

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2019 WAIRC 00885

**CORAM** : COMMISSIONER T B WALKINGTON

**HEARD** : FRIDAY, 26 JULY 2019

**DELIVERED** : FRIDAY, 20 DECEMBER 2019

**FILE NO.** : B 139 OF 2018

**BETWEEN** : JO ANNE STONES  
Applicant

AND

DIRECTOR TROY BARBAGALLO  
THE HOROLOGIST PTY LTD  
Respondent

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CatchWords : Contractual benefits claim - salary review - commission payments -  
express terms - implied terms - collateral contract

Legislation : *Industrial Relations Act 1979*

Result : Application dismissed

**Representation:**

Applicant : In person

Respondent : Mr John Park (of counsel)

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**Case(s) referred to in reasons:**

*Anne Patricia Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)* (1999) 79 WAIG 1867

*Australian Broadcasting Commission v Australasian Performing Right Association Limited* (1973) 129 CLR 99

*Belo Fisheries v Dennis Terence Froggett* (1983) 63 WAIG 2394

*B P Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266; (1977) 16 ALR 363

*Con-Stan Industries of Australia Proprietary Limited and another v Norwich Winterthur Insurance (Australia) Limited* [1985-1986] 160 CLR 226

*Graham Sargant v Lowndes Lambert Australia Pty Ltd* [2001] WAIRC 02603; (2001) 81 WAIG 1149

*Hawkins v Clayton and others* (1988) 164 CLR 539

*Heilbut Symons and Co v Buckleton* [1912] AC 30

*J J Savage & Sons Pty Ltd v Blakney* (1970) 119 CLR 435

*Masters and another v Cameron* (1954) 91 CLR 353

*Norwich Winterthur Insurance (Australia) Ltd v Con-Stan Industries of Australia Pty Ltd* [1983] 1 NSWLR 461

*Perth Finishing College Pty Ltd v Susan Watts* (1989) 69 WAIG 2307

*Price v Rhondda Urban District Council* [1923] 2 Ch 372

*Richardson Pacific Ltd v Deborah Anne Miller-Smith* [2005] WAIRC 00545; (2005) 85 WAIG 1277

*S & K Investments Pty Ltd v Cerini* [2016] WASC 233

*Sheppard v The Council of the Municipality of Ryde* (1952) 85 CLR 1

*Thornley v Tilley and others* (1925) 36 CLR 1

*Waroona Contracting v Alan B G Usher* (1984) 64 WAIG 1500

**Case(s) also cited:**

*Bottomley's Case* (1880) 16 Ch D 681

*Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503

*Locke v Dunlop* (1888) 39 Ch D 387

*Re Transport Workers Union of Australia* (1993) 50 IR 171

*The Council of the Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429

*Reasons for Decision*

- 1 Ms Jo Anne Stones claims payment of \$35,000 for unpaid commissions and \$5,000 for an unpaid salary increase review as entitlements under her contract of service.

