

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 431
3074612

BETWEEN MICHAEL MACDONALD
 Applicant

AND BRAKE & TRANSMISSION
 NZ LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Ashley Sharp, counsel for Applicant
 Elizabeth Coates, counsel for Respondent

Investigation Meeting: 29 July 2020

Submissions Received: 31 July and 5 August 2020 from Applicant
 31 July and 5 August 2020 from Respondent

Determination: 19 October 2020

DETERMINATION OF THE AUTHORITY

- A. A permanent order for non-publication of the financial information contained in the financial records for Brake & Transmission NZ Limited and its related companies is made.**
- B. Mr MacDonald’s application for payment and interest under the Short Term Incentive plan is declined.**
- C. Mr MacDonald’s application for damages for breaches of the employment agreement is declined.**
- D. Costs are reserved.**

Non publication orders

[1] Brake & Transmission NZ Limited (BNT) has applied for non-publication orders in respect of financial information in documents provided during the course of these proceedings and personal information relating to Mr Colin Daly, Chief Executive of the Hellaby Automotive Group.

[2] The financial information was provided after a case management call during which I requested the documents to be provided to assist my investigation of Mr MacDonald's claims and BNT's responses to his claims.

[3] The Authority may, in any proceedings, make non-publication orders in accordance with Clause 10(1) of Schedule 2 of the Employment Relations Act 2000 (the Act). The scope of this discretion has been traversed by a full Court in *H v A* and again by the Court in *XYZ v ABC*.¹ In the latter case the Court considered and applied the approach taken by the Supreme Court in *Erceg v Erceg*.²

[4] The starting point in considering non-publication is the principle of open justice.³ However, there is no discernible public interest in the details of the financial records or Mr Daly's personal information being available. The risk of adverse consequences to BNT, its associated companies and Mr Daly mean it is in the interests of justice that non-publication is ordered.

[5] Accordingly, a permanent order for non-publication of the financial information contained in the financial records for BNT, its related companies and the personal information relating to Mr Daly is made.

Employment relationship problem

[6] Mr MacDonald started work with BNT on or about 3 February 2014 in the role of General Manager. The terms of Mr MacDonald's employment were set out in a written employment agreement.

[7] At the time of Mr MacDonald's employment BNT was a wholly owned subsidiary of Hellaby Holdings Limited. Mr MacDonald reported to the Chief Executive Officer of Hellaby Automotive Limited also a fully owned subsidiary of Hellaby Holdings Limited (Hellaby Holdings).

¹ *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [78]; *XYZ v ABC* [2017] NZEmpC 40.

² *Erceg v Erceg* [2016] NZSC 135.

³ *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [44] and [76].

[8] Since Mr MacDonald's employment ended Hellaby Holdings, and its subsidiaries have been purchased by Bapcor Finance Pty Limited.

[9] The employment agreement signed by Mr MacDonald provided for the possibility that he would be invited to participate in Hellaby Holdings' short term incentive plan (HSTI). Mr MacDonald received and accepted an invitation to participate in the HSTI and did so for the financial year ending 2015.

[10] Mr MacDonald received and accepted a similar invitation for the 2015-2016 financial year (FY16). Hellaby Holdings financial year started on 1 July each year and ended on 20 June the following year.

[11] Mr MacDonald resigned from his employment on 1 March 2016 giving three months' notice of the ending of his employment. Mr MacDonald's employment ended in accordance with his resignation, at the end of May 2016. This was one month prior to the end of FY16.

[12] After receiving his resignation Hellaby Holdings wrote to Mr MacDonald confirming that despite his resignation, he would continue to be recognised as a participant in the HSTI for the FY16 period due to his leadership of the ongoing positive performance of BNT.

