

Attention is drawn to paragraph 1 of this determination, prohibiting publication of certain information.

Determination Number: CA 94/06
File Number: CEA 307/05

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Maritime Union of New Zealand (Applicant)
AND Lyttelton Port Company Limited (Respondent)
REPRESENTATIVES Peter Cranney, Counsel for Applicant
Rob Towner, Counsel for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 28 April 2006
SUBMISSIONS RECEIVED 17 May 2006
31 May 2006
DATE OF DETERMINATION 26 June 2006

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] I prohibit from publication under schedule 2 clause 10 (1) of the Employment Relations Act 2000 the following parts of the paper to the remuneration committee titled *Decision paper 2004/05 performance bonus* from the chief executive of Lyttelton Port Company Ltd, Peter Davie. The whole of page 7, that part of page 8 starting at *For staff members covered by the logistics officers' collective agreement* and the whole of page 9.

[2] I make this order on the basis that the parts prohibited from publication concern discussion about employees who are not party to this employment relationship problem.

The Employment Relationship Problem

[3] The employment relationship problem is about whether clause 11 of the Lyttelton Port Company Ltd 2005 collective agreement ("the main collective agreement"), which concerns performance bonuses, has been correctly interpreted, applied and operated. The problem was lodged with the Authority after there was no performance bonus paid in 2005 to those covered by the collective agreement.

[4] The parties attended mediation but were not able to resolve the matter.

Parties to the main collective agreement

[5] There are three union parties to the main collective agreement. They are the applicant, the Maritime Union of New Zealand (“the Maritime Union”), the Rail and Maritime Transport Union (Inc.), and the N.Z. Foremen Stevedores Union (Inc).

[6] Mr Cranney confirmed that the other two unions have been notified about this matter and was happy for the Maritime Union and Mr Cranney to deal with the matter on their behalf. Brian Cronin from the Rail and Maritime Transport Union (Inc) was present during the investigation meeting.

[7] The respondent, Lyttelton Port Company Limited, (“the company”) is the employer party to the main collective agreement which covers 271 employees in a variety of roles. Lyttelton Port is a deep-water port offering a range of regular worldwide shipping services, cargo holding, stevedoring services and loading and unloading facilities for a variety of bulk products.

[8] There are also three other collective agreements that the company is party to but they cover a smaller number of employees.

Clause 11

[9] Clause 11 provides:

11.0 PERFORMANCE BONUS

11.1 The Company will operate a performance based bonus system based on actual financial performance of the Company and paid out on a regular basis equally to all permanent full time employees who have worked the full year with the Company. PRP's will receive a 6/10 proportion of the full time employees bonus.

11.2 Employees who leave during the course of the financial year will be entitled to a proportion of the bonus equivalent to the proportion of service in the financial year. To receive their entitlement these staff members must place an application with the Company during the month of July. The application must include details of the bank account the bonus is to be paid into. Should these conditions not be met no bonus will be paid and the entitlement will lapse. Employees who are dismissed under clauses 24.4, 24.5 or 24.6 shall not be entitled to receive a performance bonus.

11.3 The bonus payment will be paid out upon completion of the end of year financial accounts.

The Complete Contract Clause

[10] There is a complete contract clause in the main collective agreement that provides:

1.6 This Agreement supersedes all previous awards, contracts, agreements, arrangements and customary practices that were in force or being observed.

The issue for determination

[11] The issue in this case is whether the company operated a performance based bonus system based on actual financial performance of the company in accordance with its obligations in clause 11 of the collective agreement.

The background to the performance bonus clause

[12] The performance bonus clause was first inserted into a collective employment contract in 1992. The Maritime Union say that the insertion of the clause was in exchange for significant concessions made by their members.

[13] In the June 2001 collective agreement the clause was amended to include the reference to pro-rata payments when an employee left the company prior to the bonus being paid out and a proportional payment for staff employed as part of the part-time relief pool.

[14] Following the introduction of the performance bonus clause a bonus payment was made each year either by way of cash payment or shares to those covered by the main collective agreement until 2005 when there was no performance bonus paid out.

The history of bonus payment

[15] The company's financial year runs from 1 July to 30 June. The profits of the company grew from 1994 to 2002. The annual bonuses that were paid out to employees over these years ranged from \$1,800 to \$2,700. From 2002 the bonus was paid in shares rather than cash.

[16] Mr Davie has been chief executive of the company since 2003. There was a period of six or seven months between the previous chief executive's departure and the commencement of Mr Davie in the role. Mr Davie was alerted to the provision in the collective agreement about performance bonuses by the human resource manager Tonia Denize.

[17] The financial performance of the company began to deteriorate in 2003. In 2003 there was a reduction in the net profit after tax and net profit after tax return on shareholders' funds. For the year ending June 2004, although the net profit after tax increased, there was no improvement on the net profit after tax return on shareholders' funds.

