

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 539
3170243

BETWEEN

GRAHAM JOHN PAYNE
Applicant

AND

AUCKLAND TROTting CLUB
INCORPORATED
Respondent

Member of Authority: Rachel Larmer

Representatives: Rajiv Rao, counsel for the Applicant
Stephen Langton and Stephen Shaw, counsel for the
Respondent

Investigation Meeting: 9 and 10 February 2023 at Auckland

Submissions and other
information received: 10 March 2023, 26 April 2023, 24 May 2023 and 16
June 2023 from the Respondent
16 February 2023, 11 April 2023, 8 and 19 June 2023
from the Applicant

Date of Determination: 19 September 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Auckland Trotting Club Incorporated (“the Club”) is a club that owns and operates Alexandra Park, a harness racing venue in Auckland.

[2] Inside Alexandra Park the Club operates a TAB for the New Zealand Racing Board, which in 2020 became known as TAB New Zealand (“the TAB”). The TAB pays the Club a commission-based agency fee for running the TAB at Alexandra Park (“the agency fee”).

[3] The Applicant, Mr Graham Payne, commenced employment with the Club in 2005 as TAB Manager. Mr Payne was paid a base salary and commission which included a percentage of the agency fee the TAB paid the Club.

[4] Mr Payne claimed he was owed commission arrears, because his commission payments had not been calculated in accordance with the commission formula in his employment agreement and he had not been paid commission on the increased agency fee the TAB had paid the Club from February 2015 onwards.

[5] Mr Payne worked as TAB Manager until around September 2021, when his position was disestablished under a restructuring. Mr Payne was redeployed, so remains employed by the Club as the “*GM Gaming and Wagering*”. His new position does not have the same commission structure as his TAB Manager role did.

[6] The Club said Mr Payne did not raise a commission arrears claim until his TAB Manager position was restructured. He denied that, and said he had previously raised commission issues, which the Club had not addressed.

[7] The Club opposed Mr Payne’s commission arrears claim by arguing:

- (a) The commission formula in his employment agreement was incorrect, so should not be applied;
- (b) He had verbally agreed in 2015 that he would not be paid commission on the increased agency fee the TAB paid the Club from February 2015 onwards;
- (c) He had waived his entitlement to be paid commission in accordance the commission formula in his individual employment agreement dated 28 August 2013 (“the 2013 IEA”); and
- (d) He was estopped from claiming commission arrears.

[8] The Club applied to rectify the commission formula in the 2013 IEA to reflect the commission formula in an unsigned 2005 individual employment agreement (“the 2005 IEA”).

[9] The Club said the 2005 IEA commission formula was recorded in the spreadsheet template it had used to calculate Mr Payne’s commissions since his employment had started (“the spreadsheet calculations”), so no commission was owing.

[10] The spreadsheet template had been created by one of the Club's previous Chief Financial Officers ("CFO's"), Mr Alastair Carmichael in either 2005 or 2006 and been used since then.

[11] When the TAB agency fee was increased from 2.5 percent to four percent in February 2015, the Club failed to reflect that in Mr Payne's commission payments, despite the commission formula in the 2013 IEA providing that he was to be paid half of the sales commission the Club received from the TAB, after the first \$90,000 per week for operating costs had been deducted.

[12] The amount to be deducted under the commission formula for operating costs that was recorded in the 2013 IEA had been based on the 2013/2014 operating costs. As turnover significantly increased, so did the associated operating costs. However, Mr Payne's commission formula did not provide for that, as operating costs were fixed at \$90,000 per week, regardless of what they actually were.

[13] The Club said that omission was a huge error. When Ms Dominique Dowding, who at that time was the Club's Chief Executive Officer ("CEO") negotiated an increase to the TAB's agency fee she said she had told Mr Payne it would not apply to his commission.¹ Ms Dowding said she told Mr Payne she needed to use that extra money to cover the increased operating costs that were associated with the significantly increased turnover.

[14] Ms Dowding claimed Mr Payne verbally agreed he would not be paid commission on the increased TAB agency fee, but he disputed that. This alleged verbal agreement that the Club said occurred on some unspecified date(s) in 2015 was not documented. Nor was the commission formula in the 2013 IEA varied to reflect this alleged change to Mr Payne's commission entitlements.

[15] Mr Payne's commission arrears claim dated back to 14 April 2016, being six years prior to the lodging of his Statement of Problem with the Authority. The parties agreed that any commission arrears that may have been owed prior to 14 April 2016 were time barred under s 142 of the Employment Relations Act 2000 ("the Act").

¹ Ms Dowding's married name is now "*Mrs Doody*". However, she has been referred to as "*Ms Dowding*" in this determination, as that was the name she used at the material time so it is how she was recorded in the relevant documents.

[16] The Club acknowledged that, but for its rectification, estoppel and waiver claims, the TAB increase had to be passed on to Mr Payne. However, the Club's position was that if that occurred then his commission needed to be calculated using the spreadsheet calculations, rather than the commission formula in the 2013 IEA.

[17] Mr Payne opposed the Club's rectification claim. He said the 2013 IEA clearly and accurately reflected what the parties had agreed, in terms of providing a more simplified commission formula. He also said he had not waived his right to be paid commission as per the 2013 IEA, and he denied there was any verbal agreement or other conduct by him that would create an estoppel defence.

The Authority's investigation

[18] The Authority held an in-person investigation meeting in Auckland on 9 and 10 February 2023. Both parties lodged witness statements and an agreed bundle of relevant documents was provided to the Authority.

[19] Further documents were produced during the course of the investigation meeting. This included an unsigned copy of Mr Payne's 2005 IEA, which was produced on the second day of the Authority's investigation meeting, in response to the Authority's request for a copy of it.

[20] The Authority heard from Mr Payne, who was his only witness. Ms Dowding, Mr Maurio Barsi, Mr Perrin Montgomery and Mr Bryon Waring gave evidence in person for the Club.

[21] Like Ms Dowding, Mr Barsi was also one of the Club's former CEO's who now worked elsewhere. Since May 2022 Mr Montgomery has been the General Manager Financing Commercial Operations for the Club. Prior to that Mr Montgomery was the Club's Head of Finance, which was a position he had held since June 2021.

[22] Mr Waring worked for the Club between July 2015 and October 2019. At the material time Mr Waring held the role of CFO, but he is now employed elsewhere.

[23] Mr David Foley also provided a witness statement for the Club, but he was not required to give evidence in person. His witness statement was converted into an affidavit, because the Authority and parties did not have any questions for him.

[24] At the material time Mr Foley was employed as the Club's Corporate Services Manager, but he no longer works for the Club. Mr Foley was responsible for looking after a number of the Club's business units, including Finance. As part of his role, he oversaw the calculation and payment of Mr Payne's commissions.

[25] The Club foreshadowed during the first day of the investigation meeting that it would be seeking an order for rectification of the 2013 IEA, so that the commission formula was corrected to that used in the 2005 IEA and spreadsheet calculations. That position was further developed in the written submissions the Club lodged after the investigation meeting.

[26] The Club lodged an Amended Statement in Reply which contained the rectification claim on 24 May 2023. Mr Payne lodged a Statement in Reply to the new rectification claim and an affidavit in response to it on 8 June 2023.

[27] Both parties lodged written submissions after the conclusion of the evidence.

The issues

[28] The following issues are to be determined:

- (a) Findings by the Authority on the material conflicts in the evidence;
- (b) Should the 2013 IEA be rectified to the commission formula in the 2005 IEA and/or the spreadsheet calculations?
- (c) If not, is Mr Payne estopped from claiming commission arrears?
- (d) If not, did Mr Payne waive his contractual entitlement to be paid commission in accordance with the commission formula in the 2013 IEA?
- (e) Is Mr Payne owed commission arrears?
- (f) What costs and disbursements should the successful party be awarded?

Material facts

The 2005 IEA

[29] The unsigned 2005 IEA recorded Mr Payne's start date as 28 February 2005. Schedule 2 of the 2005 IEA stated:

Benefits Quarterly bonus in accordance with the formula set out below based on 50% of commission earnings in excess of target earnings less wage costs incurred in excess of base wage costs.