[13] In August 2016 Mr MacDonald was advised that due to the financial results of Hellaby Holdings no payments under the HSTI were due. Instead Mr MacDonald was advised that the Board had decided to award him a discretionary payment of \$20,000 to recognise his leadership

[14] Mr MacDonald says he should have received an HSTI payment calculated in accordance with the HSTI rules and has applied to the Authority for a determination about the issue. If the Authority determines Mr MacDonald was entitled to payment of the HSTI he seeks payment of the sum owed plus interest.

[15] Mr MacDonald also claims BNT breached its contractual obligations and seeks damages for distress and suffering as a result of the sustained refusal by BNT to properly or adequately account for the HSTI calculation.

Issues

[16] In order to resolve Mr MacDonald's application I must determine:

- a) Whether Mr MacDonald is entitled to payment of the HSTI calculated in accordance with the rules for FY16;
- b) If the answer to a) is yes what amount is owing to him?
- c) If the answer to a) is yes should interest be paid?
- d) Whether BNT has breached the express or implied terms of the employment agreement?
- e) If the answer to d) is yes, what remedy if any is available for the breach?

[17] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and made orders accordingly. While I have not referred in this determination to all the evidence and submissions received I have carefully considered all relevant material lodged with the Authority.

Short term incentive plan

[18] Mr MacDonald's employment agreement provided for the payment of a base salary and other benefits. Upon invitation, Mr MacDonald would also be eligible for the HSTI scheme specified in the First Schedule of the employment agreement. The First Schedule included the HSTI in the following terms:

A short term incentive (HSTI) will be agreed annually and will be subject to the employee achieving agreed targets. You will be invited to participate in the FY2015 scheme commencing 1st July 2014.

The maximum variable remuneration will be no more than 100% of the Employee's base salary.

For the remainder of the FY 2014 year, your at-risk HSTI will be \$30,000 gross with your performance being assessed against three agreed Individual Key Objectives (IKOs). This amount is calculated on a prorated basis commencing 1st March to 30 June 2014 as follows: Max HSTI 100% of base salary per annum = \$305,000 x 30% (IKO portion) = \$91,500/12 months x 4 months = \$30,500 gross.

The Hellaby Holdings Chief Executive Officer reserves the right to vary or cancel the HSTI and/or the targets at any time or to implement a replacement scheme.

The final decision on whether targets have been achieved shall rest with the Hellaby Holdings Chief Executive Officer.

[19] The HSTI covers a financial year which runs from 1 July in one year to 30 June the following year. On 3 November 2015 Mr MacDonald received the details of the plan for the 2016 financial year (FY16) HSTI which included in its introduction:

The HSTI Plan FY16 will stipulate for each participant a financial target and several challenging, measurable individual objectives for the financial year, called Individual Key Objectives (IKO's), which have already been agreed between you and your supervisor for FY16.

[20] The 3 November 2015 letter set out a number of rules applying to the HSTI. Rule 2 set out the conditions of participation which included:

2.1. The plan structure and rules is at the full discretion of the Hellaby Group CEO and Board;

2.2. The incentive plan and these rules do not form part of the contract of employment terms and conditions between the Business Unit and the participant.

2.3. In instances where a ruling on the interpretation of the plan rules is required, the decision of the Hellaby Group CEO and Board is final.

...

2.5. To be eligible to participate in the plan, employees must be a permanent full-time employee of Hellaby or one of its Business Units, throughout the period of the plan;

[21] Rule 4 dealt with the incentive plan itself and stated that the plan will be self-funding. The financial target for FY16 was an EBIT (earnings before interest and taxes) target and the following rule applied:

4.9. All items affecting EBIT will be included in the calculation of EBIT for the purposes of calculating HSTI. However, the Hellaby Group CEO is entitled to review targets for the HSTI where abnormal or one-off events occur.

[22] In relation to the achievement of the Financial Target or the IKO's the rules provided:

4.30. The Hellaby Group CEO will determine whether the Financial Target and/or the IKO's have been achieved. Should the participant and Hellaby be unable to reach agreement, the Board shall make the final decision.

