

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Murray Lawrence David Ross
AND Compass Group New Zealand Limited
REPRESENTATIVES In person
David France, for Respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 11 October 2006
SUBMISSIONS RECEIVED 18 and 27 October 2006
DATE OF DETERMINATION 28 November 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Ross was a long serving senior employee of Compass Group New Zealand Limited ("Compass Group") until his resignation effective 8 January 2006. Mr Ross has requested that the Authority determine whether the bonus payment he received in November 2005 from Compass Group should have been included in the calculation of his holiday pay entitlements which were paid out when his employment ended.

[2] Compass Group says that Mr Ross' holiday pay entitlement was correctly calculated under the provisions of the Holidays Act 2003 and that the bonus payment ought not to have been included in that calculation because it was a discretionary payment.

[3] The first issue for the Authority to determine is the nature of the bonus payment – whether it was a discretionary payment or one made as a consequence of Mr Ross' terms of employment. Once that issue is determined how such a payment should be dealt with under the Holidays Act 2003 for the purposes of calculating holiday pay entitlements is to be considered.

The nature of the bonus payment

[4] Mr Ross says the bonus payment is not a discretionary payment. He relies on a memorandum dated 31 March 2004 from Neil Bryant, Compass Group's financial controller, which advises that Mr Ross' bonus payment was not discretionary and that the calculation of his holiday pay entitlement for the preceding three years would be adjusted to include bonus payments received.

[5] On 6 July 2005 Mr Ross entered a new individual employment agreement with Compass Group. For the purposes of this determination the relevant provisions of that document are:

2. **Remuneration**

...
At the absolute discretion of the Company you may be invited to participate in an incentive scheme based on achievement of Key Performance Indications (KPI).

[6] This employment agreement was presented to Mr Ross accompanied by a covering letter. This letter explained that unspecified amendments to the Employment Relations Act 2000 required an update of individual employment agreements, advised Mr Ross that acceptance of the proposed employment agreement would set his terms of employment, that he was entitled to seek independent advice and requested that Mr Ross raise any discrepancy between his current employment agreement and that proposed. Megan Price, Compass Group's HR manager drafted the new employment agreement. She said the provision dealing with the bonus scheme reflected the incentive scheme which had been implemented and which Mr Ross had first participated in 2004.

[7] Mr Ross signed and returned the proposed agreement on 6 July 2005. At the investigation meeting Mr Ross accepted that this was the relevant employment agreement. I find that the employment agreement was entered in accordance with the parties' good faith obligations.

[8] The bonus scheme under consideration here is the 2005 incentive scheme which Mr Ross participated in and for which he received a bonus payment of \$28,350 gross on 27 November 2005. This incentive scheme is titled "*Pacific Yes 2005 Senior Management Incentive Plan Operations Murray Ross*" and includes:

"PLAN RULES & ADMINISTRATION

...

- The Company reserves the right in its sole discretion to revise, supplement, or discontinue all or part of the programme at anytime without notice.
- The programme is discretionary and grants no employment rights whatsoever.
- The Company has sole and absolute discretion in regard to any payments"

[9] Mr Ross had a copy of this document when he was offered the scheme.

Discussion

[10] Mr Ross makes the following arguments in support of his claim that the bonus payment is not discretionary for the purposes of calculating holiday pay entitlements:

- (i) the discretion provided in the 2005 scheme applies only to Compass Group's ability to manage the scheme; and
- (ii) the 31 March 2004 memorandum stands and any subsequent bonus scheme must be read against it.

[11] With regard to the first argument the rules of the scheme, as set out above, plainly state that participation in the scheme and any payment under the scheme is discretionary and that that discretion resides with Compass Group. This view is reinforced by the clear statement in the rules that no employment rights arise from the scheme. For these reasons I do not accept Mr Ross' argument that the employer has a discretion to set the terms of the scheme and manage the scheme but no discretion not to pay a bonus once targets set under that scheme have been met.

[12] I accept Compass Group's explanation that the 31 March 2004 memorandum was based on an erroneous view of what constituted a discretionary bonus. The explanation contained in the memorandum does not make sense – "*Bonuses can be either an [sic] "incentive" or "discretionary".*" However, it is entirely understandable that Mr Ross should accept on its face this statement as to the nature of his bonus payments for the purposes of calculating holiday pay entitlement.

[13] Notwithstanding, Mr Ross cannot rely on the 31 March 2004 memorandum to support his claim that the bonus paid to him in November 2005 was not a discretionary bonus. I have reached this conclusion because firstly, the terms of the 2005 scheme are discretionary and stand outside the employment agreement and secondly because the distinction between

“incentive” and “discretionary” articulated in the 31 March 2004 memorandum is expressly overridden by the language of clause 2 paragraph three of the employment agreement. The two cannot stand together and it must have been the parties’ intention to overwrite the former in entering the latter.

Determination

[14] Mr Ross participated in a discretionary bonus scheme in 2005 for which he received a payment in November 2005. The Holidays Act 2003 excludes discretionary payments from the definition of gross earnings¹ and the definition of ordinary weekly pay². If payments are deemed discretionary they do not form part of earnings in the calculation of holiday pay.

[15] Mr Ross has sought to rely on a determination of the Authority which found that a bonus payment did form part of the gross earnings for the purposes of calculating holiday pay entitlements³. The factual context of that employment relationship problem is distinguishable from Mr Ross’ situation; the bonus provision formed part of the terms of employment and was not discretionary.

[16] For the reasons set out above Mr Ross’ claim is unsuccessful.

Costs

[17] Costs are reserved. I record that significant issue in any consideration of costs would be the respondent’s reluctance to attend mediation.

Marija Urlich
Member of Employment Relations Authority

¹ Section 14(b)(i) Holidays Act 2003

² Section 8(1)(c)(i) Holidays Act 2003

³ *Phillips v Hauraki marine Ltd* [unreported, 5 April 2006, AA 112/06, M Urlich]