondent's position the payment of \$200,000 was contingent on the successful outcome of the outstanding parts of the claim.

Further, it is submitted for the respondent that the re-opening of the investigation will not place unnecessary additional burden on either applicant or the respondent as it deals with a narrow issue only i.e. whether or not the \$200,000 was to be paid to the applicant from monies received out of the varroa bee mite claim (not yet closed) or in spite of it.

It is submitted the Authority should re-open the investigation to take account of the new evidence in equity and good conscience and pursuant to its investigative powers as it directly affects the Determination made without this evidence.

#### The applicant's position (Kerry Paul)

It is the applicant's position that the Determination of the Authority dated 4 April 2006 should stand and that the application to re-open the investigation should be declined. It submits the following in support of its position.

1. The letter of 18 June 2003 from Finn and Partners to the BNZ (the BNZ letter) was prepared by Mr Rogers. The applicant was not involved in the preparation of the letter other than in providing information to Mr Rogers re the affairs of Honey New Zealand (International) Ltd and prior to receiving the application to reopen the investigation the applicant had never seen the letter.
2. The letter to the BNZ was prepared in response to concerns the BNZ had regarding the transfer of assets from Waikato Honey Products (WHP) to Honey New Zealand (HNZ). The applicant understood that the purpose of the letter was to assure the BNZ that WHP's investment in HNZ was favourable and improved WHP's own financial position.
3. The passage from the letter of 18 June, identified by the respondent, cannot be attributed to the applicant and it does not mean, nor could it be taken to mean that the payment was contingent on the success of the varroa mite claim.
4. It is acknowledged that at the date that letter was written WHP may have believed that the settlement with the applicant could indeed be fully funded from the varroa mite claim. This is however, irrelevant to the terms of settlement reached between the parties.
5. It is submitted for the applicant that the alleged "new evidence" does not impact on the Authority's finding in para 40 of its Determination nor the outcome of that Determination. The Authority found that, on the balance of probabilities, the parties had agreed that the applicant would be paid a sum of \$200,000 irrespective of the outcome of the varroa mite claim. It is the applicant's view that the 18 June letter relied upon as a basis for the application to reopen the investigation merely establishes what the company wanted the BNZ to know and it does not impact on the Authority's Determination.

6. The applicant also questions whether this is “new” information as the applicant submits it was customary for Mr Rogers to provide copies of correspondence to Mr and Mrs Clements (principals of the respondent company).

In summary, it is submitted that the material relied on by the respondent to support its application that the hearing should be reopened, provides no basis for its claim that it is necessary to reopen the investigation to prevent a miscarriage of justice. Nor is there any new evidence before the Authority to support the claim that there is a substantial possibility or a real or substantial risk of a miscarriage of justice having occurred.

## Discussion

In arriving at a determination in this matter I have had regard to the original file and Determination, the content of the “new” documents submitted, the submissions of the parties and to relevant case law.

An important consideration in determining such applications is that succinctly stated in *Ports of Auckland Limited v NZ Waterfront Workers Union* [1995] 2 ERNZ 85, 88.

*“... in general the Court must look toward the possibility of a miscarriage of justice, but should not look for proof of that possibility to a high standard. For balance, it must give equal weight to the importance of certainty in litigation and the right normally enjoyed by a successful litigant, ... to enjoy the fruits of a judgment in its favour.”*

The specific principles having application where a rehearing is sought on the basis that fresh evidence is available are those set out in *Squire v Waitaki NZ Refrigerating Limited* [1985] ACJ 839, 842.

*“One: it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial. Two: the evidence must be such that if given it would probably have an important influence on the result of the case although it need not be decisive. Three: the evidence must be such as is presumably to be believed although it need not be incontrovertible.”*

I have considered the two documents provided. It seems to me and, I find, that the extract from the BNZ letter which is relied on by the respondent in support of the application amounts only to a statement to the BNZ (as of 18 June 2003) as to how the respondent company expected to *fund* the settlement to Mr Paul. It does not support the respondent’s position that the base payment of \$200,000 that the respondent agreed to pay Mr Paul was *contingent* on the outcome of the varroa bee mite claim.

In respect of the second piece of correspondence I cannot see its relevance to the application at all. It seems to go to a claim by the respondent the Authority misinterpreted a letter from MAF and that in fact the bee mite claim is still proceeding and the agreement with Mr Paul is contingent on the success of that claim.

I accept that the company's position is that the agreement to pay any settlement sum to Mr Paul was contingent on funds being available from the varroa bee mite settlement to pay it. However, that position was not accepted by Mr Anderson who found the base sum of \$200,000 was payable to Mr Paul irrespective of the outcome of the varroa mite claim. He did accept that any payment above \$200,000 was contingent on a substantial sum of money being paid to the company as a result of the varroa bee mite claim being successful.

In conclusion, I have examined the documents submitted and the submissions of the parties and I have weighed this information against the principles set out above. As a result, I find, that the documents submitted would be unlikely to have any influence on the result of the case were the case to be reopened. I detect no possibility of a miscarriage of justice arising from a failure to reopen the investigation. When this is weighed against the principle of supporting certainty in litigation and the right of a successful litigant to enjoy the fruits of a favourable judgement, I am led to the finding that the application should be declined.

I note that this finding will not bring a conclusion to the matter as the challenge is yet to be dealt with in the Court.

## **Determination**

The application to reopen is declined.

## **Costs**

Costs are reserved. The Authority will consult with the parties on a timetable for the respondent company's submissions on costs in the substantive matter and will consult on a timetable for cost submissions in this matter.

Janet Scott  
Member of Employment Relations Authority