[18] A bonus was paid for both of those years.

[19] In 2003 Mr Davie said that there were several factors that led him to propose that it would be in the best interests of the company to pay a bonus to those covered by the main collective agreement despite the company's poor financial performance. One of these was that the company had at that time recently settled a collective agreement following negotiations from October 2000 to February 2003.

[20] In 2004 Mr Davie again proposed that a bonus be paid to those covered by the collective agreement but at a lower figure than in 2003. He said that his proposal was the subject of vigorous debate with the remuneration committee who considered not paying a bonus. Mr Davie explained about the fragile state of negotiations and that if the industrial situation was inflamed by non payment of a bonus then there was a risk that the company's business could be jeopardised and financial performance jeopardised. On that basis payment was approved.

What was the actual financial performance of the Lyttelton Port Company in 2005?

[21] During 2005 Mr Davie said the Board placed a greater emphasis on how the company was going to change direction in terms of poor financial results, grow the business and re-invest in its future. The company was also planning to spend \$90 million on infrastructure over the following five years.

[22] The actual financial performance of the company for the 2004/2005 financial year fell \$1,100,000 short of its budgeted net profit after tax and the net profit after tax return on shareholders' funds was also lower than previous years.

What was the performance based bonus system undertaken by the company?

[23] It is common ground that clause 11 provides that it is the company that is required to operate the performance based bonus system.

[24] Mr Davie gave evidence about the process that the company operates for clause 11. I am satisfied that it is the same process he has undertaken since he became the chief executive in 2003. Mr Davie understood and was supported by the evidence of Ms Denize that it was the process undertaken by the company before he commenced his role.

[25] I have set out the steps taken by Mr Davie in terms of the 2005 performance bonus.

[26] Mr Davie requested and received the information relevant to the company's financial performance in 2005. This information is usually requested a few weeks after the year end accounts are finalised.

[27] Mr Davie assessed the information and discussed it with Ms Denize. Ms Denize is involved with the administration of the company's employment agreements and also attends the meetings of the remuneration committee.

[28] Mr Davie then submitted a written report to the remuneration committee with his recommendations. Within that report he referred to the applicable part of clause 11. He said in that report:

On the basis that company performance has not met financial expectations, and that this collective agreement refers only to company financial performance, the management recommendation is to not pay a financial bonus to employees in the main collective agreement.

[29] Mr Davie recognised in his report that it was a significant shift from the past as in previous years a bonus has been paid out to collective agreement staff members despite the company not meeting budgeted result (2003 and 2004 years).

[30] The remuneration committee then met on 8 August 2005 and discussed the report and proposal. Mr Davie was asked relevant questions.

[31] The remuneration committee then made recommendations to the Board. One recommendation in terms of those staff members covered by the main collective agreement was that they not receive a financial performance bonus.

[32] The Board then considered the recommendation from the remuneration committee and made a decision in line with the remuneration committee's recommendations not to pay a performance bonus to those staff members covered by the collective agreement.

[33] The decision not to pay a performance bonus to those staff members whose work was covered by the main collective agreement was then communicated in writing to the affected employees. Mr Davie wrote to employees covered by the main collective agreement by letter dated 23 August 2005. He advised in his letter that the company had not met its financial targets and that there would be no company performance bonus paid to employees covered by the main collective agreement. In the letter he set out seven main reasons for not reaching the financial target.

Did the company operate in terms of clause 11 of the collective agreement a performance based bonus system based on the actual financial performance of the company in 2005?

[34] There is an express provision in the collective agreement that the company operate a performance based bonus system based on the actual financial performance of the company. There is nothing in the clause as to how the actual financial performance of the company is to be assessed or the amount of any bonus is to be calculated.

[35] Mr Cranney submits the words in clause 11 requiring the company to *operate a performance based bonus system* are for the purpose of determining what quantum of bonus is to be paid. He submits that such a system must be based on the actual financial performance of the company and is critical that the approach in 2003 and 2004 to pay a bonus was not based on actual financial performance of the company. He submits that there is no system based on actual financial performance as required but rather a judgment of Mr Davie.

[36] Mr Towner submits that clause 11 does not require a formula or prescribe a particular approach or methodology and that the sole factor for the 2005 decision was based on the company's actual financial performance. He further submits that the company is not obliged by clause 11 to pay a bonus every year and that in any event the applicant does not assert that. He submits that the clause does not create a profit sharing system but is about a bonus system.

[37] Both Mr Cranney and Mr Towner provided dictionary definitions of *system* in their submissions. They have both considered the definition in different editions of the Oxford English Dictionary. Mr Cranney relies on the relevant definitions of system – *a set of things working together as a mechanism or interconnecting network* and *an organised scheme or method*.

