

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 535
5384073

BETWEEN JOHN DUNCAN
 Applicant

A N D TORCHLIGHT INVESTMENT
 GROUP LIMITED
 First Respondent

A N D PYNE GOULD
 CORPORATION LIMITED
 Second Respondent

Member of Authority: T G Tetitaha

Representatives: P Skelton/A Borchardt, Counsel for Applicant
 M Crotty/G Service, Counsel for Respondent

Investigation Meeting: 17 to 19 December 2012 at Auckland

Submissions Received: 14 January, 6 March, 15 April, 15 July 2013 from
 Applicant
 14 January, 17 April, 11 and 17 July 2013 from
 Respondent

Date of Determination: 20 November 2013

DETERMINATION OF THE AUTHORITY

- A. John Duncan had no legal entitlement to the two million share bonus.**
- B. There has not been a relevant change of control of Pyne Gould Corporation Limited triggering the payment of redundancy compensation to Mr Duncan. The application for wage arrears is dismissed.**
- C. There is an order pursuant to clause 11, Schedule 2 of the Act for Pyne Gould Corporation Limited to pay John Duncan interest on the sum of \$13,930 at the rate of 5% per annum calculated from 24 April 2012 to the date of payment.**

D. There is an order for a penalty of \$2,000 to be paid by Pyne Gould Corporation Limited to John Duncan under s135 and 136(2) Employment Relations Act 2000.

E. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have a further 14 days to file and serve a reply.

Employment relationship problem

[1] John Duncan was employed initially by Torchlight Investment Group Limited (Torchlight) and latterly by Pyne Gould Corporation Limited (PGC), as a Managing Director. Part of his terms and conditions of employment included payment of a bonus in the form of shares or other payment. Mr Duncan resigned on 24 April 2012 following the initiation of a disciplinary process regarding his authorisation of the transfer of \$2.3 million dollars from Torchlight Investment Group for payment of his and other staff bonuses which was subsequently reversed. Mr Duncan submits he was entitled to the bonus payment and seeks orders requiring payment. He also seeks payment of redundancy entitlements due to activation of the change of control provisions in clause 18(e) of his employment agreement, a penalty for late payment of his holiday pay and interest upon the sums owed.

[2] PGC disagrees. It submits Mr Duncan is not entitled to any bonus payments because there was no concluded and legally enforceable agreement to pay him. Alternatively, he seriously misconducted himself disallowing any entitlement to receive a performance related bonus payment. It further submits Mr Duncan was not entitled to redundancy compensation because there was no relevant change of control of PGC. It resists any penalty for late payment of holiday pay or interest.

Issues

[3] The following issues arise:

- a. Was Mr Duncan entitled to receive the bonus payment?
- b. Was there serious misconduct, and if so, was it such to disentitle him to payment?

- c. Was there a relevant change of control of PGC triggering the payment of redundancy compensation to Mr Duncan?
- d. Should interest and a penalty be ordered for late payment of holiday pay?

Legal Framework

[4] This dispute is about the interpretation and application of an individual employment agreement. The necessary inquiry is what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. To be properly informed the Authority must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. The objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear.¹

[5] Where the contractual intention is clear from the words used, the Authority must give effect to it.² The first and often the last port of call will be the language that the parties chose to adopt. Such language must be read and understood in the context of the agreement as a whole.³

[6] There is a substantial conflict of evidence between the parties requiring findings about credibility.⁴ Credibility can be assessed on two bases – the witness personally⁵ and the story the witness tells. Some factors relevant to personal credibility are:

- (a) Demeanour⁶;

¹ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; [2010] 2 NZLR 444; (2010) 9 NZBLC 102,874 (SCNZ) at [19]

² *Lowe Walker Paeroa Ltd v Bennett* [1998] 2 ERNZ 558 (CA) at 566 -567

³ *Secretary for Education v New Zealand Educational Institute Te Riu Roa* [2002] 2 ERNZ 470 (EmpC) at [26]

⁴ *RNZAF Museum Trust Board v Hunter* Employment Court Wellington WC11/00, 1 March 2000 at p6

⁵ *Kelly v Accident Rehabilitation & Compensation Insurance Corporation* EMC Wellington WC 13/99, 24 March 1999 at p69

⁶ *Hakaraia v Foodstuffs (Wellington) Co-operative Society Ltd* Employment Court, Wellington WC6/01, 22 February 2001 at [14]; *T v SAR Ltd* ERA Christchurch CA126/05, 23 September 2005; *Young v Venables t/a Mt Eden Bakery & Delicatessen* Employment Court Auckland AC88/00, 7 November 2000 at p 6

- (b) Inconsistencies and contradictions of all kinds⁷;
- (c) Prevarication⁸;
- (d) Reasons to lie⁹
- (e) Concessions made where due, despite any perception by the witness of a risk to credibility in giving that evidence¹⁰.