**Background**

- 2 Ms Stones was employed by Director Troy Barbagallo The Horologist Pty Ltd (the Horologist Pty Ltd) as a Store Manager from 2 November 2016 to 14 September 2018 when she resigned her employment.
- 3 Prior to Ms Stones' employment the Horologist Pty Ltd engaged a recruitment agency to find a suitable person for appointment to the position of Retail/Store Manager.
- 4 Ms Stones attended an interview for the position, arranged through the recruitment agency, with Ms Tanya Thomas of the Horologist Pty Ltd on 7 October 2016. During the interview details of the position, including the job description, base salary, commissions and salary review were discussed. Ms Stones says she expressed concerns with the rate of remuneration and Ms Thomas advised that a high income would be earned, comparable with that of her current job, as a result of the commission structure.
- 5 On 19 October 2016 the director of the recruitment agency emailed Ms Stones with an offer of employment. The email included, within it, an email from Ms Thomas to the recruitment agency advising that the Horologist Pty Ltd wished to offer Ms Stones the position stipulating the salary would be \$60,000 plus super and commissions, with a salary review based on performance after six months and the start date of 2 November 2016. Ms Thomas advised that once accepted she would forward the employment contract to the recruitment agency.
- 6 On the same day Ms Stones emailed the recruitment agency indicating her acceptance. Ms Stones says she relied on the promised commissions in accepting the offer of employment.
- 7 On 19 October 2019 the recruitment agency forwarded a contract to Ms Stones that had been provided by the Horologist Pty Ltd.
- 8 On 20 October 2016 Ms Stones says she emailed the recruitment agency with several questions concerning the written contract: the number of hours per fortnight, annual leave entitlements, personal leave, how frequently the commissions are paid and the requirement to work on public holidays. Ms Stones included in her evidence a written document which incorporated a reproduction of an email exchange. Ms Stones says that on 21 October 2016 the recruitment agency emailed a response to her that included confirmation that "commissions are calculated weekly and paid monthly".
- 9 The Horologist Pty Ltd evidence is that the email exchange did not include a reference to commissions.
- 10 The Horologist Pty Ltd submits that to the extent that the email exchange submitted by Ms Stones are true, which they deny, the recruitment agency was not a representative nor agent of the Horologist Pty Ltd and did not have the necessary authority to make binding representations to Ms Stones on their behalf.
- 11 On 31 October 2016 the recruitment agency email Ms Stones with a revised contract provided by the Horologist Pty Ltd. This version of the contract contained amendments to annual leave and personal leave entitlements. The amended contract did not include a term concerning payment of commissions.

- 12 Ms Stones says that on 31 October 2016 she emailed a signed copy of the contract to the recruitment agency. Ms Stones submitted into evidence an unsigned written contract that she says she relies on in this matter (Exhibit A9).
- 13 The Horologist Pty Ltd submitted a written contract signed by Ms Stones on 31 October 2016 (Witness Statement of Troy Anthony Barbagallo [TB2]).
- 14 The terms of each of these contracts are the same. There is no reference to commissions in either contract. Each of the contracts contains two terms concerning a salary review:

Remuneration

Your salary is at a rate of \$60,000 gross per annum. As discussed, a performance review will be done six months after commencement, as (sic) which time your salary will be reviewed based on performance.

Salary Review

Your remuneration package will be reviewed annually on or about the anniversary of your employment. This is a salary and performance review and no variation to your salary is guaranteed.

- 15 Ms Stones says that her written contract of employment did not contain all the terms and conditions of her employment, in particular it did not contain a term concerning the payment of commissions and this entitlement arises from oral discussions and email exchanges.
- 16 Evidence in chief was adduced by signed witness statements in this matter. The two witness statements submitted by the Horologist Pty Ltd were emailed to Ms Stones. It became evident during the hearing that that Ms Stones had not received the witness statements. The hearing was adjourned to provide Ms Stones with an opportunity to review the statements and to consider if she wished time to prepare for cross examination and request the hearing be adjourned to a future date. When the hearing resumed Ms Stones advised that that she did not wish to cross exam the witnesses.

### Issue to be Decided

- 17 Does Ms Stones have a contractual entitlement to a salary increase \$5,000 as a result of review of salary.
- 18 Does Ms Stones have a contractual entitlement to payment of commissions?

### Principles

- 19 In deciding if there is a contractual benefit in this jurisdiction the Commission must determine whether the claim is one for a benefit to which the applicant is entitled under her contract of employment. In an application of this nature, the onus is on the applicant to establish that the subject of the claim is a benefit to which the applicant was entitled under her contract of employment. It is for the Commission to determine the terms of the contract of employment and to ascertain whether the claim constitutes a benefit which has been denied under the contract of employment, having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case (*Belo Fisheries v Dennis Terence Froggett* (1983) 63 WAIG 2394; *Waroona Contracting v Alan B G Usher* (1984) 64 WAIG 1500; *Perth Finishing College Pty Ltd v Susan Watts* (1989) 69 WAIG 2307; *Anne Patricia Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)* (1999) 79 WAIG 1867, 1869).

