

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2021 WAIRC 00048

CORAM : COMMISSIONER D J MATTHEWS

HEARD : TUESDAY, 1 SEPTEMBER 2020 AND BY WRITTEN
SUBMISSIONS FRIDAY, 11 SEPTEMBER 2020, FRIDAY, 18
SEPTEMBER 2020

DELIVERED : WEDNESDAY, 3 MARCH 2021

FILE NO. : B 94 OF 2018

BETWEEN : WARREN MEDCRAFT
Applicant
AND
METLABS AUSTRALIA PTY LTD
Respondent

CatchWords : Industrial Law (WA) - Application for denied contractual benefits -
Applicant claims oral contract variation - Claim not made out

Legislation :

Result : Application dismissed

Representation:

Counsel:

Applicant : Mr G McCorry (as agent)
Respondent : Mr G Rogers (of counsel)

Decision

- 1 Warren Medcraft worked for Metlabs Australia Pty Ltd from June 2013 to July 2018. At various times over the course of his employment his employer paid to him money over and above his ordinary salary.
- 2 Mr Medcraft says that the amounts were paid to him pursuant to an oral agreement, having contractual effect, between him and Mr Kristopher Townend, the Managing Director of the respondent, made in early 2015.
- 3 Mr Medcraft says the exact terms of the agreement were that he would receive, in addition to his ordinary salary, a sum equating to 2.5% of the respondent's profit in any year, where a profit was made.
- 4 Mr Medcraft says that for the financial year 2017-2018 he was denied that contractual benefit.
- 5 In support of his claim Mr Medcraft points to the following:
 - (1) his evidence of the meeting at which the agreement was allegedly made;
 - (2) the evidence of Ms Kay Heald to the effect that she was present at the meeting and heard the oral agreement reached and that she was, in fact, subject to an agreement on the same terms; and
 - (3) evidence that Mr Medcraft and Ms Heald subsequently received money in addition to their ordinary salary which, it is claimed, equated to 2.5% of the respondent's profits, where a profit was made.
- 6 The evidence corresponding to (1) above is found at paragraph 3 of Mr Medcraft's first witness statement:

In early 2015, Kris Townend, General Manager Ashley Thomsett, Administration Manager Kay Heald and I had a Business Review Meeting at the Kewdale Hotel. It was held at the hotel because Kris Townend did not want to be disturbed by work issues. We each discussed matters relevant to our work and also discussed the profit and loss figures. Kay had provided us with copies and the P&L Statement. At the end of the meeting Kris said that we were doing very well and he would give us a share of the profit. I don't remember whether any figures were discussed but we were happy. I do not recall what anyone said in response.
- 7 The evidence corresponding to (2) above is found at paragraph 3 of Ms Kay Heald's first witness statement:

In what I recall as being around the middle of May 2015, the four of us, Townend, Thomsett, Medcraft and myself had a general management meeting at the Kewdale Hotel followed by lunch. We sat outside and discussed the profit and loss figures for the year to date. I had taken a copy of the profit and loss statement to the meeting and we all went through it. The business was doing well and at the end of the meeting Kris said to all of us that we were doing very well and he would give us a share of the profit and said it would be 10 percent split four ways, so 2.5 percent each. We agreed and all shook hands with Kris.
- 8 In relation to (3) above there is no evidence in exactly these terms at all. Amounts paid in addition to ordinary salary were paid to Mr Medcraft in two subsequent financial years when the respondent made a profit, and not in the financial year it did not, but those payments were not 2.5% of the profit. Even on the best analysis of the figures for Mr Medcraft's claim it could only be said, quoting from paragraph 20 of the applicant's written closing submissions:

... the net bonus payments made to the applicant, Ms Heald and Mr Thomsett, when superannuation and tax were added to those figures were each approximately 2.5 percent of the MYOB generated net profit figure for 2014/2015 and the accountant adjusted net profit figures for 2016/2017.

- 9 In relation to the evidence at (1) and (2) Mr Townend gave the following corresponding evidence:

I recall that in or about May 2015, Ashley, Kay, Warren and myself went to the Kewdale Hotel.