[38] I accept Mr Cranney's submission that the company must operate a performance based bonus system based on the actual financial performance of the company.

[39] The evidence supports there was a process or method whereby consideration of performance bonuses took place every year, shortly after the financial accounts of the company are finalised. Mr Davie assessed the financial accounts. He then put forward a recommendation to the remuneration committee based on the actual financial performance of the company. There were other steps in the process described by Mr Davie involving the remuneration committee and the Board before a final decision was made.

[40] The process did not include a formula or methodology to determine when and in what amount a bonus payment should be made. That is the main concern for the applicant as to whether the company complied with its obligations under clause 11 to operate a performance based bonus system. I have considered whether a formula or a particular type of approach was required under clause 11.

[41] Clause 11 is about a bonus, based not on individual performance but on the company's financial performance. It is not a profit share clause. I do not accept that clause 11 requires the company to have a formula. I prefer Mr Towner's submission that clause 11 does not prescribe a particular approach or methodology. I find that how the actual financial performance of the company was to be assessed and what amount of bonus was to be paid were matters that had not been specifically agreed between the parties. These matters were therefore left to be decided by the company exercising its discretion and following a reasonable and structured process each year. The final decision must be based on the actual financial performance of the company. Irrelevant matters should not be taken into account.

[42] In 2005 the company did not meet its budgeted net profit after tax and there was no improvement on the net profit after tax return to shareholders. On that basis Mr Davie made his recommendation to the remuneration committee that a bonus not be paid to those covered by the collective agreement. The remuneration committee approved that recommendation after some discussion and the Board made a decision that no bonus be paid.

[43] Les Wells, the President of the Maritime Union and Kevin Laredo who is a tally clerk and has been a union representative at bargaining gave evidence at the investigation meeting. Mr Wells and Mr Laredo said that employees other than those covered by the main collective agreement had been paid a bonus. There was also a suggestion that those covered by the main collective agreement had been discriminated against because of industrial action they had taken in 2005.

[44] I have heard evidence on both these matters. I am satisfied that bonuses were only paid to employees whose work was covered by one of the three other collective agreements. The bonus payments were made to those employees because the performance based bonus system in the applicable collective agreement was based not only on financial performance of the company but also on key performance indicators. Mr Davie said that the poor financial performance of the company was reflected in the payments made.

[45] No bonus payment was made to pilots or marine staff under their collective agreement bonus clauses.

[46] The employees who were party to individual employment agreements had different incentive schemes based primarily on individual or team performances. In conclusion therefore any bonus payments that were made were done so because of different contractual obligations.

[47] There was discussion during the investigation meeting about the contents of the letter dated 23 August 2005 sent to those affected employees under the main collective agreement by Mr Davie advising that they would not be paid a bonus. There are seven reasons set out in the letter for the company not reaching its financial target. The first is the industrial action. Although the placement of that matter at the top of the list was perhaps unfortunate, I am not satisfied that industrial action was a factor considered in the decision not to pay a performance bonus. I have formed this view from my assessment of the written documentation surrounding the process undertaken by the company for bonus payments in 2005 and the fact that the pilots and marine staff who did not participate in the industrial action did not receive a performance bonus.

[48] I have considered whether the fact that payments were made in 2003 and 2004 when there was poor financial performance has any bearing on the decision made not to pay a bonus in 2005. I am not of the view that it does. I do not think that clause 11 prevents the company making a bonus payment even when the financial performance is poor if it considers there are good reasons for doing so. In this case Mr Davie did consider there were good reasons for paying a bonus in 2003

and 2004 but I am not satisfied that this obliged the company to make a bonus payment again in 2005.

[49] I have also considered whether the fact that bonuses had been paid every year since 1993 has created a practice or expectation that there be such a payment every year. I do not find that it does. Firstly there is the complete contract clause 1.6 that provides, amongst other matters, that the main collective agreement supersedes all customary practices that were in force or being observed prior to the main collective agreement coming into force. Secondly there is nothing in clause 11 to the effect that there must be payment of a performance bonus every year.

[50] In conclusion I find there was a structured, formal process that the company undertook every year under clause 11 to decide whether, and in what amount, there should be payment of a performance bonus to those covered by the main collective agreement. This process I find satisfied the requirements of clause 11. I do not find that the company took irrelevant matters into consideration in making its decision not to pay a performance bonus to those staff under the main collective agreement in 2005. I am satisfied that the decision not to pay a performance bonus was made solely on the basis of the poor financial performance of the company.

Determination

[51] I find in favour of the respondent, Lyttelton Port Company Limited that it complied with its obligations under clause 11 of the 2005 collective agreement when it made a decision not to pay a performance bonus.

Costs

[52] This may be a matter where there should be no award of costs. In the event that the parties wish to make submissions I will reserve costs.

Helen Doyle
Member of Employment Relations Authority