[7] Credibility of the story is an assessment of it within the context of other evidence, such as undisputed facts or facts unknown to the witness. Is this evidence absurd or is there other evidence making the conclusion inevitable?¹¹

[8] The Authority may draw inferences and fill gaps in evidence by application of common sense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation.¹²

[9] Section 130 Companies Act 1993 allows the delegation of powers by a company's board to a director, excluding the issue of shares.¹³ This must be done by the board. Board means *directors ... not less than the required quorum acting together as a board of directors* (s.127(a)).

[10] Section 18 Companies Act 1993 regulates dealings between the company and other persons. A company must meet its obligations to persons dealing with or obtaining property, rights or interests from the company unless the person has or ought to have, by virtue of their position, knowledge of the matters referred to in s18(1)(a) to (e). Some of those matters include knowledge this Act or the constitution of the company has not been complied with (s18(a) and a document issued on behalf of a company is not valid or not genuine (s18(d)).

[11] Knowledge is wider than actual knowledge and would include imputed or deemed knowledge, such as wilfully shutting one's eyes to the obvious, wilfully and

⁷ *Taiapa v Te Runanga O Turanganui A Kiwa t/a Turanga Ararau Private Training Establishment* [2012] NZERA Auckland 252

⁸ *Griffith v Sunbeam Corporation Ltd* EMC Wellington WC13/06, 28 July 2006 at [108]

⁹ See above at [109]

¹⁰ See above at [110]

¹¹ See above at [111]; *Corbett v National Mutual Finance Ltd* (CA 172/91, 10 February 1992, p10

¹² *New Zealand Merchant Service Guild IUOW Inc v New Zealand Rail Ltd* [1991] 2 ERNZ 587 (LC), at 603

¹³ Schedule 2 and s42 Companies Act 1993

recklessly failing to make such inquiries as an honest and reasonable person would make, knowing of circumstances which would indicate the facts to an honest and reasonable person, and knowing of circumstances which would put an honest and reasonable person on inquiry.¹⁴

[12] The word “position” suggests office holders employed by the company such as directors and senior executives.¹⁵

Facts leading to dispute

[13] Mr Duncan’s employment agreement provided remuneration of \$400,000 per annum and *discretionary incentivised remuneration*¹⁶ (bonus clause). The relevant part of the bonus clause is set out below:

6. Remuneration (paragraph 5)

1. *Total Fixed Remuneration (TFR) \$400,000 per annum.*
2. *Discretionary Incentivised Remuneration – you will be eligible to be considered for an annual bonus based on performance. The performance criteria will be determined in consultation with you but ultimately both the criteria and the payment of any bonus will be at our absolute discretion. The bonus shall be payable in cash or in PGC shares and as such terms regarding vesting as we shall determine. The first review will however, occur in March 2010 and will include a comprehensive review of remuneration structure which will be effective immediately.*

[14] In August 2011 there were discussions between the directors about Mr Duncan’s bonus.¹⁷ Two subsequent meetings occurred between Brian Mogridge, Chairman PGC, and Mr Duncan about his bonus on 16 August 2011. There is dispute about what was said. Mr Duncan believed there was agreement he would *receive a bonus of 2 million PGC shares for the year ending 30 June 2011 with no lock up*.¹⁸ Mr Mogridge disagrees. He had proposed to the PGC directors Mr Duncan receive a share bonus, but needed “sign off” from the PGC remuneration committee which Mr

¹⁴ *Levin Meats Ltd v Perfect Packaging Ltd* (2011) 10 NZCLC 264,950 at [63]

¹⁵ *Brookers Company Law* at CA18.06(2).

¹⁶ Document 1 Applicants Bundle of Documents (ABD) Individual Employment Agreement para. 5 and Schedule A clause 6

¹⁷ Document 25 ABD Summary of Discussion re LD and PM Salary/Bonus and LTI

¹⁸ BoE J Duncan para 18.