- 20 The contractual terms may be express or implied. That is, express terms are those things written or said which reflect the bargain agreed between the parties and which the parties intended to be enforceable.
- 21 It is necessary to ascertain the terms of the contract so that the benefits and obligations can be ascertained. In *Graham Sargant v Lowndes Lambert Australia Pty Ltd* [2001] WAIRC 02603 [67]; (2001) 81 WAIG 1149, 1155, the President observed:

It is always necessary, if a contract is relied upon, to determine the terms of a contract (whether it is an employment contract or any other contract) (see *Re Transport Workers Union of Australia* (1993) 50 IR 171 at 196 per Munro J). A contract may be oral or in writing, partly oral and partly in writing, the contractual terms may be express or implied, there may be a series of contracts, and indeed the written terms of the contract may not reflect the substance of the agreement between the parties. There may be terms of the contract derived from custom and usage too (see *Macken, McCarry & Sappideen's "The Law of Employment" 4th edition*, at page 94).

- 22 The general principles of interpretation for express terms of a contract are set out in *Australian Broadcasting Commission v Australasian Performing Right Association Limited* (1973) 129 CLR 99, 109-110, in which Gibbs, J observed:

It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, "even though the construction adopted is not the most obvious, or the most grammatically accurate", to use the words from earlier authority cited in *Locke v Dunlop* (1888) 39 Ch D 387, 393, which, although spoken in relation to a will, are applicable to the construction of written instruments generally; see also *Bottomley's Case* (1880) 16 Ch D 681, 686. Further, it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument. Finally, the statement of Lord Wright in *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, 514, that the court should construe commercial contracts "fairly and broadly, without being too astute or subtle in finding defects", should not, in my opinion, be understood as limited to documents drawn by businessmen for themselves and without legal assistance (cf *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429, 437).

- 23 Where parties agree to document their agreement in writing it is reasonable to infer that they wished to record the entire terms of their contract, unless there is any indication to the contrary as established in *S & K Investments Pty Ltd v Cerini* [2016] WASC 233.
- 24 In *Masters and another v Cameron* (1954) 91 CLR 353, 360, the High Court identified three classes of agreement, being:
- a) where the parties reach finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms re stated in a form which will be fuller and more precise but not different in effect;

- b) where the parties have completely agreed upon all of the terms of their bargain and intend no departure from or addition to their agreed terms, express or implied, but nevertheless have made performance of one or more of the terms conditional upon the execution of formal document; and
- c) where the intention of the parties is not to make a concluded contract at all, unless and until they execute a formal contract.

### Application

- 25 The written contract relied upon by Ms Stones contains terms for a salary review reproduced at [14] of this decision. The term provides for a review of the remuneration package, it is a review of both salary and performance, variation to salary is not guaranteed and a review will be conducted after six months employment and subsequently, annually on or near the date of commencement of employment.
- 26 Ms Stones says that at the interview for the position a salary review of \$5,000 after six months was discussed. Further Ms Stones submitted an email dated 19 October 2016, she received from the recruitment agency (Exhibit A5) (*19 October Email*) which contained an email from Ms Thomas stating that the offer included a salary review based on performance after six months. The amount of any consequential increase in salary is not stipulated in the email.
- 27 The *19 October Email* also stated that once Ms Stones had accepted the offer Ms Thomas would provide an employment contract to the recruitment agency.
- 28 Neither the unsigned written contract relied upon by Ms Stones nor the signed contract tendered by the Horologist Pty Ltd contains a term concerning the payment of commissions.
- 29 The *19 October Email* indicates that the Horologist Pty Ltd intended that the terms of the contract would be set out in a written contract. Following the *19 October Email*, the terms of the agreement between Ms Stones and the Horologist Pty Ltd were subject to negotiation as evidenced by the amendment to the terms of the written contract provided to Ms Stones.
- 30 Ms Stones communicated with the recruitment agency concerning changes to the terms of the written contract provided on 19 October 2019. The Horologist Pty Ltd says that the recruitment agency is a third party and not one of the contract parties and therefore any promises or representations made during this process were made by the third party and are not capable of being a term of the contract. This evidence was not challenged. Given there is nothing in evidence before the Commission to enable a finding that the recruitment agency was a representative and had authority to negotiate the terms of a contract on behalf of the Horologist Pty Ltd, it cannot be found that their communications were of a contractual nature as they were not conducted between the parties to the contract.
- 31 The term concerning a review of salary after six months of employment are not ambiguous and clearly refer to a review of both salary and performance.
- 32 Sometime in 2017, the Horologist Pty Ltd conducted a review of Ms Stones' salary and declined to increase the salary. Whilst the review may not have been comprehensive, nor meet Ms Stones' expectations based on her discussions with the recruitment agency, the term providing for a review does not guarantee an increase resulting from the review.
- 33 I find that Ms Stones' contract did not provide for a benefit of an increase in salary of \$5,000 on completion of six months employment.

