



Précis Paper

Employer discretion in the payment of incentive payments

A discussion about the recent decision of *Subasic v Hewlett-Packard Australia Pty Ltd (2020)* ACTSC 2 relating to the failure of an employer to pay an incentive payments to an employee.

Discussion Includes

- Background
- Facts
- Issues for Court Consideration
- Was the sales program enforceable in contract?
- Hewlett-Packard's contractual obligations and rights
- Breach of Contract
- Damages
- Estoppel
- Interest
- Costs
- Significance of decision

Precis Paper

Employer discretion in the payment of incentive payments

In this edition of BenchTV, Ingmar Taylor SC (Barrister, Greenway Chambers, Sydney) and Bede Webster (Solicitor, Just Dispute Resolution, Malua Bay) discuss the recent decision of *Subasic v Hewlett-Packard Australia Pty Ltd (2020) ACTSC 2* relating to the failure of an employer to pay incentive payments to an employee.

NB: This Precis Paper was prepared by BenchTV staff, and does not necessarily represent the views of Bede Webster or Ingmar Tylor.

Background

1. The plaintiff was a sales employee who was employed by Hewlett Packard in the ACT to sell IT equipment. Her remuneration was part commission based.
2. In late 2009 - early 2010, the plaintiff had an extraordinary sales period. After the 6 month sales period ended, the company decided to cap the commission that she was eligible for in that period, denying her almost \$310,000. Hewlett-Packard said it had done so in accordance with the discretion it had under a policy.
3. She then commenced proceedings in the ACT Supreme Court and the company in its defence alleged that the agreement to pay commissions was not contractually binding. Earlier they had told her that even if it was, they retained a discretion under its policy to cap commissions.
4. The plaintiff was successful at first instance and got an order for the full amount of unpaid commission plus costs and part of the interest. The company appealed and Melinda (the plaintiff) cross appealed on the subject of interest.
5. Both the appeal and cross appeals were dismissed by the ACT Court of Appeal.

Facts

6. There was a significant delay between the time at which the compensation to be paid would become payable around June 2010 and when the proceedings commenced in 2016. This was largely because Melinda remained employed with HP for about 3 years after the events leading up to this matter she did not want to sue her own employer.
7. Proceedings were eventually commenced in mid 2016 shortly before any claim would have become statute barred.

8. Whilst employed at Hewlett-Packard, Melinda's remuneration included a base salary and on top of that, an incentive payment which was related to sales goals.
9. It was not uncommon for sales to take some time to filter through into the sales commission program and so whilst Melinda expressed some concern her commission wasn't being, the response from HP management was that commission would flow through eventually. This was accepted at face value by Melinda.
10. However, management decided to cap Melinda's commission payment, The term 'cap' did not exist under the post 2008 system, instead there existed a system of review which could result in a sales employee's commission structure being changed.
11. An initial common law Calderbank offer was put forward to Melinda to settle which was not accepted.
12. The matter also involved an equitable claim arising from the representations that had been made by management to Melinda that if she kept selling, the commission would be paid.

Issues for Court Consideration

13. There were a number of issues before the Court for consideration. These included:
 - a. Whether the sales program was enforceable in contract;
 - b. What were HP's contractual obligations and rights under the policy;
 - c. Whether HP could exercise any rights it did have retrospectively?
 - d. Whether HP's decision to cap commission was a breach of contract and if so, how should damages be calculated?
 - e. Was there a claim in estoppel based on representations being made by HP management?
 - f. If damages were proved, was interest to be calculable from the original date that the amount would have been paid or some other date in light of the fact there was a delay in commencing proceedings
 - g. What were the costs in circumstances such as this where offers had been made to resolve the matter at an early stage.

Was the sales program enforceable in contract?

14. Hewlett-Packard contended that whilst payment of the base remuneration was contractually and legally binding, payment of the commission was not. HP argued that Melinda's commission was an additional discretionary amount which was not contractually binding . The reason for this, HP argued, was that general conditions in Melinda's employment contract made it clear that the only legally obliged payment is her base payment.
15. An additional clause HP pointed to was a clause that explicitly stated that there are policies held by Hewlett-Packard that are not legally binding.