Bonus formula (Excess commission minus excess wages) x 50 %

Formula Definitions Excess Commission = $[T - (t \times W) \times C]$

Where:

T = Total sales turnover for the quarter

t = Weekly sales turnover target

W = No. of weeks in the quarter

C = Average percentage commission earned

– if $(h > H) [(H - h) \times (R \times (1 + E))]$

[30] The Authority was told during the investigation meeting to ignore the algebraic formula at the end, as it probably did not mean anything. This commission formula was created by Mr Carmichael.

Spreadsheet calculations

[31] Mr Payne said he did not understand the spreadsheet calculations. Mr Foley also stated in his affidavit that the spreadsheet calculations were complicated and difficult to understand.

[32] Mr Montgomery said he had reviewed all of the spreadsheets and they recorded that Mr Payne's first commission payment was made for the period 6 March 2005 to 29 May 2005 and that his commission had been calculated and paid every 13/14 weeks since then, up until the last commission period in August 2021.

[33] Mr Montgomery noted that there had been some initial variability between March 2005 to August 2006 in the formula used in the spreadsheets to calculate Mr Payne's commission payments, but that from September 2006 the commission formula applied in the spreadsheet calculations was as follows:

- **Bonus Turnover** equals ATC turnover (excluding on-course turnover during race meetings) minus target turnover of \$90,000 per week;
- **Bonus Commission percentage** equals approximately 2 percent – 3.6 percent dependant on the weighting of revenues. Racing and Sport Tote revenues received 3.8 percent commission, while Racing and Sport FOB attracted 2.5 percent commission;
- **Total Commission** equals Bonus Commission Percentage multiplied by bonus turnover;

- **Net Commission** equals Total Commission minus extra wages (i.e. wage costs over budget) minus adjustment for sport rate increase;
- **Bonus payment** paid to Mr Payne equals net commission divided by two.

Lead up to the 2013 IEA

[34] There was a material dispute between the parties regarding the lead up to the 2013 IEA being signed by the parties. This is addressed later.²

2013 IEA

[35] The commission formula in the 2013 IEA was obviously quite different from the commission formula in the 2005 IEA.

[36] Under the 2013 IEA Mr Payne would have received 50 percent of the commission the Club received from the TAB in respect of the TAB's increased turnover (excluding on-course turnover during Alexandra Park race meetings) in excess of \$90,000 per week (averaged over each quarter).

Material differences in the two commission formulae

[37] Material differences in the two commission formulae include:

- (a) The 2013 IEA commission formula did not make any deduction of excess wages;
- (b) The 2013 IEA formula was tied to the total commission received by the Club, which increased to four percent of total TAB sales in February 2015;
- (c) In the 2005 IEA the "*average percentage commission earned*" used in the "*Formula Definitions*" section of the commission formula was not stated; and
- (d) The 2005 IEA did not specify the \$90,000 target turnover.

[38] According to Mr Montgomery's statement, the commission percentage used in the spreadsheet calculations was approximately 2% to 3.6%, dependent on the weighting of revenues, as each commission percentage was weighted differently.

² Paragraphs [65] – [75].

Other differences between the two employment agreements

[39] Other differences between the unsigned 2005 IEA and the signed 2013 IEA included the removal of the probationary clause, the removal of the overtime payments clause, and the expansion of the “*work exclusively and avoid conflicts of interest clause*” in the 2013 IEA.

[40] The ‘working on a public holiday’ clause in the 2013 IEA was changed to provide that Mr Payne must not work on a public holiday unless the Club “*had been consulted*”, while the 2005 IEA provided that Mr Payne was not to work on a public holiday “*unless asked to*”.

[41] The 2013 IEA contained a new clause that gave the Club the right to deduct an amount equivalent to payment for the notice period from payments due to Mr Payne if he did not give the required contractual notice, and this could include deduction of moneys accrued for any period of leave.

[42] The 2013 IEA included seven examples of serious misconduct that did not appear in the 2005 IEA. There was a handwritten annotation added beside the redundancy clause in the 2013 IEA that said, “*To be agreed after both parties seek legal advice*”, which had been initialled by both parties. This appeared to relate to the statement in the employment agreement that Mr Payne was not entitled to redundancy compensation.

[43] The abandonment clause in the 2013 IEA included an additional sentence “*We will make all reasonable attempts to contact you*”.

[44] The acknowledgement clause was expanded to include an acknowledgement that Mr Payne had not deliberately failed to disclose any matter which had materially influenced the decision to employ him and an acknowledgement that if he had failed to disclose material information, or had made a false disclosure, that could result in disciplinary action which could result in the termination of his employment.

[45] The 2005 IEA was not signed while the 2013 IEA had been signed by Ms Dowding on behalf of the Club and by Mr Payne.

Differences in the Schedules in the employment agreements

[46] Both employment agreements had two Schedules in them. The 2005 IEA had a blank Schedule 1, while Schedule 1 in the 2013 IEA contained a job description for the TAB Manager Alexandra Park.

[47] Schedule 2 in the employment agreements set out details of Mr Payne’s employment and remuneration. The base salary was the same but other terms were different. In particular:

- (a) The start date in the 2005 IEA was 28 February 2005. The start date in the 2013 IEA was 17 June 2013;
- (b) The 2005 IEA recorded Monday to Sunday as being normal days of work, whereas the 2013 IEA recorded the normal days of work as “*as per the roster*”; and
- (c) The 2005 IEA recorded the normal hours of work as “*flexible as required with a minimum of 45 hours per week*”. The 2013 IEA recorded the normal hours of work as “*45 hours per week*”.

[48] The 2005 IEA provided for a quarterly bonus as follows:

Benefits Quarterly bonus in accordance with the formula set out below based on 50% of commission earnings in excess of target earnings less wage costs incurred in excess of base wage costs.

Bonus formula (Excess commission minus excess wages) x 50 %.

Formula Definitions Excess Commission = [T - (t x W) x C]

Where:

T = Total sales turnover for the quarter

t = Weekly sales turnover target

W = No. of weeks in the quarter

C = Average percentage commission earned

– if (h > H) [(H – h) x (R x (1 + E))]

[49] The 2013 IEA contained a “*performance incentive clause*” that stated:

50 percent of the commission payable to us by the NZ Racing Board in respect of turnover in the TAB (excluding on-course turnover during Alexandra Park race meetings) in excess of \$90,000 [this was originally \$80,000 but had been amended in handwriting to \$90,000 and initialled by both parties] per week averaged over each quarter, with such performance incentive to be paid at the end of each quarter.

Other material clauses in the employment agreements

[50] Clause 8.1 in both employments was an “*entire agreement*” clause. It stated:

This agreement contains everything the parties have agreed on in relation to the employment. Neither party can rely on an earlier document, or on anything said or done by another party (or by a director, officer, agent or employee of that party) before this agreement was signed.

[51] Clause 8.3 in both employments stated, “*The parties may only vary this agreement in writing.*”

Increased TAB turnover

[52] Mr Payne said that under his stewardship turnover at the TAB soared, resulting in record commissions being paid by the TAB to the Club.

[53] The Club acknowledged significant increases had occurred but said that was not only due to Mr Payne’s stewardship. It said other factors resulted in the significant increases, such as the closure of nearby TABs, meaning those customers had been diverted to the Alexandra Park TAB.

Findings by the Authority on the material conflicts in the evidence

[54] There were a number of material disputes between the parties. The Authority has resolved these conflicts in the evidence on the balance of probabilities, by assessing all of the available evidence and determining what was more likely than not to have occurred.

[55] These findings have formed the basis for the Authority’s subsequent determination of the Club’s rectification, estoppel and waiver claims.

Were the spreadsheet calculations the same 2005 IEA commission formula?

[56] Although the Club said that the spreadsheet calculations were the same as the commission formula in the 2005 IEA, the Authority was not satisfied that was in fact the case.