### Implied Terms - Principle

- 34 The written contract/s do not contain a term concerning commissions. The issues to be decided are, then, was there an implied term for commissions, whether the contract was varied to incorporate a term for commissions or whether a collateral contract for commissions existed that is capable of being enforced in this jurisdiction?
- 35 Implied terms are those terms that by reasons of particular facts arising, the type of contract in question, or by stature, provisions or terms should be read into the contract. In *B P Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266, 267; (1977) 16 ALR 363, the High court established the following criteria for a term to be implied into formal contracts, specified in writing: it must be reasonable and equitable; it must be necessary to give business efficacy to the contract; it must be so obvious that it goes without saying; it must be capable of clear expression; and it must not contradict any express term of the contract. Where the contract is oral or partly oral and partly in writing the principle to be applied is whether in all circumstances it would be necessary for the effective and reasonable operation of the contract to imply the term contended: *Hawkins v Clayton and others* (1988) 164 CLR 539 per Deane J at 571-573.
- 36 It must be proved that the term to be implied is so notorious that everyone in the industry or trade enters that the parties making contracts for the kind would be presumed to include the term in the contract as per *Norwich Winterthur Insurance (Australia) Ltd v Con-Stan Industries of Australia Pty Ltd* [1983] 1 NSWLR 461 or *Con-Stan Industries of Australia Proprietary Limited and another v Norwich Winterthur Insurance (Australia) Limited* [1985-1986] 160 CLR 226, 236.
- 37 The implied term must be uniform as well as reasonable, and it must have quite as much certainty as the contract itself: *Thornley v Tilley and others* (1925) 36 CLR 1, 8.
- 38 For a term to be implied by custom or practice it must be an industry custom or practice and not the practice adopted by an individual employer. *Richardson Pacific Ltd v Deborah Anne Miller-Smith* [2005] WAIRC 00545 [73]; (2005) 85 WAIG 1277.

### Implied Term - Application

- 39 Ms Stones says that she did not seek to have the draft written contract of employment amended to include a term for commissions. Ms Stones says that in her previous and current employment she received commission payments regularly despite the written contracts not containing a term for commissions. Ms Stones' claim is based on her expectation that the commission payments would be made because this was discussed and agreed at the time of her acceptance of the offer, confirmed in an email, confirmed on the day she commenced work at the store and some commission payments were made in accordance with the terms agreed.
- 40 There is nothing before the Commission to support a contention that the specific arrangement for payment of commissions at the Horologist Pty Ltd is an industry wide practice.
- 41 The basis of the commission payment is not agreed by the parties in this matter. Ms Stones says that on the day she commenced employment she was provided with a table that set out commissions payable on gross profit per week. The same table had also previously been provided to her at the interview. Ms Stones says she was to be paid based on the gross profits for the store. The Horologist Pty Ltd say that the commission was to be paid based on the sales made by Ms Stones individually only.

