

EMPLOYEE AWARDED SIGNIFICANT DAMAGES AS A RESULT OF EMPLOYER'S REPUDIATORY CONDUCT

29 NOVEMBER 2017 | EMPLOYER'S LIABILITY

An employee is entitled to damages when an employer repudiates an employment contract. When assessing damages, the court will compare the financial position the employee would have been in if the employer had not engaged in the repudiatory conduct against the employee's financial position upon termination of his employment.

IN ISSUE

- Whether an employee is entitled to damages as a result of the employer's repudiation of the contract of employment.
- Assessment of employee's entitlement to damages.

THE BACKGROUND

On 1 November 2012, Mr Anthony Loone entered into a contract of employment with Crowe Horwath (Aust) Pty Ltd (CHA) in terms of which he was employed as a Managing Principal (the Contract).

The Contract included terms that provided for a bonus entitlement based on "*consideration of various performance parameters including but not limited to...personal performance, the performance of the Group and the broader economic conditions*".

By 30 June 2016, Mr Loone had facilitated the acquisition by CHA of Davey Financial Group (DFG), an accounting firm (DFG acquisition).

Mr Loone informed CHA that it had repudiated the Contract by:

- failing to include the DFG acquisition in the bonus pool;
- proposing the introduction of a new incentive model whereby CHA would defer payment of 20% of an employee's annual bonus for a three year period; and
- unilaterally reducing his responsibilities to a significant degree as a result of a restructure to its management processes (Conduct).

On 12 July 2016, Mr Loone informed CHA that he accepted its repudiation and therefore terminated the Contract with immediate effect.

Mr Loone then issued proceedings in the Supreme Court of Victoria (the Court), seeking

damages for CHA's breach of the Contract by engaging in repudiatory conduct.

THE DECISION AT FIRST INSTANCE

The Court upheld Mr Loone's claim and CHA appealed.

The Decision on Appeal

The Court of Appeal dismissed CHA's appeal, confirming that CHA engaged in repudiatory conduct and referred the matter to the Court to assess Mr Loone's entitlement to damages.

DAMAGES

CHA argued that Mr Loone was entitled to his annual bonus for the 2016 financial year, and an additional amount of \$50,000 for the DFG acquisition.

Mr Loone submitted that, but for CHA's repudiatory conduct, he would have remained employed by it for a period of 12 months and that damages should be calculated on that basis.

CHA submitted that:

- the employment relationship would have broken down upon the implementation of the management process restructure; and
- damages should be assessed on the basis that Mr Loone's employment would have been terminated because of the restructure and that he would have received six month's pay in lieu of notice.

In assessing damages, the Court held that a comparison should be made between the financial position Mr Loone would have been in if CHA had not engaged in the repudiatory conduct against the financial position Mr Loone would be in upon termination of his employment with CHA. The Court considered such an assessment of damages was consistent with *"the well-established principle that a court should look to the facts rather than proceeding upon an improbable factual hypothesis"*.

The Court therefore awarded Mr Loone \$423,445 in damages, which included payment of 12 months salary and superannuation as well as his bonus entitlements (in accordance with the terms of the Contract).

IMPLICATIONS FOR YOU

This case exemplifies that, as always, care should be exercised when drafting an employment contract. It is important that an employer's current and future intentions (especially with respect to payment of bonuses/incentives) are fully particularised and captured in the terms of an employment contract.

An employer should carefully consider the terms of an employment contract before making any bonus payments to an employee or changing the scope of an employee's duties, to ensure that such conduct is carried out in accordance with the terms of the employment contract.

[Crowe Horwath \(Aust\) Pty Ltd v Loone \(No 3\) \[2017\] VSC 548](#)

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