[57] An examination of the wording used in the 2005 IEA alongside what Mr Montgomery said in his statement about the formula that was applied in the spreadsheet calculations established that a different form of words was used in each document.

[58] The 2005 IEA did not include any reference to \$90,000. Ms Dowding’s evidence was that the \$90,000 figure was based on the 2023/2014 turnover which suggested it was not a figure that has been used since 2006, as Mr Montgomery had stated in his evidence. Mr Montgomery also acknowledged that “*there is some initial variability between March 2005 – August 2006 in the formula used to calculate Graham’s commissions payments.*”

[59] For these reasons, the Authority considered it was therefore more likely that the formula applied in the spreadsheet calculations had developed or evolved out of the commission

formula in the 2005 IEA but was not an exact replication of it. That was an important point to make because the Club sought rectification of the commission formula in the 2013 IEA to the 2005 IEA, which it said was the same as the spreadsheet calculations.

Did the parties specifically agree to use the original spreadsheet template to calculate Mr Payne's commissions?

[60] The 'template spreadsheet', which gave rise to what has been referred to in this determination as "*the spreadsheet calculations*", had all of the formulae recorded in it and it was used to calculate commission payments, based on variables that were inputted manually by the Club.

[61] Differing dates have been used for the spreadsheet calculations. The Statement in Reply said the spreadsheet calculations had been used since November 2006. Mr Montgomery said they had been used since September 2006, with some variability to that occurring over the March 2005 to August 2006 period.

[62] Mr Payne had no involvement with the creation or implementation of the spreadsheet template, and that it was never put to him to agree to. His evidence about that was not contradicted by the Club, as Mr Carmichael did not give evidence.

[63] Mr Payne said that because the template and spreadsheet calculations were implemented unilaterally by the Club, he had never been able to understand the spreadsheet calculations, and the only person who fully understood them was Mr Carmichael. The spreadsheets were not regularly provided to Mr Payne, although from time to time that would occur if he specifically asked to see them.

[64] The evidence fell short of establishing that the parties had expressly agreed Mr Payne's commission would be calculated in accordance with the spreadsheet calculations. Mr Payne was left in the situation where he simply accepted what the Club had told him he was owed in commission, while complaining that it needed to be simplified because it was too difficult for him to understand.

Why was the 2013 IEA entered into?

[65] There was a material dispute between the parties about the reasons they entered into the 2013 IEA.

[66] Mr Payne said he had never been able to understand how his commission had been calculated, so he had asked the Club for a clearer or more simplified commission formula. He said 2013 IEA was the result of that, which the Club denied.

[67] Ms Dowding said the 2013 IEA was entered into by the parties after she found out that Mr Payne did not have a signed employment agreement, so she said it was intended to record the existing arrangement. Mr Payne disputed that.

[68] Ms Dowding said she asked the Club's HR Consultant (Ms Wood) to prepare the 2013 IEA in line with the existing 2005 IEA commission arrangements. Ms Wood did not give evidence to the Authority. Nor did the Club did produce any documents to the Authority about the instructions Ms Wood was given, or about the creation of the 2013 IEA.

[69] The Authority preferred Mr Payne's evidence, that the 2013 IEA was not intended to simply record in a signed employment agreement the commission formula used in the unsigned 2005 IEA.

[70] The commission formulae in each of the employment agreements were obviously significantly different. The 2013 IEA contained a simplified commission formula, which was drafted by the Club, and other changes were also made to the terms in the unsigned 2005 IEA.

[71] That indicated to the Authority the Club had likely intended to amend Mr Payne's terms and conditions of employment and that the 2013 IEA was intended to record those changes. If no changes were intended, then Ms Dowding could have simply asked Mr Payne to sign the unsigned 2005 IEA. Ms Dowding must have noticed the changes before she signed the 2013 IEA, because they were obvious.

What, if any, discussion did the parties have about the commission formula in the 2013 IEA before they signed it?

[72] Mr Payne said he discussed the commission situation "at length" with Ms Dowding in the lead up to them both signing the 2013 IEA, which he said reflected those discussions. The Club disputed that.

[73] Ms Dowding said there were no discussions about commission arrangements or the contents of the 2013 IEA before she handed it to Mr Payne to sign. Ms Dowding said that it

was only after she had asked Mr Payne to sign the 2013 IEA that he made a handwritten annotation that changed the \$80,000 turnover target to \$90,000.

[74] Mr Payne's evidence regarding this conflict has been preferred, as it was more likely to be correct.

[75] The commission formula had been an issue Mr Payne had wanted to address for some time. It made sense that he would have used the opportunity of being presented with new employment agreement to do so. It was not logical that Mr Payne would have simply signed the 2013 IEA without discussing his long-standing concerns about the overly complicated commission formula he could not understand.

Did Mr Payne know he was paid commission based the spreadsheet calculations and not the commission formula in the 2013 IEA?

[76] The Club said that after the 2013 IEA was signed Mr Payne was not paid commission based on the 2013 IEA commission formula, but instead continued to be paid according to the spreadsheet calculations it had previously used.

[77] Mr Payne's evidence that he did not know that was occurring was accepted, because it was not obvious from reviewing the spreadsheets what the commission formula was or how it was being applied. He did not see the spreadsheets unless he had specifically asked to, and that only occurred occasionally. No-one told him the commission formula in the 2013 IEA was not being applied, so it was reasonable for him to assume that it was.

[78] It was the Club that had sole control over how Mr Payne's commission was calculated, because it was responsible for inputting all of the data and variables into the spreadsheets. The Club was also responsible for preparing the 2013 IEA, so it had drafted the new commission formula. Mr Payne could not reasonably have been expected to have known about the intricacies of the spreadsheet data himself.

[79] The Authority's view about that was supported by the fact that in August 2017 Mr Payne allowed the Club to deduct \$37,512 from the money it owed him after he was incorrectly told he had been overpaid commission, when it later transpired he had not in fact been overpaid.

[80] If Mr Payne had been able to accurately calculate his own commission payments using the spreadsheets, and if he had known and understood how the Club was doing that, then he

would not have agreed to such a large sum being deducted from his remuneration, when he had not been overpaid.

Did Mr Payne agree to be paid commission based on the spreadsheet calculations instead of the 2013 IEA commission formula?

[81] The Club said that in 2017 it realised Mr Payne's commission was costing the business too much, so it tried to re-negotiate the arrangement with him. Although Mr Payne said he was open to that, the parties were unable to agree on a new commission structure, with Mr Payne ultimately confirming in writing that he wanted to "*stay with the status quo*".

[82] The Club said that was an agreement by him to be paid in accordance with the spreadsheet calculations, instead of the commission formula in the 2013 IEA.

[83] However, that was not an example of Mr Payne agreeing to be paid commission as per the spreadsheet calculations (and not the 2013 IEA) because when he said that he believed the commission formula in the 2013 IEA applied.

[84] Mr Payne did not at any time expressly agree to be paid in accordance with the spreadsheet calculations (which he said he could not understand) instead of the commission formula in the 2013 IEA.

Was the Club's submission that a written variation of Mr Payne's commission formula was not required, correct?

[85] The Club said that the statutory obligations in the Act relating to the bargaining for an employment agreement and any variation to it did not apply to the situation regarding the changes that were made to the commission formula in Mr Payne's 2013 IEA.

[86] The Club submitted that a written variation was not required in order to effect the parties' rights/obligations regarding the commission formula in the 2013 IEA, because an estoppel or waiver could achieve the same outcome.

[87] Waiver and estoppel are equitable defences, so are discretionary. They are more commonly found in civil or commercial litigation than the employment jurisdiction. While they can be applied in the employment jurisdiction, care must be taken to recognise the special nature of an employment relationship compared to arm's length commercial or civil transactions.

[88] One of the s 3 objects of the Act is acknowledge and address the inherent inequality of power in employment relationships. In principle, an employer that claimed an employee had agreed to waive, forego, or who otherwise give up significant contractual entitlements should ensure that was appropriately documented, particularly where the employer relied on the employee's silence to deprive them of their contractual rights.

