

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Michael Carter (applicant)
AND	PAE (New Zealand) Limited (respondent)
REPRESENTATIVES	Phillip Drummond for the applicant Jenny Gibbs for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Palmerston North, 8 December 2005
FINAL SUBMISSIONS	16 December 2005
DATE OF DETERMINATION	9 January 2006

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Mr Carter asks the Authority to resolve a dispute as to the interpretation of a one-off bonus provision in his employment agreement. In particular, he asks whether the payment criteria have been met and, if not, when is the bonus payable – statement of problem (SOP) received on 15 August 2005. Alternatively, he claims the Company has altered one or more of the conditions of his employment to his

disadvantage by way of an unjustified action. He seeks payment of the bonus, interest on the same and costs.

2. The Company says the bonus is not payable until the criteria have been satisfactorily met. It also denies altering the applicant's terms and conditions to his disadvantage by way of an unjustifiable action – statement in reply received on 5 September.
3. Mediation did not settle the parties' employment relationship problem. They subsequently agreed to a one-day investigation on Thursday 8 December. Witness statements and documentary evidence were usefully provided in advance. Efforts during the investigation to settle the problem were also unsuccessful. Agreement was reached on a timetable for final submissions.

Key Facts

4. I am satisfied from the evidence disclosed during the investigation that the key facts can be summarised as follows.
5. The applicant was a shareholder and director of Central Property Services Limited (CPS). CPS' principal asset was Housing NZ maintenance contracts for the greater Manawatu, Wanganui and Taranaki regions, involving approximately 8,500 properties and worth \$12 million p.a.
6. On 1 January 2004 the respondent purchased CPS, with settlement taking place in April of that year. At the same time the applicant entered into an employment agreement with the Company, which was signed off on 28 April. Mr Carter's prime function was to assist in the retention of the existing Housing NZ contracts when they came up for retender. Mr Carter's employment agreement included the following bonus provision:

One-off Bonus

The (applicant) shall receive a one-off bonus of \$100,000 on successful retention of the existing Housing New Zealand contracts at the retender in

2005. This will be subject to achieving a minimum 5% profit margin before any Head Office or finance charges.

If (the applicant) was made redundant or dismissed in the 18 month period before 30 June 2006, (the applicant) would still be entitled to the payment, provided the criteria in the previous paragraph are satisfied.

(bonus provision 2, Schedule 2, SOP)

7. On 30 March 2005 the Company successfully retendered for the Housing New Zealand contracts. The tender provided for a minimum 5% profit margin before any Head Office or finance charges. On the same day, and by email, the applicant claimed the one-off bonus. Shortly afterward, on 5 April and by email, the Company declined Mr Carter's claim.
8. The parties underwent mediation on 18 May, but the matter was not resolved. On 29 July Mr Carter was made redundant. He does not dispute the circumstances of his redundancy. He filed his statement problem in respect of the disputed bonus, in the Authority on 15 August. Other litigation proceedings are or have been underway but they are not relevant to this investigation.

Parties' Positions

9. Reduced to its essence, Mr Carter's position is that he was entitled to the one-off bonus immediately at the point that Housing New Zealand renewed its contract in 2005. He says this is so because of the wording of the disputed bonus provision and because the figures set out in the contract successfully retendered for ensured, on paper, that the Company would achieve a predicted minimum 5% profit margin before any Head Office or finance charges. The contract would, on its face, achieve the stipulated 5% minimum profit margin requirement.
10. Mr Carter says that, since winning the tender, the Company has embarked on a course of conduct which left him with no control over whether the margin would be achieved. New rates of pay etc have been added which will have a corresponding effect on overheads and thus reduce the profit margin. The applicant says the

Company has or will unjustifiably alter one or more of the conditions of his employment to his disadvantage to ensure he is not eligible for the bonus.

11. The applicant says that, because the wording is ambiguous, regard should be had to the parties' intentions. He also says that, had he known of the Company's stance, he would never have entered into an employment agreement on that basis as it was never his intention to stay with the respondent on a long term basis and because it would not be within his ability to control whether the 5% margin was achieved, either in his absence or as a result of changes in staffing personnel.
12. The Company's position is equally straightforward: it says that the proof of the pudding lies in the eating and therefore some time is required (in the life of the 3-year retendered contract) before the Company can be sure – from the actual as opposed to predicted figures – that the 5% profit margin has been realised. The Company calculates the required period to be either the time up until July 2008, i.e. at the end of the contract, or 31 December 2006, i.e. after the completion and accounting of the Company's financial year.
13. It also denies altering any of Mr Carter's conditions of employment to his disadvantage by an unjustified act.
14. The respondent says that words agreed to by the parties are clear and unambiguous. It says therefore, that when interpreting the provisions of an employment agreement, normal principles of contractual interpretation should apply including having regard to the background matrix of fact at the time the contract was entered into: *Toll New Zealand Consolidated Limited v Rail & Maritime Transport Union Inc* [2004] 1 ERNZ 392.
15. The one-off bonus is not payable to Mr Carter unless two criteria are satisfied: first, the tender had to be successfully retendered. Second, the contract has to actually achieve, not potentially achieve, the identified profit. Whereas the first part of the criteria has been met, the second has not: the applicant is therefore not entitled to payment of the bonus.