- 42 Ms Stones submitted two tables into evidence that are her workings of the commissions, based on the store sales for the period of her employment. I would note that the table provided to Ms Stones on the day of her commencement includes a column “gross profits P/W” whereas the tables created by Ms Stones includes columns for “gross sales” and “net profits” (Exhibits A1 and A7).
- 43 The evidence of the sales and profits for the store submitted by the Horologist Pty Ltd, which were not challenged, significantly differ from that submitted by Ms Stones.
- 44 In October 2017 the principle of the Horologist Pty Ltd emailed Ms Stones and the Accounts Manager advising that he had concerns that the calculations for the commission may have been incorrect, that Ms Stones may have been overpaid and requesting this matter be investigated.
- 45 There is no evidence before the Commission that supports Ms Stones’ contention that the commission was to be calculated on the basis of the stores sales or profits and not her individual sales. There is also no evidence before the Commission that calculations or methods of commission payments are of a notorious industry wide practice and, therefore cannot be implied into the contract.
- 46 In addition, given the doubt over the method for calculating the commission in this matter, as in *Thornley v Tilley*, the payment of commissions does not have the required certainty to be capable of being implied into the contract.

#### **Variation – Principles**

- 47 A variation to a contract must be supported by consideration, especially when the variation is an improvement to an employee’s terms or conditions. An agreement to carry out what is already contracted for is not consideration: *Price v Rhondda Urban District Council* [1923] 2 Ch 372.

#### **Variation – Application**

- 48 The provision of the table for commission payments on the day Ms Stones commenced employment at the workplace or subsequently, cannot be said to be a variation of the terms of the contract to incorporate a term for commissions because Ms Stones did not provide any consideration necessary for this to be a contractual variation. Ms Stones continued to undertake the work in accordance with the established contractual terms.
- 49 I find that the contract was not varied to incorporate a term for commissions.

#### **Collateral Contract – Principles**

- 50 A collateral contract is one where there is a separate promise by one party to the other, to induce the other to enter the main contract: *Shepperd v The Council of the Municipality of Ryde* (1952) 85 CLR 1. It is not sufficient to simply assert that the representee would not have entered into the contract had the statement not been made. It must also be established that there was an intention that there would be a contractual liability: *Heilbut Symons and Co v Buckleton* [1912] AC 30. For such a contract to be made there must be an offer and acceptance, supported by consideration and an intention by the parties to enter into legal relations.
- 51 A statement must be promissory and not merely representational. Whether a statement is a promise is determined objectively. An inducement to enter into a contract is not in itself enough to be a promise: *J J Savage & Sons Pty Ltd v Blakney* (1970) 119 CLR 435, 442.



### **Collateral Contract – Application**

- 52 Ms Stones says she would not have accepted the offer of employment had she not been assured that she would earn the equivalent or greater income for her, then, job through the additional commission payments. Ms Stones says she relied on the promise of the commission and this created a contract for payment of commissions (commissions contract).
- 53 The Horologist Pty Ltd says payment of commissions was an incentive and discretionary and not a contractual obligation. The Horologist Pty Ltd says that the recruitment agency is not an employee, officer, representative nor agent and did not have authority to make a promise on its behalf.
- 54 There is no evidence before the Commission that establishes an intention to create legal relations. As such I cannot find that the commission arrangements constituted a separate collateral contract between Ms Stones and the Horologist Pty Ltd.
- 55 Given there is no evidence before the Commission of the arrangements between the Horologist Pty Ltd and the recruitment agency, it cannot be found that the third party (the recruitment agency) benefited from Ms Stones entering into an employment contract with the Horologist Pty Ltd on the promise of the commissions. Therefore, it follows, a tripartite collateral contract cannot be found.

### **Conclusion**

- 56 For the reasons set out above the application must be dismissed.