[89] The Club's submission that it did not have to vary the commission formula in the 2013 IEA because it could rely on equitable remedies to deprive Mr Payne of contractual entitlements involving a significant amount of commission was not an attractive proposition when viewed in the employment context.

[90] The Club relied on Mr Payne's alleged silence, in circumstances where there was no good reason for the disputed matters to have not been put to him clearly in writing. He could then have taken advice and made an informed decision regarding his various options. Such an approach is consistent with the good faith requirements in the Act to ensure that an employee such as Mr Payne was freely and voluntarily giving up significant contractual entitlements and that both parties clearly understood what was at stake.

[91] The Club drafted both employment agreements that each contained a 'completeness' clause and which both required variations to be recorded in writing. It would not be onerous to hold the Club to the contractual standards it had set in that regard.

[92] Realistically the Club held the balance of power in the employment relationship. It was a long standing, well-resourced and profitable business. The Club was well positioned to be able to engage high calibre professional advisors and legal advice, if it had chosen to. That contrasted with Mr Payne who needed to keep his job and was on a low base salary of \$45,000 which he relied on his commission to augment.

[93] There was no good reason for the Club not to have recorded in writing any changes it claimed had been made by mutual agreement to Mr Payne's contractual commission entitlements. The Club was aware it could vary Mr Payne's commission formula by agreement, because Ms Dowding sought to do so (without success) in August 2017.

[94] It would not be equitable to allow the Club to avoid its contractual obligations in such circumstances, as it had sufficient knowledge and resources to have entirely avoid the problem that has occurred.

Did Mr Payne raise commission arrears with the Club after the 2013 IEA had been signed by the parties?

[95] The Club submitted that there was no objective evidence of Mr Payne raising issues about commission arrears after the 2013 IEA was signed and it pointed to a lack of any supporting documentation.

[96] Mr Payne said he “*regularly complained*” about being underpaid commission to Ms Dowding when she was CEO and then to her replacement, Mr Barsi. That was disputed by the Club.

[97] The Authority preferred Mr Payne’s evidence about that, because there were emails written by Ms Dowding in July and August 2017 that proved (at least at that time) Mr Payne had raised an issue about underpaid commission with her.

Did Mr Payne agree to waive or forgo commission based on the increased TAB agency fee?

[98] The TAB agency fee increased from 2.5 to 4 percent in February 2015. The Club relied on an alleged verbal agreement between Mr Payne and Ms Dowding entered into some time in 2015 that commission would not be paid to him on the increased TAB agency fee. Mr Payne denied he had agreed to that.

[99] The Authority has preferred Mr Payne’s evidence on this point as a close examination of the emails the Club relied on to support its position that Mr Payne had agreed not to claim commissions based on the increased TAB agency fee showed they more closely aligned with Mr Payne’s evidence, that he had not agreed to that and had complained about it.³

[100] Ms Dowding said she advised Mr Payne both prior to and after the increase to the agency fee that it would not apply to his commission. Mr Payne said she only told him that after he found out the TAB’s agency fee had increased, and he had raised that with her.

[101] The Authority considered it unlikely Mr Payne had verbally agreed to waive or forgo commission, due to Ms Dowding’s email to Mr Payne dated 8 July 2017, and on an email she had sent to Ms Wood dated 10 July 2017.

³ Pages 309 – 314 of the Common Bundle.

[102] These two emails from Ms Dowding recorded Mr Payne had claimed he was owed commission arrears on the increased TAB agency fee. Ms Dowding's email to Ms Wood also noted that Mr Payne "*went off*" and he "*was threatening me pay up or else*".

[103] That account by Ms Dowding of her discussion with Mr Payne supported his evidence that the discussions about his commission arrears had become increasingly fraught, and that he had not agreed to give up any of his commission entitlements. There would have been no reason for him to have raised this with Ms Dowding during their 7 July 2017 meeting as an unresolved issue if they had previously reached a mutual agreement about it in 2015.

[104] The explanation Ms Dowding recorded in her emails for refusing to pay Mr Payne commission based on the increased TAB agency fee was not that Mr Payne had previously agreed in 2015 to waive or forego it. Instead, she focused on how the Club needed to keep the extra income from the increased agency fee to cover its increased overheads, as Mr Payne's commission formula did not allow adjustments to be made for that.

[105] Ms Dowding's evidence that Mr Payne represented "*he was okay with it*" and he never complained about it afterwards was not accepted. Her view was based on her assumption only, not on any overt words or actions by Mr Payne. The Authority finds that Ms Dowding had simply informed Mr Payne he would not get commission on the increased agency fee. There was no meeting of the minds about that.

[106] Ms Dowding did not give Mr Payne any information that would have enabled him to understand the financial effect such a decision would have on his commission payments. Nor did she negotiate or bargain with him about this significant change, or suggest he take legal advice. Their alleged verbal agreement was not documented at all.

Did Mr Payne inform the Club after February 2015 that he expected to be paid commission on the increased TAB agency fee?

[107] The Club said Mr Payne did not bring up his commission arrears until after the restructuring was raised with him. He disputed that. Mr Payne said he was never silent over the commission issue but was reluctant to push it too hard for fear of provoking retaliation.

[108] Ms Dowding told the Authority that if Mr Payne had insisted on being paid commission on the increased TAB agency fee, as opposed to the previous 2.5 percent, then the Club would

“have restructured his remuneration arrangements and if he had not accepted them, made him redundant”. That is what did in fact occur.

[109] Mr Payne said he verbally raised with Ms Dowding the failure to pass on the increased TAB agency fee to him, but she made it clear that was not going to happen. Mr Payne said things were getting fraught, so he did not want to push it to avoid getting into further conflict with her about it.

[110] The following examples are a good illustration of why he may have felt like that, as these events occurred soon after he had raised issues about his commission arrears with the Club.

[111] During their meeting on 7 July 2017 Mr Payne told Ms Dowding he was entitled to be paid commission on the increased TAB agency fee and expected to be paid it. In August 2017 Mr Waring notified Mr Payne that he had been underpaid his holiday pay, because the Club had calculated it based on his salary only when it should have included his commissions payments.

[112] In the course of addressing that underpayment, Mr Waring also told Mr Payne in an email dated 25 August 2017 that he had been overpaid commission of \$37,512. The Club therefore deducted that amount from the holiday pay it owed him. As it turned out Mr Waring’s view about the alleged overpayment was incorrect. Mr Payne had not been overpaid commission, so that deduction should not have been made.

[113] In July and August 2021 Mr Payne raised underpaid commission as an unresolved issue. In September 2021 the Club’s then counsel emailed Mr Payne that he owed the Club \$139,327 in commission overpayments and it sought to recover that from him. He was also warned that if he pursued his commission arrears claim then the Club would seek indemnity costs from him.

[114] This demand for overpaid commission was formally withdrawn by the Club at the Authority’s investigation meeting in February 2023, and the Club told the Authority it had been made in error.

[115] The Authority accepted Mr Payne's evidence that he did raise issues about his commission arrears after February 2015, but he did not aggressively push that in order to maintain good workplace relations.

Should the 2013 IEA be rectified to the commission formula in the unsigned 2005 IEA and/or the spreadsheet calculations?

The rectification argument

[116] The Club wanted the commission formula in the 2013 IEA rectified to the commission formula in the 2005 IEA, which it said was reflected in the spreadsheet calculations it had used to calculate Mr Payne's commissions from September 2006 until his last commission payment in August 2021.

[117] The Club described the commission formula in the 2013 IEA as a "*drafting error*" by the HR Consultant who had prepared the employment agreement at Ms Dowding's request.

[118] The rectification claim relied on the Authority finding that there was a mistake in the 2013 IEA, as the parties had mutually intended for it to reflect the commission formula in the 2005 IEA, and that was still their mutual intention at the time they signed the 2013 IEA on 28 August 2013.

