

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, Counsel for Applicant
Agnes McKay, Counsel for Respondent
MEMBER OF AUTHORITY Ken Anderson
INVESTIGATION MEETING 22 November 2005
23 November 2005
25 November 2005
SUBMISSIONS RECEIVED 6 December 2005
15 December 2005
23 January 2006
DATE OF DETERMINATION 4 April 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] In the *Amended Statement of Problem* received by the Authority, Mr Paul claims that Waikato Honey Products Limited breached his employment agreement, in that the company failed to pay him a performance bonus as agreed under the terms of the agreement. Mr Paul sought an order from the Authority that he be paid the sum of \$200,000. Conversely, Waikato Honey Products Limited (“WHPL”) denied that the company breached Mr Paul’s employment agreement and says that he does not have any entitlement to the sum claimed.

However, as matters progressed on the first day of the investigation meeting, it became clear that the problem was somewhat different to that originally claimed. The Authority identified, and the parties appeared to accept, that Mr Paul’s claim for payment of the sum of \$200,000, related to a subsequent agreement that the parties negotiated, whereby Mr Paul agreed to forego any entitlements that he may have under the terms of his employment agreement, and also terminate his employment agreement with WHPL.

Background Facts and Evidence

- [2] The business of WHPL was beekeeping and the manufacturing and sale of commodity table honey. At the material times, the Company was 100% owned by Mr Bryan Clements and his

wife, Mrs Barbara Clements as trustees of the Clements Family Trust. Mr and Mrs Clements were also the Directors of WHPL along with Mr Peter Rogers. Mr Rogers was the Chairman of the Board of the Company. The Company was incorporated in 1980.

- [3] Mr Paul was employed by WHPL in the position of Chief Executive Officer. He commenced his employment on 16 May 2001, under the terms and conditions of an employment agreement that he signed the same day. The agreement was signed for the company by Mr Clements.
- [4] The remuneration to be paid to Mr Paul is set out in *Schedule A* to the employment agreement. Mr Paul received a salary of \$60,000. In addition to the salary, Mr Paul was to be paid a performance component as follows:

“BENEFITS AND ALLOWANCES: There is a performance component to be made [sic] based on a percentage of the profits produced over each of the two years ending March 2002 and March 2003.

The Base Profit is based on the final accounts for the 31 March 2001 financial year. This Base Profit figure is based on the before tax figure and will be modified by the following adjustment.

- deduction of the Chief Executive’s salary of \$60,000 and Operations Manager of \$50,000

The performance component will be based on the profit produced in each of the two financial years ending 31 March 2002 and 31 March 2003. The performance profit will be determined by the profit before tax produced above the Base Profit. This is called the Surplus above Base. The profit for each year will be modified by:

- an adjustment to increase the value of current stocks on hand to market value
- deduction of product development expenditure

After these modifications forty percent of this surplus will be paid as equity and cash. A share value will be established based on the earnings method of valuation using the Base Profit. The number of shares to be paid as the performance payment will be established using the initial share value. This will be applied to the Surplus above Base in each of the two years to establish the number of shares to be transferred to the CEO.

This principle applies to a maximum of 25% of the shares of the Company. In the event the total performance payment is in excess of the twenty five percent then it shall be paid in cash.

The shares shall be transferred to the CEO at the end of year two.”

- [5] The evidence of Mr Paul is that he accepted a significantly lower salary than he had received in his previous employment, and hence, the ability to obtain a shareholding in WHPL, was a major factor in the acceptance of employment with the Company. Mr Paul says that he believed that if he invested his efforts into the business then there would be an opportunity to obtain an interest in the Company. This was a strong incentive to him in his day-to-day role as the CEO. Effectively, Mr Paul was willing to take the risk of having a reduction in salary in return for the opportunity to acquire shares in the business.
- [6] In addition to his role as Governing Director of WHPL, Mr Clements was also employed by the Company as the Operations Manager, largely responsible for the beekeeping and husbandry aspects of the business.
- [7] The overall evidence points to an escalating level of conflict between Mr Paul and Mr Clements, possibly due to the different backgrounds of the two men in that Mr Paul came from a corporate background, whereas Mr Clements had built the business to where it was, and had, to some extent, lost control of the business operations to Mr Paul.