Duncan was aware of. The remuneration committee did not sign off on his proposal and Mr Duncan's share bonus was still unresolved in March 2012.¹⁹

[15] Mr Duncan then instructed Michael Tinkler, PGC General Counsel, to draft minutes of a PGC board meeting with appropriate resolutions to implement payment of his bonus.²⁰ Mr Tinkler emailed Mr Mogridge a copy of the draft minutes.²¹

[16] Mr Duncan drafted a letter which he sent to Mr Mogridge for signing and return.²² The letter allegedly confirmed payment of his bonus stating *inter alia*:

As previously advised, the PGC Board has decided to pay bonuses selectively and I am pleased to advise that you will receive a bonus calculated with reference to 2 million PGC shares multiplied by the Company's average share price over a period to be determined grossed up for tax.

You will shortly be provided with formal documentation to be executed in connection with the bonus.

...

[17] The minutes and letter were later signed by Mr Mogridge. Mr Mogridge says he did not intend to sign the minutes at all. They were part of a stack of documentation he was signing that day. Similarly, the letter to Mr Duncan was not intended to convey any agreement to issue the shares and was subject to further documentation being executed.

[18] During this period PGC was subject to possible takeover by another company.

[19] In November 2011 PGC's target company statement noted the issue of 3.5 million shares to PGC senior executives *had been approved in concept by the Board of Directors of PGC*. The proposed share issue included payment of Mr Duncan's share bonus. It went on to conclude *if the proposal proceeds, and the issue is completed, an announcement to NZSX will be made as to the material terms of the issuance*.²³

¹⁹ BoE BW Mogridge in reply para.4

²⁰ BoE J Duncan para.25

²¹ Document 30 ABD email M Tinkler to B Mogridge and J Duncan

²² Document 4 ABD Letter B Mogridge to J Duncan dated 16 September; BoE J Duncan para.24

²³ Document 8 ABD PGC target company statement November 2011

[20] During this period Mr Duncan continued emailing Mr Mogridge asking for an update on the issue of his bonus shares.²⁴

[21] On 19 December 2011 there was a meeting between Mr Duncan, George Kerr (PGC Director) and Mr Mogridge. Mr Kerr and Mr Mogridge raised concerns about the “optics” of issuing PGC shares to senior executives in the midst of a takeover.

[22] Email correspondence between Mr Duncan, Mr Kerr and Mr Mogridge from 20 December 2011 and 16 January 2012 evidenced continued discussions about the issue of the bonus shares.²⁵ Mr Duncan was clearly frustrated at the lack of progress and the “optics” from his perspective was *not pushing forward to execute the necessary documents*. He suggests a cash bonus grossed up for tax instead of shares. Mr Duncan then emails Mr Kerr stating:

On the matter below, there has been deafening silence from the remuneration committee (you and Brian). Tinks needs clear instructions to issue me the shares unencumbered. Rather than 2m how about we increase the number in case I get diluted from a rights issue ...

[23] The reply from Mr Kerr was *your revised “post transition” arrangements deal with this*. Mr Duncan replied *its been a f..ing long transition. When is “post” transition? As you can tell, I am very unhappy with all this*. Mr Kerr replies *when I get to make all the calls – ie 1. As soon as unconditional 2. Would have been through if James and Elliot were not there 3. Don’t worry*.

[24] In February 2012 Australian Equity Partners Fund No.1 LP (AEP) took over PGC. On 15 February 2012 Russell Naylor and Michael Tinkler were appointed as AEP’s directors on the PGC Board.

[25] In March 2012 Mr Kerr and Mr Duncan corresponded again regarding the bonus payment. Mr Duncan was upset PGC had failed to pay the share bonuses and felt employees were being used like *unauthorised working capital*.²⁶ Mr Kerr sent a text message to Mr Duncan stating *JD – think I have solved the payment timing to the team – will call later*.²⁷

²⁴ Documents 7, 10 and 34 ABD

²⁵ Document 12 ABD emails between J Duncan, B Mogridge and G Kerr

²⁶ Documents 13 and 14 ABD, emails between G Kerr and J Duncan

²⁷ Document 36 ABD, text messages between G Kerr and J Duncan

[26] On 29 March 2012 there was a telephone conversation between Mr Duncan and Mr Kerr. There is a dispute about what was said. Mr Duncan alleges he was told to *settle these bonuses tomorrow because once the takeover is finished it will be hard to put these in place.*²⁸ Mr Kerr denies he did or could authorise payment because other approvals were required. He believes Mr Duncan was aware of this.