Timing of the rectification claim

[119] Rectification was verbally alluded to for the first time by the Club's counsel on the first day of the Authority's investigation meeting and was then referred to in written submissions the Club lodged on 26 April 2023. The rectification claim was formally made by the Club in an Amended Statement in Reply lodged on 24 May 2023.

[120] The 2013 IEA was signed in August 2013. Commission issues were addressed in detail by Ms Dowding and the Club in July and August 2017. Mr Payne also raised commission issues with Mr Barsi after he became CEO in August 2019. The Club has had five different lawyers (including current counsel) acting for it since August 2021.

[121] If there was a mistake regarding the commission formula in the 2013 IEA, then it was surprising the Club took almost ten years to identify the problem when it had clearly turned its mind to, and had obtained legal advice, about the disputed commission issues years before it made its rectification claim.

The legal position

[122] Rectification is an equitable, and therefore discretionary, remedy which allows a written contract which does not reflect the common intention of the parties to be modified or corrected, so that it does.

[123] The party seeking rectification has to be able to show that there was a common intention between the parties prior to the contract being entered into, and that the terms of the completed contract did not accurately reflect the parties' mutual intention.

[124] Section 162 of the Act provides that, subject to ss 163 and 164 of the Act, the Authority can make “*any order that the High Court or the District Court may make under any enactment or rule of law relating to contracts*”, including Part 2 of the Contract and Commercial Law Act 2017 (“the CCL”).

[125] Part 2 of the CCL governs contracts, and Subpart 2 of the CCL governs contractual mistakes. Subpart 2, s 22 of the CCL provides that nothing in Subpart 2 affects “*the law relating to the rectification of contracts*”, see s 22(3)(b) of the CCL.

[126] The predecessor to the CCL was the Contractual Mistakes Act 1977 (“the CMA”), with the material provisions of the CMA being substantially equivalent to those in the CCL. The CMA case law is therefore relevant to the Authority's determination of rectification claims.

Rectification cases in the employment jurisdiction

[127] There has been little case law involving rectification in the employment jurisdiction. The Authority's most recent rectification determination is *Johnson v Gemmeus Solutions Limited*, in which the employment agreement was rectified to include a redundancy provision.⁴

[128] There have been no relevant Employment Court decisions since the 2021 case of *Goodall v Chief Executive Officer of the Department of Corrections*, and there have been few Authority cases since then.⁵

[129] The rectification claim succeeded in *Goodall*, because the Court was satisfied the parties had a common intention not to maintain the employee's salary at an unabated level indefinitely. The agreement was therefore rectified, so the employee's salary would revert to

⁴ [2002] ERNZ 356.

⁵ [2001] ERNZ 668.

that of a probation officer when he reached the qualifying age for guaranteed retirement income.

Court of Appeal decisions on rectification

[130] The principles for rectification are taken from contract law cases in the Court of Appeal. The commonly applied test for rectification was set out by the Court of Appeal in *Pimlico Properties Limited v Driftwood Developments Limited*, which applied the test in the earlier Court of Appeal decision in *Westland Savings Bank v Hancock*.⁶

[131] The applicable rectification test requires the following elements to be established:

- (a) The parties had formed, and continued to hold, a mutual intention on the point in question;
- (b) That parties' mutual intention continued to exist right up until the execution of the document for which rectification was sought;
- (c) It had to be objectively apparent from the words or actions of the parties that they both held, and continued to hold, the same intention on the point in question;
- (d) The document to be rectified did not reflect the parties' common intention but would if it was rectified.

[132] The Court of Appeal in *Tri-Star Customs and Forwarding Limited v Denning* considered remedies for contractual mistakes under the CMA and the equitable remedy of rectification.⁷ The Court of Appeal clarified the law in relation to unilateral mistakes and held that:

- (a) Relief under the CMA was not available to remedy a unilateral mistake that the other party did not actually know about when entering into the contract; and
- (b) Rectification only allowed the Court “to vary the terms of a concluded contract which does not express the true intention of the parties to it so as to conform with that intention”.

⁶ *Pimlico Properties Limited* [2009] NZCA 523 and *Westland Savings Bank* [1987] 2 NZLR 21 (CA) at [29] – [30].

⁷ [1999] 1 NZLR 33 (CA).

[133] In *Kaimai Properties Limited v Queen Elizabeth the Second National Trust*, the Court of Appeal was asked to consider overturning the *Tri-Star* position that rectification was unavailable for unilateral mistakes, which required that the other party must have actual knowledge at the time of entering the contract that the provision in question was a mistake, not just constructive knowledge.⁸

[134] The Court of Appeal in *Kaimai* declined to overturn *Tri-Star*, so it continues to apply under the CCL.

Did the parties form, and continue to hold, a mutual intention that the commission formula in the 2013 IEA would record the commission formula in the 2005 IEA and/or the spreadsheet calculations?

[135] The Authority has found that the parties did not hold a common or mutual intention that the 2013 IEA would record the same commission formula as the 2005 IEA and/or reflect the spreadsheet calculations.⁹

[136] The evidence fell short of establishing on the balance of probabilities that the Club had intended for the commission formula in the 2013 IEA to be exactly the same as the commission formula in the 2005 IEA.¹⁰

Was there a mutual intention regarding the commission formula in the 2013 IEA?

[137] Ms Dowding was the only witness who gave evidence about what the Club's intentions were regarding the commission formula in the 2013 IEA. According to Ms Dowding she simply presented the 2013 IEA to Mr Payne and told him to sign it, without any prior discussion.

[138] Ms Dowding's evidence about the Club's intention was inadequate to establish it had intended for the 2013 IEA to merely record the 2005 IEA commission formula. There was no credible evidence that the parties shared a mutual intention about that. At best, Ms Dowding's view about that was an unreasonable assumption, which had been made without a credible evidential foundation.

⁸ [2021] NZCA 10.

⁹ Paragraph [69].

¹⁰ Paragraph [71].

[139] Ms Dowding's own evidence established that the parties had expressly discussed the commission formula in the 2013 IEA, as she acknowledged that in discussion with Mr Payne a handwritten change was made to the turnover figure in the commission formula in the 2013 IEA, before the parties signed it. It was changed by the parties from \$80,000 to \$90,000.

[140] That change showed the parties had specifically turned their minds to the commission formula that would apply from 28 August 2013 onwards and had edited the 2013 IEA to reflect their mutual intention about that, before they signed it.

[141] There was no evidence given by Ms Dowding that she had informed Mr Payne the 2013 IEA was merely intended to record his current commission formula in a signed employment agreement. If that was the case, then the Authority considered the Club would have told him so.

[142] The lack of any contemporaneous documentary evidence to support the Club's position undermined its ability to establish that the parties had a mutual intention to record the 2005 IEA commission formula in the 2013 IEA.

[143] The Authority accepted Mr Payne's evidence that he had a number of discussions with Ms Dowding before she prepared the 2013 IEA, during which he had asked for a clearer commission formula because he could "*never understand*" how his payments had previously been calculated.¹¹

[144] Mr Payne's position on that was understandable because even Mr Foley agreed the 2005 IEA commission formula was complicated and difficult to understand. The Authority considered it significant that the 2013 IEA contained a more simplified commission formula, as Mr Payne had asked for.

[145] Mr Payne had no input into the drafting of the commission formula in the 2013 IEA, other than asking for it to be simplified, and in adding the handwritten change from \$80,000 to \$90,000 for the turnover figure into the commission formula before the 2013 IEA was signed. The HR Consultant therefore had to have drafted the commission formula in the 2013 IEA based on information from the Club.

¹¹ Paragraphs [74] and [75].

[146] The Club did not produce to the Authority the instructions Ms Dowding gave the HR Consultant, or the advice the HR Consultant gave Ms Dowding, to support its claim that the commission formula in the 2013 IEA was a mistake.

[147] It was obvious from a cursory glance at the employment agreements that the commission formulae in the 2005 IEA and 2013 IEA were significantly different. Ms Dowding and the HR Consultant therefore must have, or ought reasonably to have, known that from the outset.