- [8] Some time in December 2002, following an incident concerning the reversal by Mr Paul of a written warning that Mr Clements had issued to a senior beekeeper, Mr Clements resigned as the Operations Manager. From that point on, the relationship between the two men appears to have been largely dysfunctional, with Mr Rogers in his role as Chairman of the Board, becoming involved as a “go-between” the two men.
- [9] Associated with the personal conflict between Mr Paul and Mr Clements was the formation and operation of another company Honey New Zealand (International) Limited (“HNZ”). It appears that for some time Mr Paul was the CEO of that company in addition to his role as CEO of WHPL. The Authority is not required to take make findings pertaining to the machinations that were taking place pertaining to the operation of the two companies. However, according to the minutes of the “*Establishment Committee Honey New Zealand International Limited*” dated 13 August 2002, several motions were carried regarding the position of Chief Executive for HNZ. The motions recorded that:
- “1. Kerry Paul be appointed Chief Executive of Honey New Zealand (International) Limited;
 2. The current salary with Waikato Honey Limited will continue until May 16 2003;
 3. The current salary for the remaining part of the contract will be charged to HNZ Ltd;
 4. The salary will be negotiated prior to the review period of the current contract and the new contract will be based on both cash and shares.”
- [10] Despite the fact that both companies had common directors (apart from Mr Steens for HNZ), and that Mr Paul was present at the above meeting, Mr Paul was retrospectively informed, via a letter dated 12 August 2003, from Mr Clements in his role as Governing Director of WHPL, that his employment with this company finished on 31 March 2003 and that his salary of \$60,000 per annum also ceased as at that date. Mr Paul was also informed that the first payment of his new salary of \$120,000 as CEO of HNZ, would commence when Mr Paul commenced work full time for HNZ – whenever that was.

Unfortunately, this rather peculiar communication to Mr Paul is indicative of what appears to have been a lack of business accountability and rather odd behaviour by the people involved with the two companies at that time.¹

Mr Paul’s entitlements under the employment agreement

- [11] While there are no written records and the evidence of the parties is somewhat blurred, it appears that at various times in April and May of 2003, Mr Rogers, in his role as Chairman of the Board of WHPL, met with Mr Paul for the purpose of discussing Mr Paul’s entitlements in regard to the performance component of his remuneration, given that the two financial years had been completed.
- [12] The evidence of Mr Paul is that he was confident of his entitlements, as the business of WHPL had improved significantly due to his involvement. Mr Paul says that he and Mr Rogers were in agreement that Mr Paul was entitled to a 25% shareholding in WHPL, however, they were unable to agree on the appropriate level of the cash bonus to be paid.
- [13] There is no tangible evidence available to the Authority in regard to how any entitlements that might be due to Mr Paul were calculated. Indeed, everyone concerned, and Mr Paul in particular, was most unforthcoming as to the reason for the lack of information in this regard. Given that Mr Paul was the CEO of WHPL, I have to say that it was most astonishing that he did not have to hand financial details relating to the basis for the entitlements that he believed

¹ The appointment of Mr Paul as CEO of HNZ was confirmed in a company minute dated 11 April 2003

he was due.

- [14] There is the evidence of a Chartered Accountant, Mr John Dodson. On 15 October 2005, he wrote to the Directors of WHPL and expressed a qualified view, that following an analysis of the accounts available to him, the bonus due to Mr Paul fell within a range of zero to a maximum of \$15,000, depending on how the bonus agreement was interpreted.
- [15] There is also the evidence of Mr Rogers. Upon being questioned by Mr Gudsell at the investigation meeting, Mr Rogers was of the view that WHPL was showing an increasing turnover, in excess of \$1 million, and it was likely that Mr Paul would have an entitlement. However, Mr Rogers did not venture a view as to how much that entitlement might be.
- [16] But in any event, given the manner in which matters subsequently transpired, the Authority is not required to analyse and/or determine, Mr Paul's entitlement under the terms of his employment agreement. This is because some time in late April or early May 2003, Mr Rogers received advice from Mr Clements that he did not want Mr Paul to receive any shares in WHPL.

