IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 408
3060681

	BETWEEN	LEE WALLACE JAMIESON Applicant
	AND	FORTLOCK SECURITY SYSTEMS (2008) LIMITED Respondent

Member of Authority:	TG Tetitaha
Representatives:	Applicant in person H Hay, for the Respondent
Investigation Meeting:	11 July 2019 at Auckland
Submissions Received:	11 July 2019 from both parties
Record of Oral Determination:	11 July 2019

ORAL DETERMINATION OF THE AUTHORITY

A. I order Fortlock Security Systems (2008) Limited to pay Lee Wallace Jamieson the sum of $4,110 wage arrears within 28 days of this determination.

B. There is no issue as to costs as both parties were self-represented.

Employment Relationship Problem

[1] The employment relationship problem is whether Mr Jamieson was entitled to receive a bonus under clause 5.16, Schedule 2 of his employment agreement?

Relevant Facts

[2] Mr Jamieson was employed as a project manager by Fortlock Security Systems (2008) Limited (FSSL). He signed an employment agreement on or about 25 July 2018. This agreement contained clause 5.16 that provided for payment of a bonus:

> 5.16 Your annual incentive "at risk" amount is $15,000. The amount payable will be dependent on meeting agreed targets. The criteria for achieving this payment is being finalised however it will be an appropriate combination of financial (margin based) performance on your allocated project portfolio and non-financial performance indicators.

[3] Mr Jamieson discussed payment of the bonus prior to employment at the end of a second employment interview with his former manager, Campbell Gourlay. He gave uncontested evidence of their discussion as follows:

> Campbell Gourlay asked what I was looking for in terms of money. I said I currently get $100,000 plus a $15,000 bonus which I always get paid. Campbell said we could work with that.

[4] Mr Jamieson then discussed the bonus again when he came to sign the contract on the Friday before he started work. Mr Gourlay had left and he was met by another manager, Catherine Hodgson whom was his immediate manager. She told him in respect of the bonus that FSSL "couldn't set his KPIs because they didn't know what they were going to be doing". At no stage during his employment did Mr Jamieson meet with Ms Hodgson to set his KPIs.

[5] Mr Jamieson was assigned to project manage one of FSSL's top clients. No issues with his performance arose. Mr Jamieson believes he met any and all performance expectations. FSSL does not dispute this occurred.

[6] At some stage during his employment Mr Jamieson realised he no longer wished to do project management. Instead, he wished to move into a more hands-on technical role as an engineer, for which his base qualification was in. No such role was made available to him at FSSL. Although there was some dispute the discussions about his preferred role, they make no difference to this decision.

[7] On 4 December 2018, Mr Jamieson decided to resign and handed in his resignation. His notice period was due to expire on 4 January 2019. During this period he began

corresponding with Ms Hodgson about payment of his bonus as well as other matters. She indicated this was a matter for the FSSL CEO, Jason Cherrington, to determine.

[8] Mr Jamieson then arranged to meet with Mr Cherrington on 19 December 2018 at 3 pm to discuss the bonus. At that meeting Mr Jamieson states that following was discussed:

> Jason said you don't have any KPIs set. No KPIs, no bonus. He also said Fortlock has always been that way. No-one has ever been paid a bonus if they haven't worked the full year. Jason also said that this could be sorted out within 15 minutes by a phone call to their lawyer. I said if you could find that out it would be great.

[9] The meeting then ended. Mr Jamieson says he has never been told anything further about the discussion with the lawyer.

[10] The following day (20 December 2018) Mr Jamieson was exited from the building and placed upon garden leave.

[11] The parties continued corresponding about the bonus. Amongst other things, FSSL emailed on 7 January 2019 advising:

(a) That KPIs would "usually be done after probation of 90 days to ensure alignment"; and

(b) They "don't pay a pro rata bonus per se, with the qualification period being a financial year, the mechanism to review overall business performance can't happen until post accounts completion in May 2019 for GY2018".

[12] The parties have been unable to resolve their dispute around the bonus and have filed proceedings in the Authority.