[148] The fact that other changes had also been made to the 2013 IEA suggested to the Authority that the Club had intended for it to change Mr Payne's terms and conditions of employment, from those recorded in the unsigned 2005 IEA.

Mr Payne's intention

[149] Even if the Authority has got it wrong, and the Club did intend for the 2013 IEA to record the 2005 IEA commission formula, the Authority finds that Mr Payne's intention when he signed the 2013 IEA was to agree to a new and simplified commission formula. In other words, he intended for there to be changes made to the commission formula used in the 2005 IEA.

[150] Mr Payne did not intend for the 2013 IEA to simply record the same commission formula that was used in the 2005 IEA, as he would have had no reason to have signed it if that was the case. Nor did Mr Payne say or do anything that would have reasonably led the Club to believe that he had intended the 2013 IEA to record the 2005 IEA commission formula.

[151] Accordingly, even if the Club's argument had been successful, there would still not have been a mutual intention by the parties regarding the content of the commission formula in the 2013 IEA.

No mistake

[152] The evidence fell far short of establishing that the commission formula in the 2013 IEA was a mistake.

[153] Even if it was a mistake (which was not accepted) the Authority was satisfied Mr Payne did not know there had been a mistake. He had not, by his words or actions, lead the Club to

reasonably believe he intended his commission formula would be anything other than what was recorded in the 2013 IEA.

[154] If there was a mistake in the 2013 IEA commission formula then it was a unilateral mistake made by the Club, about something that was entirely within its own knowledge and control.

Summary of Authority's findings on rectification

[155] In summary:

- (a) There was no mutual intention to record the 2005 IEA commission formula in the 2013 IEA;
- (b) There was more likely a mutual intention by the parties to adopt a new simplified commission formula in the 2013 IEA, because that is what was discussed by the parties in the lead up to the 2013 IEA being signed and that is what the 2013 IEA actually recorded;
- (c) To the extent that there was no common intention about the 2013 IEA commission formula, then Mr Payne was not aware that the Club did not share his view that the purpose of the 2013 IEA was to simplify his commission formula; and
- (d) Rectification of the 2013 IEA commission formula was not legally possible, because it would not reflect the parties' true mutual intention, which the Authority considered was recorded in the 2013 IEA.

[156] Accordingly, the Club was unable to establish the required factual elements to support its claim for rectification. On that basis, the commission formula recorded in the 2013 IEA applied, because the rectification claim did not succeed.

Was Mr Payne estopped from claiming commission arrears?

Relevant law

[157] Estoppel is an equitable defence to a claim. The Employment Court in *Newick v Working Inc Limited* confirmed that the Authority had jurisdiction to investigate a claim based on equitable estoppel.¹²

[158] The Court of Appeal set out the widely accepted test for estoppel in *Wilson Parking New Zealand Limited v Fanshawe 136 Limited*.¹³ This was the same test as had been expressed by the Court of Appeal in *Mega Project Holding Limited v Orewa Developments Limited*.¹⁴

[159] The defence of estoppel was upheld by the Employment Court in *Schollum v Corporate Consumables Limited* (which applied the *Wilson Parking* test) and in *Singh v Trustees of Wellington Rudolf Steiner Kindergarten Trust*.¹⁵

[160] The Employment Court in *AsureQuality Limited v New Zealand Public Service Association Inc* held there are four key elements required to establish an estoppel defence:¹⁶

- (a) A belief or expectation must have been created or encouraged through some action, representation, or omission to act by the party against whom the estoppel is alleged;
- (b) The party relying on the estoppel must establish that the belief or expectation has been reasonably relied upon by the party alleging the estoppel;
- (c) Detriment will be suffered if the belief or expectation is departed from; and
- (d) It must be unconscionable for the party against whom the estoppel is alleged to depart from the belief or expectation they created or encouraged.

[161] The Courts have been reluctant to find an estoppel where it is based on silence or inaction. In the civil (non-employment related) Court of Appeal cases of *Infinity Enterprises NZ Limited v Kinara Trustee Limited* and *Mega Project Holding Limited v Orewa Developments Limited*, estoppel defences based on silence did not succeed.¹⁷

¹² [2012] ERNZ 510.

¹³ [2014] 3 NZLR 567.

¹⁴ [2020] NZCA 113.

¹⁵ *Schollum v Corporate Consumables Ltd* [2017] ERNZ 668 and *Singh v Trustees of Wellington Rudolph Steiner Kindergarten Trust* [2017] NZEmpC 47 at [24] and [25].

¹⁶ [2018] NZEmpC 70 at [25].

¹⁷ *Infinity Enterprises NZ Ltd v Kimara Trustee Ltd* [2020] 3 NZLR 626 and *Mega Project Holding Ltd v Orewa Developments Ltd* (2020) 25 PRNZ 320.

[162] The Employment Court in *Stormont v Peddle Thorp Aitken Limited* did not accept an estoppel defence that involved the employer failing to pay bonuses to an employee in accordance with the bonus formula in the employment agreement, and instead using a different formula that resulted in a lower bonus being paid to the employee.¹⁸

[163] The Employment Court in *Aviation and Marine Engineers Association Inc v Air New Zealand Limited* accepted that the s 4 duty of good faith in the Act could potentially give rise to a duty to speak.¹⁹ However, whether it did or not would depend on the particular facts of each individual case.

[164] In *AsureQuality* the Employment Court dismissed the estoppel defence because the union had not been silent or inactive but had taken action as soon as it was put on notice that there was an issue.²⁰

[165] In cases where there is a mistake, and the party relying on the estoppel would have acted differently if it had known about the mistake, then it is necessary for that party to establish that the silent party had a duty to warn the party relying on the estoppel that it was relying on a mistaken assumption.

[166] Silence by one party will generally not amount to a representation that creates a belief or expectation that can be relied on by the other party. However, in *Mega Project Holding Limited v Orewa Developments Limited* the Court of Appeal recognised that a belief or expectation could be created by silence, and that silence could give rise to an estoppel if it amounted to a misrepresentation or because there was a duty to speak, and the silence caused the other party to rely on its own mistaken belief.²¹

[167] To establish an estoppel based on silence or acquiescence, the silent party must have had a duty to speak. However, the duty to speak can be defeated if the party relying on the estoppel could have obtained the same information it expected the silent party to provide from other sources and should have done so.

¹⁸ [2017] ERNZ 352.

¹⁹ [2013] NZEmpC 172 at [330] and [344].

²⁰ Above n17.

²¹ Above n18, *Mega Project* at [63].

[168] A silent party will not have a duty to speak out if the party claiming estoppel had active or constructive knowledge of the correct position, because in such circumstances there would be no mistake for the other party to correct.

Summary of the Club's estoppel defence

[169] The Club submitted that estoppel prevented Mr Payne from claiming:

- (a) Commission payments, other than as per the spreadsheet calculations; and
- (b) Commission on the increased TAB agency fee, meaning his commission was permanently capped at the commission rate the TAB paid the Club prior to February 2015.

[170] The Club's estoppel defence can be briefly summarised as follows:

- (a) Mr Payne did not complain about commission arrears until his position was restructured in 2021, and it said his evidence that had he complained was false;
- (b) Mr Payne had been paid commission in accordance with the spreadsheet calculations the Club had used for eight years, without complaint by him;
- (c) The new commission formula in the 2013 IEA was a mistake, as the spreadsheet calculations were intended to apply;
- (d) After the 2013 IEA was signed Mr Payne continued to be paid commission based on the spreadsheet calculations, without complaint;
- (e) Mr Payne represented to Ms Dowding that the increased TAB agency fee would not apply to his commission, so it was excluded from his commission calculations, and he never complained about that;
- (f) The duty of good faith in s 4 of the Act required Mr Payne to speak up about his commissions arrears earlier than he did because:
 - (i) He was aware of the basis on which his commission payments were being calculated; and
 - (ii) His commission payments had been addressed a number of times throughout his employment, including in 2017 regarding an unsuccessful variation and in 2020 when the Club lost the spreadsheet template it used to calculate his commissions;

- (g) After the 2013 IEA was signed, Mr Payne's conduct led the Club to reasonably (but mistakenly) believe that his commission would be paid in accordance with the spreadsheet calculations it had used since 2006, and he would not hold the Club to the commission formula in the 2013 IEA; and
- (h) The Club relied on this mistaken belief to its detriment by not restructuring Mr Payne's position sooner, in order to avoid the ongoing cost of his expensive commission.