The evidence of Mr Rogers is that:

“At that time the relationship between Kerry Paul and Bryan Clements had broken down and this made discussions difficult. Bryan Clements was very uncomfortable with the thought of transferring any shares in his company to Kerry Paul.”

- [17] The evidence of Mr Rogers is confirmed by that of Mr Clements:

“I admit that in early 2003, after my relationship with the Applicant had deteriorated considerably I was very concerned about the prospect of the Applicant becoming a shareholder in WHPL. I simply could not cope with that, mentally, emotionally or in any other way.

By the weekend of 10 May 2003 I had just had enough, the stress was too much and I instructed Peter Rogers to take whatever steps needed to remove the Applicant as a prospective or active shareholder in WHPL. At this stage no calculation had been done under the Applicant's employment agreement to determine whether any bonus was due to him that could give him an option for shares. This is because the end of year accounts to 31 March 2003 had not yet been completed. They were completed on 27 May 2003”

- [18] The Authority also has before it a letter initially dated 10 May 2003, and then continued on 12 May 2003, from Mr Clements to Mr Rogers. In that letter, Mr Clements asks Mr Rogers for his thoughts on some issues regarding the continuation of Mr Paul's employment. The letter makes it clear that Mr Clements would prefer to be rid of Mr Paul. Pertinently, he records:

“5. **Peter, the following are our instructions to Finn and Partners and your self** [sic].

B&B [Bryan and Barbara] Clements instruct you to take whatever steps you need to achieve Kerry's removal as a prospective or active shareholder in WHP. We will fight any legal action taken against us at the highest level, if we need to.

As an incentive to Kerry to move with out [sic] legal action I will support the motion that Kerry's shareholding in HNZ carry no risk. I also offer 20% of the net settlement by MAF in relation to our varroa claim. E.g. any court or other out side [sic] costs in relation to the Varroa claim would come off the gross pay out, giving the net which I offer 20% of.”

- [19] Further into the letter, Mr Clements adds:

“If we have to sack him [Mr Paul] and he up and walks, from my point that is life. I feel if we were to advertise for a CEO with a salary of \$120,000 we would be flooded with applicants.”

[20] Then on 12 May 2003, in the same letter, Mr Clements writes:

“Having slept on the above we now think that Kerry will never go quietly am [sic] we are prepared to go all the way as from today.

I am not prepared to meet with the ANZ with out [sic] Kerry’s resignation as CEO and will cancel the meeting today being Monday morning.

I think Kerry should be asked what holidays are owing and be given a months notice and paid for the month and sent home at the time of dismissal. A security guard should be employed to oversea [sic] his removal from the property. He should have no access to staff prior to departure.

We need to talk Peter and I need to act. This thing can not be driven by Kerry.”

The negotiations with Mr Paul

[21] The evidence of Mr Rogers is that consistent with the instruction of Mr Clements, the negotiations with Mr Paul were for a “commercial” settlement outside the terms of Mr Paul’s employment agreement. Mr Rogers acknowledged that by the use of the word “commercial”, he meant a pragmatic solution to an employment related issue. Mr Rogers says that it was understood during the negotiations that Mr Paul would not seek any entitlement due under the performance incentive scheme or make any other claims against WHPL providing that the parties reached an agreement during these negotiations.

[22] Mr Paul’s evidence is that he proceeded with the negotiations on the understanding that any settlement reached would provide consideration for giving up his entitlement to shares in WHPL and would also settle the issue about any cash bonus he may be entitled to. Mr Paul told the Authority that he believed that he was entitled to a 25% shareholding in WHPL and a cash bonus of \$200,000. Mr Paul says that he formed that belief on the basis of the figures that Mr Rogers produced and then he applied a “discount factor to it.”

[23] Mr Paul says that on 12 May 2003, Mr Rogers arrived at his office unexpected and informed him that things had changed and that Mr Clements had given Mr Rogers instructions to; [*“get you out of his life.”*] Mr Paul says that Mr Rogers told him that there were two options. Mr Paul could carry on as the CEO for WHPL or; negotiate an exit from the employment contract. Mr Paul says that he concluded that if Mr Clements was to remain “*in charge*” of WHPL, then the 25% shareholding would not be worth having. He conveyed to Mr Rogers, that he would be willing to negotiate an exit from his employment agreement and that the sum that he would require to do this would be \$400,000.

