

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Ian Gardner-Lee (Applicant)  
**AND** B.O.C. Limited (Respondent)  
**REPRESENTATIVES** Ian Gardner-Lee in person  
Anthony Drake for respondent  
**MEMBER OF AUTHORITY** Alastair Dumbleton  
**INVESTIGATION MEETING** 2 March 2005  
**DATE OF DETERMINATION** 8 March 2005

**DETERMINATION OF THE AUTHORITY**

Employment relationship problem

[1] The essence of Mr Gardner-Lee's employment relationship problem is a complaint that his former employer BOC Ltd (referred to as "BOC") failed to pay a bonus to him correctly. Under an incentive scheme implemented by the company for the benefit of its employees, they were eligible to receive bonus payments. Mr Gardner-Lee claims however that the level of those he received did not recognise the selling work that was part of his job.

[2] Using mediation Mr Gardner-Lee and BOC have tried to resolve this problem but have been unable to. An investigation therefore became necessary and for that purpose the Authority has met with the parties and their witnesses. Evidence has been taken from which I make the findings below.

[3] In May 2000 Mr Gardner-Lee was appointed by BOC to a position described as Operations Coordinator/Sales Specialist LPG. He had previously worked in a similar role for Enerco before that company was acquired by BOC in 1999. Mr Gardner-Lee remained employed by BOC until the beginning of April 2004, when he was made redundant.

[4] At material times BOC operated a comprehensive scheme to financially reward the individual contribution employees had made to the success of BOC's gas business in the 12 month period commencing 1 October each year. An employee's contribution was measured according to his or her personal performance and achievement of specified targets. Other variables were in respect of the performance of the company on a regional, national and business unit basis. The explanatory material about the scheme as supplied to employees contained advice that payments under it remained at the absolute discretion of the company. Those who qualified for payment received them at six monthly intervals during each year, in May and November.

[5] The BOC incentive scheme also had a number of reward levels which differed according to the kind of work the employee had been appointed to perform. In the 2003/2004 year the maximum reward at the highest level – Executive – was \$21,333 and at the lowest level - Support/Frontline - it was \$1,666.

[6] The two reward levels under the scheme that are relevant to this case were Sales – maximum \$9,000, and Supervisory – maximum \$6,533. At material times, including the 2003/2004 year, BOC had assessed Mr Gardner-Lee at the Supervisory level and had paid him accordingly. In 2001/2002 he received as the total of two payments about \$5,460, and in 2002/2003 about \$3,615. There is no dispute that the payments he received were correct for the Supervisory level and for his performance as appraised, however Mr Gardner-Lee says the level itself was incorrect and that he should have been measured at the Sales level which had a higher maximum and a potential for additional payment even above that. He says that sales work was a significant component of his work, as indeed his original job title of Operations Coordinator/Sales Specialist LPG suggests.

[7] That title was apt, for during Mr Gardner-Lees employment with BOC as well as coordinating operations he carried out sales work, I find. There is no dispute about this. Sales in his area increased noticeably and this he says was attributable to his efforts. He claims however that his work was not rewarded at the appropriate level under the incentive scheme, no doubt because he had not been formally classified as a Sales Specialist.

[8] A difficulty with this claim is that if it is upheld Mr Gardner-Lees financial loss cannot now be easily quantified because he was not set key performance indicators relating to sales work and consequently his level of attainment in that regard went unmeasured. His KPI's were set for his work as a coordinator rather than as a Sales Specialist. It is also possible, BOC says, that if he had been set sales KPI's his performance against those may not have resulted in any greater incentive payments than those he received at the Supervisory level.

[9] In relation to the exercise of placing him at the correct level of reward within the incentive scheme I conclude from the evidence that Mr Gardner-Lee was unreasonably and unfairly treated by BOC. This was in two respects in particular. First, BOC I find substantially changed his written job description without consulting him or even telling him it had done so. I find that the changes were made in 2001 but that the first Mr Gardner-Lee knew of them was in 2004 after he had finished his employment and had requested information to pursue this claim. The job description was significantly changed by narrowing the title of his position to Operations Manager only and by excluding reference to selling or sales as a major component of his job. While the job description as “reviewed” on 23 October 2001 does refer to accountability for “growth of sales revenue” which was to be achieved by “facilitat(ing) sales opportunities”, the emphasis was shifted to management responsibilities rather than sales.

[10] Mr Gardner-Lees evidence that he was unaware of the changes to his formal position description until after he had finished with BOC, was contradicted by Mr Ian Macefield his manager who said he had emailed a copy of the changed document to Mr Gardner-Lee and had discussed the changes at about the time they were made. There is no other evidence to corroborate Mr Macefields statement. I accept that Mr Gardner-Lee honestly believes at least that it is not correct. Also I reject the possibility that he may have simply forgotten what happened, and therefore I reject Mr Macefields evidence on this point.

