

“3. Western Mailing Ltd and Western Mailing Wellington Ltd agrees [sic] to calculate the 2009 bonus in accordance with Schedule 2 of Allan Craigs [sic] Individual Employment Agreement. Western Mailing Ltd and Western Mailing Wellington Ltd acknowledges [sic] that for the purposes of settlement it [sic] will pay this bonus based on a percentage of 5% if the increase between the net profit before tax is up to \$500,000.00: 7.5% if the increase is more that \$500,00.00 [sic] and less than \$1million: 10% if the increase is more that \$1 million. Payment of the bonus will occur after the audited accounts for the year ending 31 March 2009 are available and the bonus figure agreed between the parties.....”

Subject to Clause 3 herein, this is full and final settlement of all claims that Allan Craig has or may have against Western Mailing Ltd and Western Mailing Wellington Ltd or any Directors, Board of Advisors or employees of Western Mailing Ltd and Western Mailing Wellington Ltd in respect of his employment or the termination of his employment.”

[4] The respondents says that following preparation of the relevant accounts, their accountant calculated Mr Craig’s performance incentive entitlement for the year ended 31 March 2009 and found it to be nil. The respondents say therefore that they have complied with Clause 3.

[5] Mr Craig lodged his application for compliance in May 2010. At that stage, his primary goal was to obtain financial information from the respondents so that he could check the basis of the assertion that the incentive owing was nil. His position was that clause 3 obliged the respondents to provide him with this information. The respondents declined to do so. Thereafter, as I understand it, the parties made efforts to resolve the matter before it was referred to me in August of that year.

[6] The parties provided witness statements and submissions and a short investigation meeting was held in December 2010. It was agreed that the respondents would provide answers to interrogatories thereby making available some, but not all, of the information Mr Craig sought. This process was completed in early 2011. After Mr Craig had reviewed the information which had been provided, Mr Tee advised that his client was not reassured. He remained unconvinced that a nil balance was owing for the year ended March 2009 and wanted both to see the audited accounts and to have the Authority conduct a full investigation into what bonus was payable.

[7] An amended statement of problem was then lodged. It added claims that the matter gave rise to a dispute, a disadvantage grievance and a claim for arrears of

wages. In their reply to the amended statement of problem, the respondents addressed the new claims by saying:

- i. the parties had entered into a full and final settlement of all claims which precluded the applicant from raising any sort of claim (grievance, dispute or arrears);
- ii. a grievance was not raised within the 90 day period and the respondents did not consent to the late raising of a grievance, and
- iii. in any event there was no substantive basis to the disadvantage, dispute and arrears claims.

[8] It was agreed between Counsel and the Authority that the next step would be an exchange of submissions on the first of these issues (accord and satisfaction). I then met with Counsel on 26 May to hear them speak to those submissions. They were able to advise me that they had reached agreement on some limited issues in a way that will enable the Authority to establish a process by which the matter may finally be disposed of. The outcome is that they have agreed that the following points should be incorporated into a consent order of the Authority.

[9] The parties confirm their shared understanding that:

- i. the Terms of Settlement, having been signed by a Mediator in accordance with s. 149, are binding and enforceable;
- ii. although the Respondents remain of the view that the settlement precludes the Applicant from bringing a grievance, dispute or arrears claim, they accept that the Authority has jurisdiction to enforce clause 3 of the settlement and therefore to investigate and determine an application for compliance with clause 3;

- iii. the Applicant's position is that the original application for compliance was not limited to an application for provision of information, but to enforce compliance with clause 3 in its entirety, and that application remains live;
- iv. the Respondents accept that in proceeding to investigate an application for compliance with clause 3 the Authority would first need to determine whether it has been breached which would require an assessment of what bonus was payable, pursuant to Schedule 2 of the Employment Agreement, for the year ending March 2009;
- v. that inquiry will require the Authority to have regard to the audited accounts;
- vi. for the avoidance of doubt the Applicant will formally confirm that an application for compliance with clause 3 remains on foot, and
- vii. once that has been done a process will be set for the investigation into the application for compliance. This will include a mechanism for the Authority to have access to the audited accounts while addressing the Respondents' concerns regarding confidentiality.

Yvonne Oldfield

Member of the Employment Relations Authority