16. Fundamentally, HP argued, that these clauses meant that there was no legally binding obligation to make commission payments to Melinda and that they were at all times, discretionary payments.
17. One of the things that the primary judge and the court of appeal judge found difficult was the notion that Melinda would have been employed under a letter which told her how much remuneration they could expect to earn, but that a significant proportion was in fact not legally binding. As a result, the argument from Hewlett-Packard failed both at first instance and on appeal.
18. The record keeping by Melinda was very important as she was able to demonstrate that from 2006 onwards the sales letter had intended, on the facts, to contain enforceable terms and conditions applying to the sales commission.
19. The primary judge relied on the letter which formed part of Melinda's contract with HP and which contained words of the sort that you might expect to find in a contract such as 'if you accept this sales letter then you will be bound by its contents. The Appeal Bench agreed that there was an intention on both parties to have a legally binding commission arrangement.

Hewlett-Packard's contractual obligations and rights

20. Once it was accepted by the court that Hewlett-Packard was under an obligation to abide by its own commission policies, the next question before the court was what could they actually do under those policies? That is, can HP review the commission arrangement that it had with Melinda within a six month period and secondly, can it do so retrospectively?
21. Hewlett-Packard always asserted that it had a right to alter the commission and in particular, had a right to not approve commission payments as it saw fit. There was little doubt that Hewlett-Packard had a right to review. It was also stated clearly in the contract that HP had a more general right to cancel or alter its commission plan at any time.
22. This gave rise to the primary judge giving consideration to a NSW Court of Appeal decision *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357. This was a case where an employee was engaged under a contract which fixed a commission if they met performance criteria at the absolute discretion of the company. As it turned out no performance criteria was ever set and the employee was never paid anything. The employee then sued for non-payment of the bonus. When it came to the NSW Court of Appeal, the question arose as to in circumstances where no criteria had been set, what was the obligation.
23. In that case, the leading judgement of Justice Allsop was to the effect that whilst the bonus was said to be at the total discretion of the employer, there was nevertheless an obligation under the contract which could not be avoided arbitrarily and therefore damages for the lost opportunity were available upon proof that the employee had been someone who had performed at the requisite level.

24. In this case the primary judge similarly said the mere fact that Hewlett-Packard at all times retained a discretion to cancel or vary the policy didn't mean that it could decide not to pay where criteria had been met.
25. Secondly Her Honour's focus was on the policy itself and the fact that whilst it permitted review, it would require clear words to allow that to mean the imposition of a cap to decide retrospectively to not pay what had been promised to pay if the criteria had been met.
26. The Appeal Bench similarly took the view that there was an obligation up until the point that HP decided to cancel the policy, to apply the policy. It was entitled to alter the criteria by which commission was calculated, prospectively.
27. The primary judge and the Appeal Court then went on to ask whether the review could occur with effect that was retrospective effect. The primary judge said that there was nothing in the sales plan or policy that permitted a cap to be imposed retrospectively.
28. The Appeal Bench found similarly having already found that there was no possibility to impose a cap, they said further that whilst there was a right to alter metrics and the like, there was nothing in the policy to suggest that it could be done retrospectively as it wouldn't be in conformity with the commercial purpose of the contract, that is to incentivise Melinda to make sales.

Breach of Contract

29. Given the findings about what Hewlett-Packard could and could not do under the policy, to impose a cap was a breach and to do so retrospectively was a breach of contract.
30. The primary judge relied upon it to conclude that it meant that the application of the discretion to cap commission was an application that had been done arbitrarily and applying *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357.

Damages

31. The Court has found that the decision to retrospectively prescribe a commission payment cap was in breach of the obligation of Hewlett-Packard to apply its policy in circumstances where the policy could not be done in a manner to impose a cap.
32. The primary judge held that Melinda was entitled to the amount of money and used language which seemed to indicate that she was satisfied that it was a debt. However even if it was not a debt, in the calculation of damages the same result would apply. The Court of Appeal did not embrace the debt argument but rather treated this case as a loss of opportunity case involving damages. Ultimately however, they reached the same conclusion.
33. Both had to deal with the least burdensome principal argument and that is an argument which is raised by defendants when there is an alternative case.

34. Hewlett-Packard argued that they had a right under the policy to review and not approve payments at their discretion. On the least burdensome principle, Hewlett-Packard argued that they had that right and therefore the court should not award any damages.
35. In response to this argument, both the primary judge and the appeal bench found that Hewlett-Packard were never going to change the metrics in the 6 month period.
36. In both cases they found that any review was going to take place once the six months was over. The Appeal Bench went further and said that there was material before them to help reinforce that HP were never going to do this during the six month period.
37. There were some strongly worded emails from Senior Management to Melinda imploring the need for HP to deliver every last sale. Against that background, the notion that Hewlett-Packard would have, during a sales period, alter people's commission arrangements in a way that may disincentivise them would be inherently unlikely.