Authority's findings on the estoppel defence

[171] The Club's estoppel defence has fundamental problems both factually and legally, so it faced significant difficulties at every stage of the AsureQuality four step analysis.

[172] In short, Mr Payne did not have a duty in this particular case to speak up to correct a mistake that he had allegedly created or encouraged by omission, which the Club said it had relied on to its detriment.

[173] Mr Payne was not aware of the alleged mistake and there was no unconscionable conduct by him that meant he should be estopped from being able to recover the contractual commission arrears he was owed under the 2013 IEA.

No mistake

[174] The Authority was not satisfied that the commission formula in the 2013 IEA was a mistake. It more likely reflected the mutual intention the parties had to update Mr Payne's terms and conditions of employment and to simplify his commission formula.²²

Mistaken belief (if it existed) was unreasonable

[175] Even if the Club had a mistaken belief about the correction commission formula, Mr Payne did not create or encourage that mistake. He could not easily work out how his commission was being calculated, as the spreadsheets were within the Club's exclusive control.

[176] If the Club had the mistaken belief (which was not accepted by the Authority) that Mr Payne would not seek to enforce the commission formula in the 2013 IEA, then that was based on its own unreasonable assumptions, which Mr Payne was not responsible for.

²² Paragraph [71].

[177] Even if the Club had held a mistaken belief that the 2013 IEA commission formula did not apply, and relied on that belief or expectation, then it was unreasonable in the circumstances of this particular matter for it to have done so.

[178] Ms Dowding's email to Mr Payne dated 8 July 2017 said "*Again I apologise for the confusion [about his commission payments] and it appears that we both thought things were happening that are not.*" This indicated the parties did not hold a mutual belief regarding his commission payments.

Shared belief about commission on the increased TAB agency fee

[179] According to Ms Dowding's evidence, she told Mr Payne before, and after, the TAB agency fee increase that his commission would not be affected. He disputed that, and said he found out about the increase himself after the increase had occurred.

[180] Ms Dowding's evidence meant she was aware in 2015 that under the applicable commission formula Mr Payne was entitled to commission on the increased TAB agency fee. The Authority therefore considered the parties both held the same view about his contractual entitlement in that regard, or Ms Dowding would have had no need to have raised that with him.

Did the parties agree to depart from the contractual commission formula in the 2013 IEA?

[181] The Club must have known it had a clear contractual obligation to pay Mr Payne commission in accordance with the commission formula in the 2013 IEA. Any departure from that should have been properly documented, and it was not. The Club therefore sought to have the equitable defence of an estoppel based on silence override clear contractual provisions, instead of entering into a contractual variation.

[182] Clause 8.3 of the 2013 IEA gave the Club the ability to vary in writing the commission formula, if the parties agreed to do so. Although the Club set that standard (for all variations to be in writing) which would have been easy for it to have fulfilled, it failed to adhere to it. That strongly suggested to the Authority that no such agreement had been reached.

[183] Ms Dowding's evidence that her practice was to enter into verbal arrangements with managers was not a satisfactory explanation for there being no written documentation recording the financially significant change that the Club claimed had verbally been made to

Mr Payne's commission entitlements. He was not even sent an email proposing or recording this alleged significant change.

The Club's actions regarding the increased TAB agency fee were contrary to good faith

[184] As a matter of fairness and good faith, such an important change that deprived Mr Payne of contractual entitlements amounting to significant sums needed at the very least to be clearly recorded.

[185] If Ms Dowding believed that Mr Payne had agree to forego or waive his contractual right to commission that he was entitled to on the increased TAB agency fee, then she was wrong about that.

[186] The Club failed to take basic or prudent steps to ascertain that Mr Payne was fully informed about what he was supposedly giving up, there was no negotiation about it and no clear agreement by him to waive his contractual rights.

[187] It was significant that Ms Dowding never referred to the supposed previous agreement she had with Mr Payne (that he would waive or forgo commission on the increased TAB agency fee) when she met with him on 7 July 2017, in her email to him on 8 July or in her separate emails to Ms Gaye Wilson and Ms Wood on 10 July 2017.

[188] If the parties had reached such an agreement in 2015, then the discussions Ms Dowding had with Mr Payne in July 2017 was the appropriate time for her to have referred back to their previous agreement, but she did not do so.

[189] Instead, the way Ms Dowding dealt with the increased agency fee in her email to Mr Payne on 8 July 2017, recording their meeting the previous day, reflected that a unilateral decision had been made by her not to pay him commission on the increased agency fee. That accorded with Mr Payne's account of what had happened.

[190] Mr Payne therefore had no real or genuine opportunity to have agreed or disagreed with the Club's unilateral decision he would not be paid commission on the increased TAB agency, as it was presented to him as *fait accompli*. When he did raise concerns about that decision with Ms Dowding, she made it clear to him that she would not be changing her mind.

[191] In the interests of workplace harmony Mr Payne did not press the issue at that time. He believed it would be futile given Ms Dowding's firm view about it, the discussions had become

increasingly fraught, and he did not want to provoke retaliation against him. Mr Payne did however circle back to this issue again in July 2017, during discussions he had with Ms Dowding about his commission formula. Again, without success.

[192] It was the Club's decision not to record the changes it claimed had been agreed with Mr Payne about his commission entitlements. Nor did it record anything about the discussion(s) it claimed had occurred.

[193] If what the Club asserted was correct (and the Authority was not satisfied it was) then Mr Payne had given up his right to significant commission payments based on (according to Ms Dowding) two brief informal chats with her or, according to Mr Payne, based on one brief informal unplanned conversation Ms Dowding had with him, after the increase had already occurred.

[194] Mr Payne had no advance notice prior to the 2015 discussion(s) with Ms Dowding that she intended to ask him to give up his right to be paid commission on the increased TAB agency fee, so he was obviously unprepared to address that in a considered way.

[195] Before making such a significant alleged verbal change to his commission entitlements, no prior information was given to Mr Payne by the Club. There had been no financial analysis of the value of the commission he had allegedly verbally agreed to waive or forego, and he had not been advised to take financial and/or legal advice or given time to do so before being required to verbally agree to such a significant change to his contractual entitlements.

[196] Nor was Mr Payne given opportunity to be represented during the brief unscheduled discussion(s) Ms Dowding had with him about such matters, in circumstances where the Club was aware that the financial ramifications for him would be significant.

[197] These omissions starkly demonstrate the inherent inequality of power that is expressly recognised in s 3 of the Act. The Club therefore had no reasonable basis for believing that Mr Payne had freely and voluntarily waived, or agreed to forego, his contractual right to be paid commission in accordance with the 2013 IEA.

Did Mr Payne know the Club mistakenly thought he would not seek to be paid in accordance with the commission formula in the 2013 IEA?

[198] Mr Payne was not aware that the Club was operating under an allegedly mistaken belief that he would not seek to enforce the commission formula in the 2013 IEA, because it never expressly or directly raised that with him.

[199] Mr Payne could not have misled the Club about a mistaken belief the Club supposedly had, if he was unaware of the alleged mistake and/or of the Club's mistaken belief about that.

[200] Nor did Mr Payne encourage the Club's belief that he would not seek to be paid in accordance with the commission formula in the 2013 IEA. He gave no express undertaking about that and the evidence fell far short of establishing the parties had reach a mutual verbal agreement to that effect.

Did the Club have actual or constructive knowledge of its alleged mistake?

[201] The Club had actual or at the very least constructive knowledge of the matters that it claimed gave rise to the estoppel, namely that the 2005 IEA and the 2013 IEA commission formulae were different, and that Mr Payne was contractually entitled to be paid commission on the increased TAB agency fee. After all, it was the Club that exercised exclusive control over these matters.