[24] Clearly the sum that Mr Paul was seeking was not acceptable or sustainable and consequently, Mr Paul reduced the sum sought to \$200,000. The evidence of Mr Rogers is that this figure was not based on anything in particular but it was a “base figure” and that in order to obtain a higher total sum, Mr Paul also required a percentage of any monies that WHPL might receive from a varroa mite claim that had been filed with the Ministry of Agriculture and Forestry (“MAF”). The sum claimed being \$691,781. Mr Rogers says that he was also concerned about Mr Clement’s health and that he needed to reach a settlement with Mr Paul; “for Bryan’s sake.”

[25] The evidence of Mr Rogers is that he met with Mr and Mrs Clements at their home on 13 May 2003 and informed them that Mr Paul would exit from his employment agreement and settle all matters pertaining to his share and bonus claims for the sum of \$200,000, but in addition to this sum, Mr Paul required to be paid 50% of any amount over and above \$200,000 that may result from the varroa mite claim.

[26] The details of what Mr Paul was seeking were written out in pencil by Mr Rogers on a child’s

home-made house warming greeting. Mr Rogers is adamant that following further discussion, the Clements agreed to Mr Paul's proposal and that they understood that the base figure of \$200,000 was not conditional on the varroa mite claim. The evidence of Mr Rogers is that:

"I then decided to prepare a Board Minute. I wanted a record of the decision because I was not confident that the Clements would not change their mind or their position on me. I have experienced this from them before."

[27] The evidence of Mr Clements is that it was his suggestion to prepare a Board Minute "for internal consumption" but I conclude that it is more probable that it was Mr Rogers. This is also confirmed by the evidence of Mrs Clements. [I record at this point, that where there is a conflict in the evidence between Mr Clements and Mr Rogers, I prefer the evidence of Mr Rogers, largely because I suspect that Mr Clement's overall judgement at the time in question may have been impaired by the effects of excessive stress. I also found Mr Rogers to be candid and forthcoming about most matters, albeit at times, some of the events may not have reflected well upon his professional involvement.]

[28] The Board Minute is in Mr Roger's hand writing and records:

"WAIKATO HONEY PRODUCTS LIMITED
MEETING OF DIRECTORS DATED 13/5/03

Present. Bryan Clements, Barbara Clements, Peter Rogers

Resolved. That the offer received from Kerry Paul be accepted. Details as follows.

1. That a payment of \$200,000 as a base amount be paid as will 50% of any amount over and above \$200,000. This calculation is based on the varroa mite claim.
2. Richard Swarbrick be instructed to prepare the letter to advise this is a full and final settlement of all claims and obligations in respect of shareholding and profit sharing.

example.

(1)	Claim	500,000	
	base	<u>200,000</u>	
		300,000	
	50%	<u>150,000</u>	
	Payment	350,000	
(2)	Claim	300,000	
	base	<u>200,000</u>	
		100,000	
	50%	<u>50,000</u>	
	Payment	250,000	
(3)	Claim	200,000	
	base	<u>200,000</u>	
		<u>NIL</u>	

The minute is signed by the three people present and dated 13.5.03.

[29] Mr Rogers subsequently confirmed with Mr Paul that an agreement had been reached. A draft agreement dated 30 May 2003, was subsequently prepared by Mr Swarbrick, the Company's lawyer, and presented for the approval of the Clements, and presumably Mr Rogers – before

being given to Mr Paul.

- [30] The evidence of Mr Clements is that the draft agreement became nothing more than that as on 26 May 2003, the MAF advised WHPL that the compensation to be paid would only be \$12,577.99 plus GST.
- [31] Mr Paul was subsequently notified on 12 August 2003 that his employment with WHPL had ceased effective from 31 March 2003.² Mr Paul went on to a new role as Chief Executive Officer of HNZ and as at the date of the investigation meetings, remained in that position.

