
JEFF PHILLIPS ON THE CASE

Jeffrey Phillips SC puts recent and topical case law under scrutiny, resulting in a blend of wry observation, humour and opinion uniquely his own.

YOU LITTLE BEAUTY

SILVERBROOK RESEARCH PTY LTD V LINDLEY

Occasionally a lawyer will have a Eureka or “you little beauty” moment when reading a decision from an appeal court. *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357, handed down by the New South Wales Court of Appeal just before Christmas 2010, is such a case. It will be welcome news to many employment lawyers who previously may have felt that a client who was not paid a discretionary bonus may have had no cause of action. The enforcement of such bonuses at common law was always problematic. The difficulty arose out of a defence that the promise to pay was an illusory one or was so uncertain as not to be binding. See *Thorby v Goldberg* (1964) 112 CLR 597 at 607 (Menzies J) and also see *Ikin v Cox Brothers (Aus) Ltd* (1930) 25 Tas LR 1 at 2, where Clarke J said:

There can be no doubt, I think, that the stipulation as to a bonus contained in that contract, imposed no contractual obligation on Cox Brothers (Tas) Limited.

Clarke J went on to say that:

Where a promise ... accompanied by words which show that the promisor is to have a discretion or option whether he will carry out that which he purports to be the promise, the result is that there is no contract.

Prior to the amendments to the *Industrial Relations Act 1996* in New South Wales, applicants' lawyers, conscious of these common law difficulties, brought claims for a failure to pay a discretionary bonus under the unfair contracts jurisdiction. *Keycorp v Thomes* (2004) 141 IR 116 was perhaps the apogee of such claims. That jurisdiction was largely repealed by use of a statutory cap some years ago and was dealt its virtual death blow by the Work Choices legislation.

However, this Court of Appeal judgment will have benefit not just in New South Wales, but across the nation. It considers the terms of a contract of employment which purported to set objectives in relation to a bonus and also identified the discretionary nature of it. The relevant clauses of the contract which Dr Lindley had with Silverbrook were found under cl 4 headed “Annual Performance Bonus”, in particular, the following two subclauses:

- 4.2 Silverbrook will assess Lindley's performance against said objectives at the end of each quarter commencing from the date of her employment. Provided her performance satisfies the said objectives and subject to Clause 4.3, one quarter of the Annual Performance Bonus will be paid to Lindley within 21 days of the end of each quarter.
- 4.3 The decision as to whether Lindley should receive the Performance Bonus is entirely within the discretion of Silverbrook.

Lindley's employment was terminated and she was paid an ex gratia payment. However, at no stage were any performance objectives set for the performance bonus. Silverbrook said it would not have exercised its discretion in favour of Lindley even if such objectives had been set.

In the majority judgment, the President of the Court of Appeal, Allsop J, said that the bonus in question was a loss of a commercial chance or opportunity. He said such lost opportunities are recoverable in contract. The lost opportunity here was seen as a breach of contract because no objectives had ever been set (at [2]). He said, although it was not a promise to pay the bonus, the respondent had promised to set up a process of assessment. It had failed to do so in breach of contract (at [3]). In relation to the exercise of discretion, he found that when such words are found in a contract that does not permit the employer to withhold the bonus capriciously or arbitrarily or unreasonably (at [5]). The discretion must be exercised honestly and conformably with the purpose of the contract. He recognised that there may be legitimate circumstances why the discretion would not be exercised in favour of an employee, such as financial stringency or misbehaviour or some other consideration.

As an aside, Allsop J also dealt with, by way of analogy, dismissal from employment. He suggested that a dismissal of an employee, which may have been done capriciously or arbitrarily, may be effective, but the employee may have a remedy for breach of contract (at [7]).

Another aspect of the case which is of interest was that the ex gratia payment was not taken into account by the trial judge in the District Court in the assessment of damages. However, Allsop J, with whom Beazley J agreed said:

An ex gratia payment by an employer, being the person against whom the claim is made will be taken into account in the reduction of damages.

This argument did not appear to take into account the principle that an ex gratia payment for an award underpayment may not be taken into account as it is nothing more than a gift (see *Pacific Publications Ltd v Cantlon* (1983) 4 IR 415).

This case will also have important ramifications in considering other ways that discretionary incentives are paid through either commission or share options schemes. The unfair contracts jurisdiction generally dealt with these under the general rubric of “unfairness”. Some of the judges in the Industrial Court were concerned with what were described as “lavish remuneration packages” and whether they would come under the discretion exercised by a judge in the workers’ tribunal (see *Canizales v Microsoft Corp* (2000) 99 IR 426). However, no such concerns need apply in commercial common law jurisdictions where the judges are more comfortable in dealing with big numbers.

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