16. The respondent's interpretation of the disputed bonus provision is, it says, reinforced by the second part of that provision, inserted at Mr Carter's request. It makes clear that, following a successful retender, should the applicant be made redundant or dismissed in the 18 month period before 30 June 2006, he would still be entitled to payment of the one-off bonus "*provided the criteria in the previous paragraph are satisfied*".
17. The absence of a specific timeframe as to when payment should be made (assuming the criteria were met) does not ensure that the applicant's interpretation is correct. Even if the words are not clear and are ambiguous (which is denied) then it is submitted that the background matrix of facts at the time the agreement was entered into, including the fact that the Company has only ever made payments of bonuses to other employers when a contract has been both retained **and** achieved an actual profit, supports the Company's position, reliant as it is on commercial reality as well as past practice. It is logical and reasonable therefore that the contract would have to operate for at least one year before the level of profitability could be reliably ascertained. This was so because the contract itself had seasonality factors as well as a performance based component, with possible penalties applicable after the first six months of operations of the contract.
18. The Company denies acting unjustifiably toward Mr Carter.

Discussion and Findings

19. I find against Mr Carter's claim that he is entitled to payment of the one-off bonus on 30 March 2005 for the following reasons.
20. It is well established that the words of the disputed provision can, and must be, construed in their grammatical and ordinary sense unless that would lead to an absurdity or a repugnant or inconsistent outcome.
21. It is also well established that the background matrix or contextual circumstances must be taken into account in determining the parties' true intention.

22. The parties' intention in respect of the disputed bonus provision was not, I find, that payment would be made on the date of a successful retender **and** by way of predictive profits. Instead, I am satisfied that it was their intention to pay the bonus, subject to meeting the specified criteria, at a later date.

23. The parties' intention is made clear by three features in the disputed bonus provision. The first is where it states:

*(Payment) will be **subject to** achieving a minimum 5% profit margin before any Head Office or finance charges.*

(emphasis added)

24. Because there is no evidence of the parties adopting anything other than a plain or commonsensical approach to their employment agreement negotiations, it is appropriate to turn to the Concise Oxford Dictionary (10th ed.) in respect of its definition of the word, *subject*. It defines the adjective *subject to* as,

1 likely or prone to be affected by (something bad). 2 dependent or conditional upon. 3 under the control or authority of.

25. The adverb of *subject to* is defined as:

Conditionally upon.

26. In other words, it can be seen from the use of the words "*subject to*" that the parties mutually agreed to measure profitability at a date later than that of the successful retender. When that would happen is not expressly stated. Nonetheless, the parties clearly intended or accepted that a period of time was required by which to measure an actuality, rather than a predictive outcome.

27. The second is where it states:

*(Payment) will be subject to **achieving** a minimum 5% profit margin before any Head Office or finance charges.*

(emphasis added)

28. The same dictionary defines the verb “achieve” as *to bring about or accomplish by effort, skill or courage*.

29. This plain meaning approach is reinforced by regard to a third provision in the disputed bonus provision (imported at Mr Carter’s initiative), where it states:

*If the (applicant) **was** made redundant or dismissed in the 18 month period before 30 June 2006, the (applicant) would still be entitled to the payment, provided the criteria in the previous paragraph **are** satisfied.*

(emphasis added)

30. The word *was* is applied in the past tense, whereas *are* is applied in the future. In other words, actual not predictive profit is to be measured

31. Read together, these provisions make clear that the parties clearly intended that – except in a redundancy or dismissal situation – Mr Carter’s entitlement to the bonus would be measured at some unspecified point on the basis of actual profits, rather than predictive, profits. It is not clear when that might be. A good faith exercise, by both parties, is required. But it would not be open to the Company to attempt to unilaterally impose 31 December 2006 or July 2008 as the date to determine eligibility.

32. It follows from the above that, in the event of Mr Carter’s redundancy or dismissal, the parties intended to measure actual profitability at that time unless it was not possible to do so.

33. What can be clearly seen from the above, however, is that the parties clearly and expressly contracted to measure profitability following the successful retender.

34. Because I am satisfied that the words of the disputed provision had a plain and unambiguous meaning when the parties used them it is unnecessary to have regard to the parties’ conflicting recollection of discussions leading up to their signing off

the disputed bonus provision or to their differing interpretation of notes and records of the same.

35. Counsel for the applicant, Mr Phillip Drummond, properly conceded during the investigation that Mr Carter's primary argument was a claim for the one-off bonus at the time of the successful retender as there was little evidence to support the claim his conditions of employment had been altered to the applicant's disadvantage by way of an unjustified action. Accordingly, that claim fails.

Determination

36. I find against the applicant, Mr Michael Carter's claim that he was entitled to a one-off bonus of \$100,000 on 30 March 2005.

37. I also reject the applicant's alternate claim that the respondent, PAE (New Zealand) Limited, altered one or more of his conditions of employment to his disadvantage by way of an unjustified action.

38. In respect of the question of when is the bonus payable, I find that the parties committed themselves, on a good faith basis, to measure actual profit at a time when it is possible to measure actual profit. Given the respondent's position, this must be no later than 31 December 2006.

Costs

39. As requested by the parties, costs are reserved.