Analysis and Conclusions

- [32] This matter initially came to the Authority as a claim for a breach of the terms of Mr Paul's employment agreement. However, it was subsequently revealed that the problem is different to that set out in the *Amended Statement of Problem* and I understand that the parties accept this to be so. In case there remains any doubt, I also now confirm the indication given to the parties, that the issues to be determined relate directly to the employment relationship between the parties and that the Authority has the jurisdiction to do so.
- [33] It seems to me that the substantive questions to be determined by the Authority are:
1. Was a valid agreement reached between WHPL and Mr Paul and if so, is the agreement binding upon WHPL?
 2. If a valid and binding agreement was reached between the parties, was payment of the sum of \$200,000 to Mr Paul, conditional on the varroa mite claim being successful?

Was a valid agreement reached between WHPL and Mr Paul?

- [34] The evidence is overwhelming that an agreement was reached. In other words a bargain was struck. In addition to not wishing Mr Paul to have any shareholding the Company, Mr and Mrs Clements wanted to terminate Mr Paul's employment agreement with WHPL, and instructed Mr Rogers to: ["take whatever steps you need to achieve Kerry's removal as a prospective or active shareholder in WHP." The evidence is also clear that Mr Clements intended that Mr Paul should be dismissed, with little apparent thought of the legal consequences of such action, particularly the remedies that most likely would have been available to Mr Paul in the circumstances, and of which I have no doubt Mr Rogers would have been aware of.
- [35] It has been argued for WHPL that Mr Rogers did not have the necessary authority to negotiate a settlement with Mr Paul. That argument is quite at odds with the significant evidence to the contrary available to the Authority. I find that Mr Rogers had the requisite authority to negotiate a settlement with Mr Paul and that he did so with the full knowledge, agreement and subsequent acceptance of Mr and Mrs Clements. Effectively, the agreement that Mr Rogers reached with Mr Paul was exactly what the Clements required and authorised Mr Rogers to achieve.
- [36] I further find that a valid agreement was reached and the terms of that agreement were recorded in the signed WHPL Board Minute dated 13 May 2003. While the Board Minute is less than professional in its format, nonetheless it is a valid record of the decision to accept the offer made by Mr Paul, to settle all matters relating to any entitlements he may have had

² See paragraph 11 of this determination.

in regard to “shareholding and profit sharing.” It was also accepted that Mr Paul would cease his employment relationship with WHPL.

Is the agreement binding upon WHPL?

[37] Given my findings above, it follows that the agreement reached with Mr Paul is binding upon WHPL. While the legal format of what had been agreed still had to be finalised, the essential terms of the agreement reached were certain and this had been verbally confirmed with Mr Paul by Mr Rogers, following acceptance by the Clements and the recording of the Board Minute on 13 May 2003.

Was payment of the sum of \$200,000 to Mr Paul conditional on the varroa mite claim being successful?

[38] The evidence of Mr Paul and Mr Rogers was unequivocal. Mr Paul was not prepared to have the substance of what he believed he was entitled to dependant on a successful outcome regarding the varroa mite claim. Equally, Mr Rogers had made it clear that WHPL was not in a financial position to meet the sum being sought by Mr Paul, but could make a payment of a “base figure” of \$200,000. In addition to being the Chairman of the Board of WHPL, Mr Rogers is a Chartered Accountant and looked after the personal and business affairs of Mr and Mrs Clements and WHPL and it appears that he believed that the Company had the fiscal resources to meet the base figure of \$200,000.

[39] While the Clements now say that WHPL was never in a position to be able to pay the sum of \$200,000, without the varroa mite claim being successful, I find it difficult to accept that this was their position on 13 May 2003, when the situation was explained to them by Mr Rogers, and when they signed the Board Minute that day.

[40] I find that on the balance of probabilities, when the agreement was reached and confirmed with Mr Paul on 13 May 2003, all parties were fully aware of and accepted, that the base figure of \$200,000 would be paid to Mr Paul, regardless of the success or otherwise of the varroa mite claim. In plain terms, the agreement to pay that sum was unconditional and WHPL has breached that agreement by now refusing to pay the sum in question to Mr Paul.

Determination

[41] 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.

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

[43] 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.

Costs

[44] Costs are reserved. The parties are invited to reach a resolution of this matter. In the event that a resolution is not achieved, submissions may be made to the Authority for an order, within 21 days of the date of this determination.

Ken Anderson
Member
Employment Relations Authority