I do not recall what the meeting was about or exactly what was discussed. I do recall that the meeting was informal and was not a formal management meeting.

Although I cannot recall exactly what was discussed, I do not believe I would have ever discussed profit sharing, bonuses, cash gifts or anything of that sort in such a public place with a number of employees present. At all times I have considered these were private matters and would have only ever discussed them one on one with an employee in private. The only time I can recall talking about any possible bonus payment with other Metlabs employees present was in the 2012 Accounting Meeting.

- 10 Mr Ashley John Thomsett, the other person present, gave evidence as follows:

I recall attending a meeting at the Kewdale Hotel in or about the middle of 2015. I do not recall exactly what was discussed. I recall that Kris Townend, Warren Medcraft and Kay Heald were present. I do recall that Metlabs' financial position and its profit and loss for that financial year was discussed. The meeting then moved onto more of an informal gathering where we had lunch and some drinks rather than a more formal management meeting. There was no discussion about any bonuses, profit sharing or anything like that.

- 11 Mr Medcraft only has Mr Townend saying, having seen the profit and loss for 2015, that "we were doing very well and he would give us a share of **the** profit" (*my emphasis*). Mr Medcraft says he cannot remember whether any figures were discussed. Alone that evidence could not possibly make out the claim.
- 12 Ms Heald's version has Mr Townend speaking about only the 2014-2015 financial year. She has him saying, having looked at the profit and loss as at May 2015 that year, "we were doing very well and he would give us a share of **the** profit" (*my emphasis*).
- 13 No one gave evidence that the promise was of the kind Mr Medcraft's claim alleges, that is a variation to the contract so that Mr Medcraft received 2.5% of any profits made into the future.
- 14 The evidence that the agreement stretched into the future is evidence that the amounts of subsequent payments made in excess of ordinary salary were 2.5% of the profit made in those years. But those payments were not 2.5% of profit. They were, even on the applicant's case, "approximately" 2.5% of the "MYOB generated net profit" in 2014-2015 and 2.5% of the "accountant adjusted net profit" for 2016-2017 and then only "when superannuation and tax were added."
- 15 The evidence, even taken at its highest for the applicant, cannot make out the claim.
- 16 I note here that Mr Medcraft asserts that the deal struck at the Kewdale Hotel replaced a deal he had struck with Mr Townend in the previous year. I do not understand the relevance of that evidence and in fact, if I was to accept it, it must, as a matter of common sense, do damage to Mr Medcraft's claim. The 2014 deal was significantly better than the Kewdale Hotel deal and yet Mr Medcraft attempts no explanation for accepting the later deal without demur.

- 17 I note also that there was some evidence about a meeting in June 2017 where it is said Mr Townend said he was “happy with how we were doing and that there would be bonuses this year”. Whether or not words to this effect were said by Mr Townend at that meeting is, in terms of what took place at the Kewdale Hotel, neither here nor there. Those words did not reference, let alone reiterate or reinforce, what the applicant and Ms Heald say was said at that Kewdale Hotel meeting. In fact, this evidence supports that Mr Townend revisited the issue of bonuses each year.
- 18 As a matter of fact, I find that the applicant’s case, even when taken at its highest, does not make out the claim.
- 19 Further, even if the evidence had all lined up, and the applicant had been paid exactly 2.5% of profit, with the profit being calculated in the same way and paid applying the same formula, this may have provided pause for thought on the facts but would not have changed the outcome. This is because there was nothing contractual about the agreement said to have been made.
- 20 There is nothing in the way of evidence of consideration attaching to the parties’ enjoyment of the bargain said to have been struck. There was no suggestion that the applicant gave up an opportunity elsewhere or did anything at all in response to, or reliance upon, the promise alleged to have been made. He did not go on working for the respondent in circumstances where absent the promise he may have left. There was no practical benefit provided to the respondent as a result of the promise said to have been made.
- 21 My view, on both the facts and the law, was that Mr Townend liked to, adopting the vernacular, ‘bung’ his employees some money from time to time. There was nothing predictable or formal about it. It was certainly not contractual.