[11] It is clear to the Authority that having his role properly recognised by BOC is not something Mr Gardner-Lee became actively interested in only after his job ended but is a matter he raised, as Mr Macefield said, in 2002 if not earlier. If he had been told about the change to his job description then, he is likely to have expressed some dissatisfaction or taken it further and he would now be

able to still remember doing so. Although Mr Gardner-Lee has pursued this claim with considerable persistence and determination, I do not consider he would try to waste the time of everyone now by repeatedly pretending in his recent letters to BOC and in his evidence that he had never before seen the job description BOC sent to him when disclosing, at his request, general material from his personnel file.

[12] The job description was directly relevant in assessing the level or category under the scheme that best fitted his work. When Mr Gardner-Lee asked for reconsideration of this the General-Manager, Ms Susan Dale, who reviewed the classification must have been influenced by the Position Description and because of its contents must inevitably have decided that the job had no significant or relevant sales content. I am reinforced in my view of what actually happened by the undisputed evidence that the personnel file had on it other important documents that Mr Gardner-Lee should have been shown and consulted about but was not. These were his performance appraisals carried out by Mr Macefield. Like the Position Description, the appraisals contained information that was relevant to determining his bonus under the incentive scheme. This is the second aspect of unfair and unreasonable treatment I find was given by BOC to Mr Gardner-Lee.

[13] I conclude that in its administration of employment matters BOC cut corners and did not involve Mr Gardner-Lee in decision making about his job description and the appraisal of his performance. BOC unreasonably excused itself from following its own written procedure requiring it to make a "formal appraisal" of each of its employees at least once a year. BOC's published Performance Management Toolkit required amongst other things that the performance appraisal each year was to be "face-to-face" and that the documentation of it was to be signed by the employee and by the manager. Any comments by the employee were also to be signed. I find that over several years such appraisal as was made of Mr Gardner-Lee was done without his input or knowledge. He only found out about the documents on his file after he left BOC. In these circumstances I do not consider that what BOC acknowledges was merely an "informal" appraisal can be regarded as a true appraisal at all. I also reject Mr Macefield's assertion that Mr Gardner-Lee suffered no disadvantage by being excluded from the formal performance appraisal procedure. It may be that with input from Mr Gardner-Lee as required under BOC's own procedure, his appraisal would have been more favourable and consequently would have attracted a higher bonus at either the level of Supervisory or of Sales

#### Determination

[14] I conclude that the entire exercise carried out under the incentive scheme in relation to Mr Gardner-Lee was significantly flawed because of BOC's failure to get his input into the changes made to the Position Description and his annual performance appraisal. There has I find been a breach of the term implied into an employment agreement that an employer will act fairly and reasonably towards an employee in its dealings. Mr Gardner-Lee is justified in complaining that Mr Macefield strung him a line as a response to concerns he raised about his bonus and classification in that regard. Mr Macefield deliberately misled him and fobbed him off about having his concerns properly addressed. While I accept that Ms Dale reviewed in good faith Mr Gardner-Lee's classification, she obviously had to rely on what Mr Macefield told her about the position and on the dubious job description unilaterally created by Mr Macefield. It is hardly surprising she did not change the job classification, but I consider it likely that she has relied on incorrect information supplied by Mr Macefield.

[15] Mr Gardner-Lee I find has been unjustly deprived of the chance or opportunity under the scheme of being awarded a higher bonus than he received in each of the years in dispute. Although it cannot now be determined what bonus he would have got, that should not prevent him from having a remedy to resolve the employment relationship problem that I find BOC was responsible

for creating.

[16] The remedy of damages is able to be awarded by the ordinary civil courts and consequently is available to the Authority as part of its extended jurisdiction under s.162 of the Employment Relations Act 2000. Damages for loss of chance or opportunity is a remedy which has been applied by the Authority before; see *Dorset v Chemcolour Industries (NZ) Ltd* AA, unreported dated 8 April and 2 June 2004, 117/04 and AA 117A/04.

[17] Therefore at this stage, as discussed with Mr Gardner-Lee and Mr Drake for BOC, I now refer back to them the question of quantum of monetary compensation that is to be paid to Mr Gardner-Lee to remedy his problem. Hopefully they will be able to agree upon a sum to compensate him for his loss. BOC is of course entitled to set-off the bonus payments it gave to him over the years in question.

[18] Mr Gardner-Lee has not incurred legal cost in his successful battle, although there may be some reasonable travel or similar expenses he may be entitled to.

[19] If the parties are unable to resolve the outstanding issue of quantum the Authority will do so upon being advised by Mr Gardner-Lee of that situation.

A Dumbleton  
**Member of Employment Relations Authority**