Estoppel

38. Representations were made to Melinda during the second half of the 6 month period that the commission that she was earning would be paid. She gave evidence that she relied on those representations to keep selling and bring forward deals.
39. The primary judge determined that she did not need to determine whether the representations were made.
40. Nevertheless, the estoppel argument did not succeed as there was not a reliance by Melinda to her detriment on those representations and fundamentally, Melinda was contracted to make those sales anyway and to close the deals anyway. As an employee she couldn't do anything other than comply with her employment obligations.

Interest

41. Factually, Melinda had for various reasons, including a lack of desire to sue her employer, not commenced proceedings in 2010 or 2011 until just before the six year period expired.
42. The primary judge denied the application for pre-judgment interest from when it was claimed from the Australian Financial Year, which was the period of time that Hewlett-Packard had to make up any payments to Melinda (interest was claimed from 1 July, 2010). This was denied.
43. It was deemed by Her Honour that there had to be an explanation for why there had been such a long delay; what prejudice to Hewlett-Packard of not being on notice that a claim was going to be made. The primary judge used her discretion to only allow interest from the filing of the Statement of Claim.
44. On appeal, they tried to argue that even though it was a discretionary decision, there was a failure in application of principle by Her Honour in simply rejecting the full period for interest purposes simply because there had been a delay in commencing proceeding

45. Reliance was placed on a line of authority from *Kalls Enterprises v Baloglow* (2007) NSWCA 191 which stated as a matter of principle that delays are not a reason to delay or refuse interest. The purpose of interest is to compensate a person for money due.
46. The mere fact that there has been a delay in the proceedings commencing should not prevent the plaintiff for being compensated for not having the money they should have had from the earlier date unless something had caused prejudice to the defendant because of the delay.
47. However, Her Honour tended to rely more on the authority of *Robert John King, Long Paddock Pty Ltd v Stelmag Pty Ltd* [2007] ACTCA which noted that the conduct of the plaintiff in delaying bringing proceedings may well have an impact on interest.
48. The Appeal Bench stated that it was a matter for Her Honour's discretion and it was open to her to decide which approach to take. Her Honour put some emphasis on the fact the Hewlett-Packard was not put on notice that she was demanding that money until shortly before the proceedings commenced.

Costs

49. Costs at first instance turned in part on offers that were made. There was an offer of compromise on the Calderbank terms to HP. An offer of compromise under the ACT Civil Procedure Laws was then made.
50. When it came to the costs decision, both offers of compromise were put forward as providing for the special costs order. In regard to the Calderbank offer her Honour rejected that, was that it did not sufficiently express the factual and legal basis on which Melinda intended to proceed.
51. The order that was made was an order that effectively gave Melinda almost the entirety of her costs. The Appeal Bench also awarded costs although discounted them by 20% on account of the cross appeal failing.

Significance of decision

52. It is not limited to the law in the ACT as it dealt with a superior level Supreme Court decision which sets some things of potential relevance in contract cases involving commission payments that would have application outside of the ACT.
53. The High Court has taken the view that on matters of common law or matters on uniform legislation throughout Australia, a decision of an intermediate Court of Appeal should be followed by any other lower level court *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22.

BIOGRAPHY

Ingmar Taylor SC

Barrister, Greenway Chambers, Sydney

Ingmar Taylor SC was called to the Bar in 1997 and was appointed Senior Counsel in 2012. He specialises in employment and industrial law, including all matters arising under the Fair Work Act. Ingmar is the Editor of the Industrial Reports and the specialist Industrial Law Editor for the NSW Law Reports. Since 2012, Ingmar has been the Chair of the Law Council of Australia's Industrial Law Committee.

Bede Webster

Solicitor, Just Dispute Resolution, Canberra

Cases

Subasic v Hewlett-Packard Australia Pty Ltd (2020) ACTSC 2

Silverbrook Research Pty Ltd v Lindley [2010] NSWCA 357

Kalls Enterprises v Baloglow (2007) NSWCA 191

Robert John King, Long Paddock Pty Ltd v Stelmag Pty Ltd [2007] ACTCA 2

Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22