[27] On 30 March 2012 Mr Duncan sought legal advice about exposure to claims if the executive bonus payments were paid to the senior executive team. Later that day he sent instructions to James West, PGC Financial Controller, to pay the 2011 bonuses to the senior executives.²⁹ This resulted in the transfer of \$2.3 million dollars from Torchlight for payment of his and other staff bonuses.

[28] Later on 30 March 2012 Mr Kerr emailed Mr Duncan with concerns the 2011 bonuses had been paid ahead of Torchlight's financial obligations. He stated *as previously discussed this is incorrect and needs reversing NOW ... Is there anyway of fixing this.*³⁰

[29] Mr Duncan arranged for reversal of the payment of the bonuses on 2 April 2012. That same day Mr Duncan was given a letter suspending him while the Board investigated whether he had misappropriated company funds. He attended a meeting on 4 April 2012, following which the PGC Board commenced a formal disciplinary investigation into what they deemed serious misconduct.

[30] On 24 April 2012 Mr Duncan gave written notice to PGC under clause 18(e) of his employment agreement that he was terminating his employment with immediate effect.

Was Mr Duncan entitled to receive the bonus payment?

[31] Mr Duncan submits once PGC informed him he was to receive a bonus for 30 June 2011, it was not legally entitled to resile from that decision by not implementing it within a reasonable timeframe based upon the doctrine of election.

[32] PGC submits it intended to grant Mr Duncan shares but did not progress this to a legally binding obligation. There was no Board authorisation to proceed as intended, no formal documentation concluded and no certainty as to terms. There was

²⁸ Documents 15 and 37 ABD

²⁹ Document 16 ABD, email J Duncan to J West

³⁰ Document 17 ABD, email J Kerr to J Duncan

no entitlement to the shares (or cash) at the time Mr Duncan authorised the transfer of funds. Even if there was, he has misconducted himself to an extent he is ineligible to receive the bonus.

[33] Mr Duncan's employment agreement makes payment and vesting of the share bonus at PGC's "absolute discretion." The exercise of that discretion required two levels of sign off – remuneration committee and Board. As late as March 2012, the form of the bonus was still being negotiated i.e. cash or shares. The timing and method of payment during takeover and ahead of other financial obligations was also uncertain.

[34] The Board had not met to approve payment or vesting. This approval was required by the Companies Act 1993. The Minute of the Board of Directors dated 16 August 2011 refers to a meeting which never occurred between Mr Mogridge, Mr Kerr, Mr Duncan and another director. Messrs Mogridge, Kerr and Duncan confirmed they were not at a Board meeting held by telephone on 16 August 2011. Mr Duncan instructed Mr Tinkler to draft the Board minutes using a template. This supports Mr Mogridge's evidence the Minute was erroneous and Mr Duncan would have been aware of this. There was no evidence of a subsequent Board meeting authorising the share bonus.

[35] Mr Duncan was the managing director of PGC. By virtue of his position and actual knowledge, he would have known the Minute was erroneous. He cannot rely upon the Board minutes as evidence of agreement to pay his bonus or s.18 Companies Act 1993.

[36] Similarly Mr Duncan cannot rely upon the letter dated 16 September confirming he was to receive his share bonus. He drafted this for signing by Mr Mogridge. The evidence shows Mr Duncan knew signoff by the remuneration committee and Board was required.

[37] The fact provision was made for payment in the company's accounts does not evidence agreement to pay the amounts owed. As noted in PGC target statement, the provisioning was contingent upon the proposal for payment being approved.

[38] There was a reasonable inference the remuneration committee had not approved payment during the material times. Email correspondence in December 2011 showed Mr Duncan was aware further approvals were still needed. He referred

to the “deafening silence” from the remuneration committee inferring sign off had not occurred because *Tinks [Mr Tinkler] still required clear instructions to issue shares unencumbered.*³¹

[39] The impression from the evidence is there was no concluded agreement for PGC to pay Mr Duncan’s bonus.

[40] The telephone conversation with Mr Kerr in March 2012 did not alter these facts. Mr Kerr could not bind the company to issue a share bonus without Board approval. Mr Duncan was aware of this, and that it had not been given. While there is some suspicion an agreement for payment may have been made reached with Mr Kerr, Mr Duncan could not have reasonably relied upon it until the necessary steps had been taken to oblige PGC to make payment. His actions in immediately reversing the payment from Torchlight detract from his submission he was entitled to receive it in the first place.