[23] Rule 5 dealt with payment under the plan and included:

5.3 If the employee's employment is terminated by either party during the FY16 year, the employee will not be eligible to receive any payment of incentive

rewards whatsoever under this plan after the date of termination. In addition, no pro-rata incentive payments will be considered in these circumstances.

Mr MacDonald's resignation

[24] Mr MacDonald resigned on 1 March 2016. On 2 March Mr Colin Daly, Chief Executive of the Hellaby Automotive Group wrote to Mr MacDonald accepting his resignation. Mr Daly advised Mr MacDonald:

Additional and due to your leadership of the ongoing positive performance of the BNT Group I am pleased to confirm that Hellaby Holdings will continue to recognise you as a participant in the Hellaby Holdings Short Term Incentive Scheme for the financial year ended 30 June 2016. This means, subject to business performance to the conclusion of the current financial year, you may be entitled to receive a prorated HSTI payment based on the performance of the BNT business and an assessment of your personal performance against agreed Individual Key Objectives (IKOs) for the financial year ended 30th June 2016. The timing of any such HSTI payment will occur following the completion of review and approval of BNT's financial performance for year ended 30 June 2016 and final Board and Audit approval.

[25] Mr Daly had obtained prior approval from the Hellaby Holdings' Board to extend the opportunity for Mr MacDonald to be considered for a payment under the HSTI even though he did not qualify.

[26] In mid-July 2016, as part of the financial year end process, BNT discovered a serious error in relation to its forecasted results for FY16. Specifically the amount forecasted and accrued to fund BNT's FY16 local sales incentive payments was greatly understated compared with the actual cost for those payments under the terms of the scheme. There was a significant gap between the amount payable under the scheme rules and the funds which had been accrued throughout FY 16 to fund the scheme.

[27] This error had a materially negative impact on the EBIT results of BNT Group, Hellaby Automotive Group and Hellaby Holdings. The result of the accounting error was that relevant EBIT targets under the HSTI plan for eligible employees were not met so no eligible employee would qualify to receive a payment.

[28] Mr Daly met with Mr MacDonald in August 2016. During this meeting Mr Daly advised Mr MacDonald of the change in the EBIT position for the BNT Group. Mr Daly says he informed Mr MacDonald that the key reason for the negative financial impact was due to incorrect accruals in the business, most notably for local incentives, which needed to be corrected. Mr Daly says he also advised Mr MacDonald that the business had experienced a decline in the sales margin during May and June.

[29] Mr Daly provided a letter to Mr MacDonald confirming their discussions and reiterating that the financial results had led to a significant reduction in the HSTI amount payable, to zero. As a gesture of goodwill and to recognise Mr MacDonald's leadership and contribution to the business during the FY16 Mr Daly advised Mr MacDonald he would receive a discretionary payment of \$20,000 gross.

[30] The payment was made in August 2016.

Is Mr MacDonald entitled to a further payment under the HSTI plan?

[31] BNT says the HSTI plan was discretionary and the Hellaby Holdings' Board made a gesture of goodwill toward Mr MacDonald when it offered to consider him for payment under the plan even though he was not going to be employed for all of FY16. BNT says that when Hellaby Holdings paid Mr MacDonald \$20,000 in August 2016 it was a discretionary payment.

[32] As set out earlier in this determination the terms of the HSTI were set out in the invitation to Mr MacDonald dated 3 November 2015. The letter makes it clear the plan is discretionary and also that an employee who leaves their employment before the end of FY16 is no longer eligible to participate. It is also important to note that the plan was not BNT's plan. It was a Hellaby Holdings' plan, administered by Hellaby Holdings and not BNT.

[33] The terms of the plan were extended when Hellaby's Chief Operating Officer (COO) wrote to Mr MacDonald on 2 March. The COO's letter made it clear that depending on the performance of the business and an assessment of Mr MacDonald's personal performance against agreed IKOs and despite not being employed by BNT throughout the period of the plan, Mr MacDonald remained eligible to be considered for a prorated HSTI payment.