No Briefs Hearing

[13] The parties have been able to accept an early hearing. This is on the basis they have not been required to file any further briefs of evidence. Both parties have affirmed the contents of their statements of problem and reply as their written evidence. They have also given additional evidence orally today.

Determination

[14] FSSL submits the description of the bonus in clause 5.16 as being "at risk" and/or the lack of agreement over "agreed targets" makes this bonus payment discretionary. Mr Jamieson disagrees.

Law

[15] Ms Hay for the respondent confirmed that FSSL has paid a pro rata bonus to employees who were employed and had worked less than 12 months at the end of the financial year. Further, the company had had an average but not a stellar year financially. There is no dispute Mr Jamieson had performed during his period of employment.

[16] The interpretation of clauses within an agreement requires establishing the meaning the parties to the agreement intended those words in dispute to bear. [1] This requires an objective approach to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."[2]

[17] However, words can never be construed as having a meaning they cannot reasonably bear. The plainer the words used, the more improbable it is that the parties intended them to be understood in any other way than what they plainly say. The Authority will not ascribe to the parties an intention that a properly informed and reasonable person would not ascribe to the clauses when aware of the circumstances in which the agreement was made.[3]

Clause 5.16

[18] The wording of clause 5.16:

- does not set out the agreed targets to be met by Mr Jamieson;
- does not refer to whether payment of the bonus should be on a pro rata basis or not; and

---

1 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19].

2 *Affco New Zealand Limited v New Zealand Meat Workers And Related Trades Union Incorporated* [2017] NZSC 135 at [39] citing *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 (footnotes omitted).

3 See n 5 citing *Vector Gas* at [4], [22]; and at [61] citing the five principles set out by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 [HL] at 912-913.

- does not refer to the need to work any certain period before KPIs will be agreed or a bonus paid.

[19] The words "at risk" in the clause are linked to Mr Jamieson's performance when it refers to criteria. If he fails to meet the performance measures then he will not be paid a bonus. It does not necessarily mean this bonus is completely discretionary because of the specific link to his performance.

Parties conduct

[20] FSSL's email of 7 January 2019 referred to an intention to set KPIs after Mr Jamieson had worked 90 days to ensure "alignment". Even after 90 days and before his employment ended this did not occur. Mr Jamieson gave evidence of his manager refusing to meet to discuss the bonus until 19 December. Further, when Mr Jamieson raised his payment of the bonus he is exited and placed upon garden leave. This conduct indicates there is a reluctance to pay any bonus to a departing employee that has little if anything to do with clause 5.16. FSSL cannot rely upon its failures to specify or agree performance measures as a basis for non-payment.

[21] I am particularly influenced by Mr Jamieson's evidence that he would never have taken this job if payment of the bonus was at issue. He had made it clear to Campbell Gourlay when he was interviewed that he would not accept less than what he had had from his previous job. This included an expectation his bonus would be paid on the same terms as his previous job. His previous bonus had been paid on a pro rata basis on the basis of his performance. He would not have taken the job if payment of a bonus was completely discretionary because he had personal obligations to his family to meet.

[22] Common sense dictates this clause was intended to be applied on a pro rata because employees such as Mr Jamieson often start partway through the financial year. Given the evidence FSSL have paid employee bonuses pro rata, I accept that Mr Jamieson could also have been paid his bonus pro rata. There is no dispute about the amount Mr Jamieson has calculated as being payable of $4,110.

[23] From the evidence it was reasonable to believe FSSL would have assessed his eligibility for a bonus on a similar basis to his previous jobs, i.e. based upon his individual performance and the company's overall performance. Evidence showed he met their

performance expectations. The evidence about the overall financial performance of the company would also indicate a bonus was payable. Therefore, Mr Jamieson was entitled to receive the bonus.

[24] I order Fortlock Security Systems (2008) Limited to pay Lee Wallace Jamieson the sum of $4,110 wage arrears within 28 days of this determination.

[25] There is no issue as to costs as both parties were self-represented.

TG Tetitaha
Member of the Employment Relations Authority