[41] The commercial context is relevant. A takeover was occurring involving the transfer of nearly 80% of PGC shares to AEP. AEP approval of large share issues and bonuses would have been required. This could have been obtained through the Board. Torchlight’s creditors and other financial obligations had to be met. Movement of large amounts of money and shares needed to be carefully managed. A decision to pay Mr Duncan two million shares or its cash equivalent could not have been made without Board approval and documentation. It certainly should not have occurred after a telephone call with Mr Kerr.

[42] Given the above, the Authority determines Mr Duncan had no legal entitlement to the two million share bonus. The application for wage arrears in the form of the payment of a share bonus is dismissed.

[43] There is no need to consider the issue of misconduct given the above finding.

Was there a relevant change of control of PGC triggering the payment of redundancy compensation to Mr Duncan?

[44] Mr Duncan submits he is entitled to receive redundancy under clause 18(e) of his employment agreement. This allowed him by written notice to immediately terminate his employment and seek payment equal to his redundancy entitlements:

³¹ Document 12 ABD emails between J Duncan, B Mogridge and G Kerr

In the event that Pyne Gould Corporation Limited's most substantial shareholder should reduce its shareholding in Pyne Gould Corporation Limited to less than 10% ...

[45] Mr Duncan submits prior to a takeover on 31 March 2012, Pyne Holdings Limited (PHL) was PGC's most substantial shareholding. During the takeover PHL sold all of its PGC shares to AEP. AEP is a limited partnership with Baker Street Capital LP. PHL owns 80% of the limited partnership interest in AEP with Baker Street Capital LP owning the remainder. Mr Duncan submits PHL, as the most substantial shareholder, had reduced its shareholding to less than 10%. Accordingly, he was entitled to terminate his employment and seek payment of his redundancy entitlements.

[46] PGC submits clause 18(e) in Mr Duncan's employment agreement has not been triggered because PHL's interest in PGC has not decreased to less than 10% following the AEP takeover. This is because PHL holds 80% of the shares in AEP, which in turn holds 76.2% of the shares in PGC. In short PHL retains control of PGC through its shareholding in AEP.

[47] The issue for the Authority is what is meant in clause 18(e) by the phrase *most substantial shareholder should reduce its shareholding in Pyne Gould Corporation Limited to less than 10%*.

[48] PHL is owned by George Kerr. Mr Kerr uses the company as a vehicle to exercise control over PGC. Mr Duncan accepted in evidence the purpose of clause 18(e) was to align his employment at PGC to Mr Kerr's control of the company.

[49] Even though the companies named as owning the shares have changed, Mr Kerr continues to exert control through PHL's 80% interest in AEP over PGC to the same or greater extent. In these circumstances, the words *most substantial shareholder should reduce its shareholding in Pyne Gould Corporation Limited to less than 10%* must be referenced to Mr Kerr's control of PGC through his various companies. There has been a reorganisation of the companies he uses to control PGC, but no loss of control in the manner and extent contemplated by clause 18(e).

[50] In the circumstances the Authority determines there has not been a relevant change of control of Pyne Gould Corporation Limited triggering the payment of redundancy compensation to Mr Duncan. The application for wage arrears is dismissed.

Should interest and a penalty be ordered for late payment of holiday pay?

[51] Mr Duncan originally sought payment of arrears of holiday pay of \$13,930. Following hearing, PGC elected to pay the remaining holiday pay. Mr Duncan now seeks interest and a penalty of \$2,000 under s135 and 136(2) Employment Relations Act 2000.

[52] An award of interest for the lost use by Mr Duncan of his holiday pay is appropriate. He was successful albeit by PGC's capitulation at the end of hearing. There is an order pursuant to clause 11, Schedule 2 of the Act for Pyne Gould Corporation Limited to pay John Duncan interest on the sum of \$13,930 at the rate of 5% per annum calculated from 24 April 2012 to the date of payment.

[53] Where the failure to pay holiday pay is more than a technical breach, it cannot be cured by an award of interest.³² Although there was some evidential basis to dispute Mr Duncan's holiday records, this did not negate PGC's legal obligation to pay. Payment could have been made and recovery sought through counterclaim. The breach was not technical. In the circumstances, a minimal penalty is appropriate. There is an order for a penalty of \$2,000 payable by Pyne Gould Corporation to John Duncan under s135 and 136(2) Employment Relations Act 2000.

[54] If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have a further 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority

³² *Winchester v Cook* [1994] 2 ERNZ 473, 491