[202] The Club drafted both employment agreements and the different commission formulae, and it took advice from a HR Consultant on the terms of the new 2013 IEA. The Club prepared and controlled the spreadsheet calculations because it entered the variables used to calculate the commission payable. The Club negotiated the increase to the TAB's agency fee, and the Club decided not to pay Mr Payne commission on it.

[203] The Club knew (because it had drafted it) that Mr Payne's employment agreement required variations to be in writing. Yet despite that requirement, the Club instead decided to act in reliance of undocumented verbal conversations Ms Dowding claimed she had with Mr Payne on unspecified dates.

[204] During these conversations, Ms Dowding alleged Mr Payne had immediately agreed not to claim the significant commission he was entitled to on the increased TAB agency fee, notwithstanding he was contractually entitled to it, which did not seem likely to the Authority.

Evidence of the alleged agreement was inadequate

[205] The evidence regarding the content of the alleged conversation(s) was also highly unsatisfactory in terms of providing credible evidence that Mr Payne had freely and voluntarily agreed to give up part of his contractual commission entitlement.

[206] No real details were provided of what exactly was discussed or conceded, other than the fact Ms Dowding told Mr Payne in 2015 he would not be paid his percentage on the increased agency fee and he had “*not pushed back*” on it.

[207] The Authority noted that Ms Dowding’s email to Ms Wood on 10 July 2017 indicated she considered Mr Payne had ‘pushed back’ aggressively about that when they had met on 7 July 2017 to discuss commission related issues.

[208] Ms Dowding’s emails in July 2017 were evidence that Mr Payne had raised issues about his commission payments before his position was restructured in 2021. In 2017 Ms Dowding had informed Mr Payne that a restructuring of his position, and therefore remuneration, was likely if charges were not made to his commission.

Did Mr Payne have a duty to warn the Club about its alleged mistake?

[209] Mr Payne had no duty to warn the Club about a mistake he was unaware of.

[210] Mr Payne did not misrepresent the terms of the commission formula in the 2013 IEA to the Club. It was the Club that created, recorded and implemented the commission formula in the 2013 IEA. It was therefore reasonable for Mr Payne to believe that it accurately reflected the Club’s intention to simplify his commission formula, as he had asked it to do.

[211] To the extent Mr Payne was silent, his silence was benign. He did not have any information that was known only to him which he unconscionably withheld from the Club, therefore causing its supposed mistaken belief. If a mistake was made, that occurred due to the Club’s own actions/inactions, which Mr Payne was not responsible for.

[212] If Mr Payne did have a good faith duty to speak up to correct the Club’s alleged mistake, it would have been defeated in this particular case.

[213] The Club had all of the necessary and relevant information available to it to be able to readily ascertain what Mr Payne’s contractual commission formula was and to establish

whether or not it had been paying him in accordance with his contractual entitlements. As a matter of public policy it should be required to have ascertained that itself, particularly given its extensive resources and ready access to the necessary information.

[214] The Club also had all of the necessary information to enable it to make informed decisions about whether or not to restructure Mr Payne's position in order to save it the cost of his expensive commission. Despite this knowledge, the Club still elected to rely on an alleged verbal agreement that had not been documented anywhere to change Mr Payne's contractual commission entitlements.

[215] A reasonable person would not consider that Mr Payne had a duty to warn the Club that he was entitled to be paid his commission in accordance with his 2013 IEA, which was the only signed employment agreement the parties had.

[216] The Club had elected to draft the 2013 IEA to be a complete agreement. It was expressly stated to have replaced all previous documents, and anything that was previously said and done by the parties, before the 2013 IEA was signed. Having set that contractual standard, the Club should be held to it.

[217] The Club, as the party that had prepared the 2013 IEA, could reasonably be expected to know and understand what its contractual obligations to Mr Payne were, without him having to raise a contractual breach with it.

Lack of knowledge the spreadsheet calculations were being used instead of the 2013 IEA commission formula

[218] The evidence did not establish that Mr Payne was aware that the spreadsheet calculations were being applied by the Club instead of the 2013 IEA commission formula.²³

[219] Mr Payne's evidence was that it was difficult for him to be able to calculate what he was owed was accepted by the Authority.

[220] It was not obvious from the spreadsheets what commission formula had been applied or whether it had been calculated correctly. Mr Payne's agreement in August 2017 to repay a

²³ Paragraphs [76] – [80].

significant commission overpayment that had not in fact occurred was compelling evidence of that.

Public policy considerations

[221] As a matter of public policy it would be wrong for an employee to be deprived of their clear contractual entitlements based on a brief, unplanned conversation (as occurred here) where the employer unilaterally informed the employee they would not be receiving their contractual entitlements, merely because the employee “*did not push back*” on it. Such an approach ignores the inherent power imbalance in the employment relationship.

[222] If the Club wanted to ensure that the increased TAB agency fee did not affect Mr Payne’s commission, then it could and should have entered into a written variation with him about that. At the very least the Club should have clearly recorded the alleged verbal change to his commission entitlements.

Outcome of estoppel defence

[223] The Club was unable to establish on the evidence that it had acted to its detriment in reliance on a mistaken belief Mr Payne had created or encouraged, that the 2013 IEA commission formula did not apply, or if it did then it would not be relied on by him.

[224] The Club therefore failed to establish the necessary elements of an estoppel defence. Mr Payne was therefore not estopped from recovering commission arrears that he was owed under the commission formula in the 2013 IEA.

Did Mr Payne waive his contractual entitlement to be paid commission in accordance with the 2013 IEA?

Relevant law

[225] A waiver involves a party to a contract giving up their strict legal right to enforce a contractual obligation against the other party, particularly where the obligation provides a benefit to the party waiving it.

[226] The requirements to establish waiver are as follows:²⁴

- (a) The party against whom the waiver is claimed, by their conduct, leaves the party claiming waiver to believe the first party's strict rights under the contract will not be insisted upon, intending that the party claiming waiver will act on that belief; and
- (b) The party claiming waiver acts on that belief.

[227] No consideration is required for a waiver, nor is the party claiming the waiver required to establish that they have suffered detriment by acting on the belief created.²⁵

[228] For there to be a waiver, there must be an express or implied (although that can occur through conduct) waiver which involves a clear and unambiguous representation and the person asserting the waiver must proceed to act in reliance on it.²⁶

Finding on the waiver claim

[229] The onus was on the Club to establish the evidential basis for a waiver, and it has failed to do so. The evidence fell well short of reaching the threshold of a clear and unambiguous representation by Mr Payne that he would forego his contractual rights to enforce the commission formula in the 2013 IEA.

[230] The same considerations arose when applying the doctrine of waiver as when applying the belief and reliance requirements of an estoppel defence, so the waiver claim did not succeed for similar reasons as to why estoppel defence was unsuccessful.

[231] Mr Payne did not waive his contractual rights to be paid commission in accordance with the commission formula in the 2013 IEA, and it was unreasonable for the Club to consider he had.

²⁴ *Connor v Pukerau Store Limited* [1981] 1 NZLR 384, p387, citing *W J Alan & Co Limited v El Nasr Export Co* [1972] 2 QB 189, pp.213-214.

²⁵ Above n24, *Connor* at p.387-388.

²⁶ *Bates v Gates* (HC) Auckland, 13 February 1985, A1078-A5, Thorp J.

Is Mr Payne owed commission arrears?

[232] Mr Payne was entitled to be paid commission from 14 April 2016 to 21 August 2021 in accordance with the commission formula in the 2013 IEA. That has not occurred, so Mr Payne is owed commission arrears.

[233] The Authority will communicate with the parties regarding the investigation and, if necessary, the determination of the quantum of Mr Payne's commission arrears.

What costs and disbursements should the successful party be awarded?

[234] Mr Payne as the successful party is entitled to a contribution towards his actual legal costs. However, costs are reserved.

Rachel Larmer
Member of the Employment Relations Authority