[34] Mr MacDonald, as the most senior employee within BNT, held ultimate accountability for the accuracy of BNT's forecasting and financial reporting. He was responsible for designing and implementing the local sales incentive scheme. Mr Daly told me the issues discovered in respect of these matters were fairly attributable to Mr MacDonald.

[35] The evidence from BNT is that no other participant who participated in the FY16 HSTI plan received a payment calculated on the methodology set out in the 3

November 2015 letter. This is because the normalised EBIT was less than the required EBIT target. The normalised EBIT was different to the reported EBIT because of some accounting adjustments made following the year end. The adjustments were necessary to reflect the under-accrual of the local incentive payments. The accounting adjustments also resulted in BNT starting the new financial year in deficit.

[36] I am persuaded by BNT's submissions that there was never a promise that Mr MacDonald would receive a payment, nor was any amount specified. I accept that payment under the HSTI was always subject to business performance and could only be determined after completion of the relevant accounts, and following Board approval.

[37] Rules 4.24 through to 4.30 contained in the 3 November 2015 letter include several examples of situations where the EBIT used for the purpose of determining any payment under the FY16 plan might differ from the EBIT reported in any final accounts. The EBIT number reported in the accounts was higher than the EBIT number determined once the relevant plan rules were applied (the normalised EBIT). As stated the accounting adjustments had to be made to account for the significant under accrual of the local incentives.

[38] The Board determined that the normalised EBIT ought to be used to assess qualification for any payment under the scheme because that reflected the true position of the accounts. The normalised EBIT did not reach the EBIT target set for the FY16.

[39] I have accepted Mr Daly's evidence that he was personally directly affected by the application of the HSTI rules and received less than 18 per cent of his expected 100% HSTI payment. He told me he would normally receive at least 50% of the maximum payment available.

[40] The HSTI plan was operated by Hellaby Holdings and not BNT. It was the CEO of Hellaby Holdings and its Board that held the decision-making powers. The calculation and payment of the HSTI would only be triggered if the EBIT target had been met. The evidence shows it was not met. While the financial documents produced to the Authority show the recorded EBIT as meeting the target, it was only achieved as a result of some accounting adjustments undertaken following the end of the financial year. These adjustments were not expected and were only necessary because of the under accrual in BNT's financial forecasts and to meet NZX requirements.

[41] I find Mr MacDonald was not entitled to receive payment under the rules of the HSTI for FY16 because the EBIT target was not achieved. I am satisfied that when it made the decision to award Mr MacDonald a discretionary payment, the Board exercised its discretion fairly and reasonably.

Was there a breach of the employment agreement?

[42] Mr MacDonald claims BNT breached its express and implied contractual obligations toward him when it refused to provide him with a copy of the FY16 calculations in the same format as he had received in 2016 for the FY15 HSTI payment.

[43] There are no express terms set out in the written employment agreement, or the HSTI rules requiring BNT to provide Mr MacDonald with the information he sought. At the investigation Mr MacDonald conceded he was not aware of any such requirement.

[44] Mr MacDonald had not established any breach of contractual obligations by BNT.

[45] Mr MacDonald argues he was entitled to the information under the implied duty of good faith. No duty of good faith exists following the ending of an employment relationship.⁴

[46] Even if there was a duty on BNT I am satisfied Mr Daly provided Mr MacDonald with an accurate explanation of the basis for the exercise of Hellaby Holding's discretion in relation to the amount that was paid to him.

[47] Mr MacDonald has not established a breach of the implied terms of the employment agreement.

[48] Accordingly his application for damages is declined.

Costs

[49] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so BNT shall have 14 days from the date of this determination in which to file and serve a memorandum on the matter. Mr MacDonald shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include

⁴ *Balfour v The Chief Executive, Department of Corrections* [2007] 1 ERNZ 808 at [30] – [31].

a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[50] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority