

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 324  
3043031

BETWEEN JASON KITELEY  
Applicant  
AND CARBINE AGINVEST LIMITED  
Respondent

Member of Authority: Eleanor Robinson  
Representatives: Tim Oldfield, Counsel for the Applicant  
David France, Counsel for the Respondent  
Investigation Meeting: 16 & 17 April 2019  
Submissions Received: 24 April & 2 May 2019 from Applicant  
1 May 2019 from Respondent  
Further information received 23 May 2019  
Determination: 31 May 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Jason Kiteley, claims that he was unjustifiably dismissed by the Respondent, Carbine Aginvest Limited (Carbine).

[2] Mr Kiteley also claims that he is owed Short Term Incentive (STI) and Long Term Incentive (LTI) payments by Carbine.

[3] Carbine denies that Mr Kiteley was unjustifiably dismissed and claims that he was justifiably dismissed as a result of the role in which he was employed being made redundant following a procedurally fair restructuring process.

[4] Carbine also denies that any STI or LTI payments are due to Mr Kiteley.

## **The Authority's investigation**

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence heard or in the submissions received.

## **The issues**

[6] The issues requiring investigation and determination are whether or not Mr Kiteley:

- (i) was unjustifiably dismissed by Carbine;
- (ii) is owed any monies in respect of STI and/or LTI payments by Carbine.

## **Employment relationship problem**

[7] Carbine was known as Tru-Test Corporation Limited until 28 September 2018. It operated animal management systems which included manufacturing of animal weighing systems, electric fencing and milk meters for the testing of herds. It also supplied cooling systems and pre-cooling systems for dairy farming and maintenance programmes for those including farm holding tanks (FHT).

[8] Mr Kiteley commenced employment with Carbine in 1999 and held a number of positions during his period of employment. At the time of termination of his employment, he was Head of Operations and Business Transformation for Carbine.

[9] Mr Kiteley had been issued with an individual employment agreement dated 13 June 2011(the Employment Agreement). In the section entitled Remuneration it stated:

...

In addition you are eligible for a Short Term Incentive (STI) of 50% of base salary, 25% of base salary based on Key Performance Measures (KPIs) for the financial year plus up to an additional 25% of base salary based on over budget achievement. The details and measures are reviewed and agreed on an annual basis and confirmed by letter. Bonus entitlements are paid on or before 15<sup>th</sup> June following the financial year end.

In addition, you will be invited to participate in the company long Term Incentive program (LTI). Separate documentation will be provided for this as determined by the Board.

## *LTI Scheme*

[10] Mr Kiteley was invited to participate in the LTI scheme during 2011, the terms of which were set out in a separate document dated 22 February 2011 which he signed. The terms included:

### **3.2 Cessation of employment:**

Except where the Board has exercised its discretion under clause 7.2, if an executive ceases to be employed by the company or a subsidiary during the restricted period then:

- (a) the executive will lose all rights to participate in the LTI scheme and to all of the bonus shares held by him or her (including any rights to accumulated dividends) with effect from, and including, the date on which his or her employment ceased.

...

### **4. Administration**

**4.1 Administration:** All aspects of the LTI Scheme shall be administered and managed by the Board. Any matter required by this document to be determined by the Board, or otherwise affecting the LTI Scheme, shall be determined by the Board in its absolute discretion.

**7.2 Early vesting:** If, prior to the Vesting Date:

- (a) an executive ceases to be a full time employee of the company or a subsidiary by reason of redundancy, retirement, illness or death; or
- (bb) the Board considers that an executive is suffering unusual hardship, then the Board may in its absolute discretion, determine that some or all of the bonus shares issued to that executive shall vest with the executive on a date prior to the Vesting Date.

[11] That LTI scheme was subsequently replaced after its expiry at the conclusion of a three year period.

[12] In 2017 Carbine was in the process of splitting the business into dairy and non-dairy or farm resource management (FRM) operations for the purposes of selling the FRM operation.

[13] Mr John Loughlin, Chairman of the Board of Carbine, said that a term sheet for the proposed sale of what was then known as the Tru-Test Limited operations was signed with Datamars on 29 August 2017. The price for the sale was not fixed but was agreed to be determined based on a multiple of the Run Rate Earnings before income tax, depreciation and amortization (EBITDA) of the business for the FRM operations for the year ended 31 March 2018, subject to a minimum level of Run Rate EBITDA (RR EBITDA). The sale of the FRM operations to Datamars occurred in late August 2018.

*Board Meeting 23 August 2017*

[14] Mr Loughlin said that at a Board meeting held on 23 August 2017 the Board of Carbine (the Board) resolved that a special one off incentive (later referred to in emails as the 'exit' incentive or the LTI) would be established for the executive team.

[15] Mr Loughlin explained that the purpose of the LTI was to align the interests of the senior executive team with those of shareholders by achieving at least the minimum level of RR EBITDA and ideally as much as possible above that.

[16] The intention was that the LTI would not be payable if the senior executive's employment was terminated on the basis of serious misconduct or if the employee resigned before 31 March 2018. Mr Loughlin said that the CEO at that time, Mr Greg Muir, was present at the 23 August 2017 Board meeting.

*Communication to executive team 24 August 2017*

[17] Mr Muir sent emails to each of the senior executive team, including Mr Kiteley, to confirm their revised bonus plan on 24 August 2017. The email set out the FHT incentive plan for each individual member of the senior executive team and stated:

As discussed at today's GPD meeting the Board has agreed revised terms for your F18 incentives. The STI will be reinstated and paid on the basis of F18 group earnings against budget.

An LTI will be established with the following criteria:

- Contingent on continued employment at the 31/3/18
- Hurdles for delivery of F18 are RR EBITDA for the FRM business.

[18] Mr Muir said that for several weeks prior to the LTI terms being approved, he had been discussing with Mr Loughlin a proposal that if a member of the senior executive team was made redundant before 31 March 2018 (when they became eligible for the F18 LTI incentive), they were to remain eligible for the LTI payment.

[19] Mr Muir said he had made the proposal because with the division of the business and preparation for sale, Carbine was seeking to reduce overhead costs. He wanted the senior executive team to be comfortable openly discussing restructuring of the business to achieve this without getting involved in 'patch protection' in case it put their eligibility for the F18 LTI at risk if they were made redundant. He set out his thoughts in an email to Mr Loughlin dated 30 August 2017.

[20] Mr Loughlin had replied stating:

I confirm that I am happy in principle with this in respect of senior executive employees who refer directly to you, with the proviso that the Board will

need to sign off organisational changes at this level as per existing delegated authorities.

*Senior Executive Meeting 31 August 2017*

[21] Mr Muir said that at a senior executive meeting on 31 August 2017 he presented the proposal that a senior executive team member would remain eligible for the LTI payment if he or she was made redundant prior to 31 March 2018. He told the senior executive team that Mr Loughlin had confirmed that he agreed in principle with this.

[22] Mr Muir said the arrangements still required Board approval as had been the case in previous years for LTIs and STIs for senior executives.

[23] Mr Kiteley said after Mr Muir advised that he and the whole of the senior executive team would be eligible for the STI and LTI to 31 March 2018 unless he or she resigned, he and his wife purchased a business with 100% loan finance. He had done so on the basis that it had been his intention that he would remain at Carbine and earn the STIs and LTIs with a view to reducing that borrowing.

[24] In addition, given the level of his salary at Carbine, he and his wife would be able to afford to employ a manager to assist Mrs Kiteley in the new business.

*Emails 8 September 2017*

[25] Mr Muir said that he had a conversation with Mr Loughlin on 8 September 2017 in which Mr Loughlin had told him he still agreed with Mr Muir's proposal in principle.

[26] He had emailed Mr Loughlin that same day, 8 September 2017, stating:

John, I would like to send the note below out to the senior team to provide them with clarity about what was agreed at the last board meeting. Attached is a list of the revised incentive structure that was signed off at the meeting.

...

The wording of the proposed note as set out by Mr Muir stated:

Redundancy

- If your role is made redundant during the upcoming “split” – and a change process is signed off by the Board: then
  - You will be entitled to full payment of FHT, STI and Exit Incentive payments
  - Your redundancy entitlements will be as per your employment contract
- ...
- This incentive will not be payable if:
  - You are terminated for serious misconduct
  - You resign prior to 31/3/18 (or the end of your notice period, whichever is the later)

[27] In response Mr Loughlin emailed Mr Muir the same day, on 8 September, stating: “Best to hold on this. I’ll talk it through with Simon and he can get something out next week”.

[28] Mr Simon Mander had been employed by Carbine in the role of CEO to replace Mr Muir who had resigned, with effect from 5 September 2017. His first day in the role was 12 September 2017.

[29] Later on 8 September 2017, Mr Muir sent an email to the senior executive team members which stated:

Hi guys – thought this Comms best to go by text.  
I sent a draft email to JL today relating to your STI etc asking for approval to send to you.  
He responded asking that Simon deal with it next week. I don’t see anything sinister in this. I will follow up with Simon on Monday.

*Events after 8 September 2017*

[30] Upon appointment Mr Mander said he had asked the senior executive team to send through to him the terms of their bonuses so that he could ascertain what arrangements Mr Muir had put in place.

[31] Before 12 September 2017 Mr Muir had given him a hard copy of the email exchange of 8 September 2017 between him and Mr Loughlin relating to the agreement about the STI and LTI payments, and asked him to follow it up with Mr Loughlin.

[32] Mr Mander said that Mr Muir had not told him that he had made a commitment to the senior executive members that they would receive the LTI payment otherwise payable provided they were still employed on 31 March 2018, and even if they were made redundant before then.

[33] On 14 September 2017 in response to Mr Mander’s request Mr Kiteley had forwarded to him the email he had received from Mr Muir on 24 August 2017 which had stated that the LTI would be: “Contingent on continued employment of 31/3/18”. Other members of the senior executive team had also forwarded their copies of the emails Mr Muir had sent them dated 24 August 2017.

[34] The senior executive team had told him that Mr Muir had said that if any of them were to be made redundant as a result of the restructure process, they would still be paid the LTI.

[35] Mr Mander had told the senior executive team including Mr Kiteley that he would need to investigate the matter because that was not reflected in the documents he had seen.

*Board Meeting 25 September 2017*

[36] Mr Mander attended at the Board meeting held on 25 September 2017 during which the Board discussed the senior executive team's STI and LTI payments which had been approved at the previous Board meeting. The Board Minutes record that:

Discussion was held on the payment of the incentive program for the executive team approved at the last meeting. It was agreed that executive team members would need to still have a role within the business at 31 March 2018 to be eligible to receive the Long term portion of this plan.

*Communication to senior executive team 28 September 2017*

[37] Mr Mander said after the Board meeting he held a meeting with the senior executive team on 28 September 2017 and told them that the LTI eligibility conditions would remain as set out in the email to them on 24 August 2017.

[38] Mr Mander said some members of the senior executive team had not received the information well. Mr Brendan O'Connell had been insistent that the Board agree that the LTI incentive payments be paid to senior executive team members who were made redundant before 31 March on the basis that this was what Mr Muir had told the senior executive team would occur.

[39] Mr O'Connell emailed the members of the senior executive team on 10 November 2017 and asked if they could confirm or comment on his understanding of discussions that took place between August and September as follows:

I'm hoping you can confirm or comment on my understanding of discussions that took place during August and September as follows:

- In Executive Team Meetings during August the topic of discussion was a business restructure in support of both a divisional split and the achievement of the improved run rate EBITDA.
- On August 24 Greg Muir confirmed with each member of the Exec their individual STI and LTI arrangements.
- At the following Exec team meeting, Greg Muir stated that, for the purpose of enabling continued Exec engagement in these discussions he had discussed the following concepts with John Loughlin:

*If a member of Exec was made redundant through this process (in preparation of the split and sale) they would still be entitled to receive both their STI and LTI. ....*

- Greg confirmed that John was in agreement with the need to allow any Exec affected by redundancy to participate in the STI and LTI structures proposed.

[40] Mr Kiteley confirmed in reply to Mr O'Connell that it was also his understanding of what had been discussed, but two members of the senior executive team, Mr Ian Hadwin, Chief Financial Officer, and Ms Verne Atmore, General Manager Tru-Test Dairy Solutions, stated that their agreement was that Mr Loughlin had agreed: "in principle" to the concepts proposed by Mr Muir.

*Restructuring and disestablishment of Head of Operations and Business Transformation*

[41] Mr Mander said he had met with Mr Kiteley on 24 October 2017 in connection with a proposal sent to him by Mr Kiteley to restructure his (Mr Kiteley's) team. This had triggered his concerns about the structure of the Manufacturing team, the possibility of a different Operations structure, and the disestablishment of Mr Kiteley's role as Head of Operations and Business Transformation.

[42] Mr Mander said that because Operations was his background, he had considered two options for Carbine in relation to the structure of the Manufacturing team during October 2017. The first option involved the disestablishment of Mr Kiteley's position as Head of Operations and Business Transformation. The second option involved a consideration of whether or not Carbine would benefit from a Supply Chain Manager position to manage Planning and Procurement and Logistics.

[43] Mr Mander had discussed the two options at the Board Meeting held on 25 October 2017 and was given authority by the Board to decide which option to pursue.

*Supply Chain Manager Position*

[44] Mr Mander said he had discussed the Supply Chain Manager option with Mr Hadwin and arranged for an anonymous advertisement to be placed on the Seek website on 27 October 2017.

[45] Mr Hadwin denied that this conversation had taken place but Mr Loughlin's evidence during the Investigation Meeting supported Mr Mander's evidence that the discussion between Mr Mander and Mr Hadwin had taken place because Mr Hadwin had spoken to him (Mr Loughlin) about it during the weekend of 28 October 2017.

[46] During their conversation Mr Loughlin said Mr Hadwin had raised his concerns arising from the discussion with Mr Mander, had he advised Mr Hadwin that he should speak to Mr Mander.

[47] Mr Mander said he had received feedback from Mr Loughlin about Mr Hadwin's concerns about the proposed change on 30 October 2017; in particular that Mr Hadwin had expressed concerns around a structure that could see the creation of a Supply Chain Manager role and the disestablishment of the Group Logistics Manager role.

[48] He had met with the Group Logistics Manager and the Planning & Procurement Manager on 30 October 2017 and been impressed by the presentations they had given on their respective roles. As a result he decided not to proceed with option 2, considering it represented too great a risk to the business on the basis that the Group Logistics Manager was identified as being essential to the business and there was a risk that he might leave if not appointed to the Group Logistics Manager role and the Planning and Procurement Manager could leave also.

[49] After his meeting with the Group Logistics Manager and the Planning & Procurement Manager he had informed Mr Hadwin of his decision not to progress the Supply Chain Manager position.

[50] Following meetings with the Group Logistics Manager and the Planning and Procurement Manager Mr Mander said he had decided to proceed with Option 1 and had informed Mr Hadwin of his decision.

[51] As a result, Mr Mander met with Mr Kiteley on 3 November 2017 in relation to a proposal regarding the restructure of the Head of Operations and Business Transformation role.

[52] Mr Mander said he had also developed a proposal to disestablish the Head of Strategy and Product role and the Head of Brand, Communications, People and Culture role and to create a new position Head of Marketing. He regarded these as separate processes and had prepared two different information packs, one for discussion with the Head of Strategy and Product role and the Head of Brand, Communications, People and Culture, and one to discuss with Mr Kiteley as Head of Operations and Business Transformation.

*Proposal presentation Friday 3 October 2017*

[53] Mr Kiteley said that Mr Mander had presented him with a document entitled 'Proposed Realignment of Executive Team' late in the afternoon on Friday 3 November 2017 (the Proposal).

[54] Whilst Mr Mander had offered to either discuss the Proposal then or reschedule any discussion on the Proposal until his return from an overseas business trip, Mr Kiteley said he

had decided to proceed immediately with the discussion rather than be left in a position of uncertainty until Mr Mander's return.

[55] Mr Mander said that he had shared the Proposal on 3 November 2017 in accordance with Mr Kiteley's preference to do so. He had suggested that Mr Kiteley have a support person but Mr Kiteley said that he did not require one.

[56] He gave Mr Kiteley a copy of the Proposal to take away and consider and asked him to provide any feedback. The Proposal set a timetable for feedback between 3 and 10 November 2017.

[57] Mr Kiteley said he had been disappointed with the quality of the Proposal, and the timeframe of the Proposal which meant there would be a long distance consultation.

#### *Feedback 8 November 2017*

[58] Mr Kiteley sent his feedback to Mr Mander on 8 November 2017. The opening stated:

Firstly I have to say that I am extremely disappointed at the process you undertook to inform me of the proposal. I received your rushed approach to me at 4.10 pm on the Friday prior to you being away overseas for a week.

The feedback proceeded to set out Mr Kiteley's comments in relation to the proposed restructure, and set out in conclusion:

.. I see the merits of disestablishing my role in order to make cost savings and to enable the sale of one of the business divisions. ...

However, I can see the following negatives with the Proposal:

- Health and Safety reporting is flawed due to the mindset and past interactions between the Head of Engineering and the QHS Manager. ...
- The GM of Dairy has no past experience in managing a manufacturing facility or supply chain.
- The CFO is already overloaded and while capable, in my opinion has no bandwidth to take on Contract Manufacturing.
- The Manufacturing Manager I believe has oversold his abilities and that the CEO will get bogged down in Manufacturing or suffer very poor results. ...
- That there will be a significant loss of lean knowledge which is the key competency ....
- That the addition of further direct reports to the CEO will detract from other elements of the business ...

I can only presume that you have considered all of the obvious points I raise above and therefore will proceed with the Proposal.  
To minimise the stress that I am under I would like to gain certainty sooner rather than later. ...

[59] Mr Mander said he had carefully considered Mr Kiteley's feedback but had decided to proceed with the Proposal to restructure. He had accordingly asked Mr Kiteley to attend a teleconference with him on 10 November 2017. Although he had offered to hold a face-to-face meeting when he returned to New Zealand, Mr Kiteley had asked that the feedback discussion proceed.

*Feedback Discussion 10 November 2017*

[60] During the discussion Mr Kiteley said that Mr Mander had responded to the specific points raised in his feedback, although he did not consider Mr Mander had responded to his feedback in relation to the quality of the Proposal document. The feedback had been recorded in a letter dated 10 November 2017 which gave an overview of Mr Kiteley's feedback and gave a summary of Mr Mander's response in relation to the specific points raised by Mr Kiteley:

1. The proposal would result in a lower cost structure for the company. However, this proposal is aimed at making a more effective management structure.
2. The proposal is about creating a more effective management structure only. Part of this structure is organising the Company into two divisions.
3. The proposal is about creating a more effective management structure.
4. a. Feedback from the Head of Engineering is positive on the specific aspect of proposal you are referring to. This structure proposed is one I am very familiar with and was very successful in improving Quality as well as Health and Safety at a company where I was the Managing Director.  
  
b. The Normanby site is well managed and the GM Dairy has been selected based on a number of factors including the ability to manage the above aspects of the Dairy Division.  
  
c. The CFO has provided positive feedback on this aspect of the proposal you reference.  
  
d. I have noted your comments and have a counter view.  
  
e. Lean principles are well embedded into the Operations of the business. I have extensive knowledge of Lean.  
  
f. The proposal is about creating a more effective management structure only.  
  
...

[61] The letter concluded with confirming the verbal information as to the decision to proceed with the restructure proposal and the consequent disestablishment of the Head of Operation and Business Transformation role:

I have decided to implement the Proposal to the extent that your role of Head of Operations & Business Transformation, Head of Strategy and Product and Head of Brand, Comms, People and Culture are disestablished and a new role of Head of Marketing is created effective, once a suitable internal applicant is selected.

Although your role will be disestablished by Monday 13<sup>th</sup> November 2017, your employment with the Company has not yet been terminated. This will only occur in the event that you either do not apply for the Head of Marketing role or your application for the Head of Marketing role is unsuccessful.

...

In the event that you do not indicate your interest in the Head of Marketing role, then you will be given notice of the termination of your employment. If you do indicate your interest in the Head of Marketing role, then we will be in touch next week to inform you of the process going forward.

[62] Mr Kiteley had decided not to apply for the Head of Marketing role and emailed Mr Mander on 14 November 2017 stating:

On Friday you confirmed my role was disestablished.  
As I have not applied for the Marketing role I understand that I am now terminated.

This is dragging on so wanted to ensure that the agenda includes and concludes:

1. Agreement on last day (I propose this is Thursday of this week as my role no longer exists)
2. Confirmation that the Company will provide Payment in lieu of notice – I will remain available by phone for support
3. Confirmation that my STI will be paid in full
4. Agreement that my phone and number will be transferred to me (I have used this number for the last 18 years)

[63] Mr Mander confirmed the termination of Mr Kiteley's employment in a letter dated 16 November 2017 in which it was confirmed:

1. **Notice Period:** In agreement with you, I understand you do not wish to work out your six month notice and would prefer that we pay the notice in lieu. I am comfortable to proceed with this and your finish date will be on Thursday 30 November 2017.
2. ...
3. **Short Term Incentive Bonus:** In regard to your eligibility to the short term incentive payment, I will consider your eligibility based on achievement of KPI's as per the STI Guidelines. The next step will be to then discuss with the board remuneration committee for their approval. I will do my best to inform you of an outcome by the end of this week.

### **Was Mr Kiteley unjustifiably dismissed by Carbine?**

[64] Mr Kiteley was dismissed from his employment with Carbine by reason of redundancy. Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as being:

#### ***S103A Test of Justification***

- (1) For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[65] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[66] In considering the actions of the employer in a redundancy situation it is not for the Authority to impose or substitute its business judgement for that of the employer taken at the time.<sup>1</sup>

[67] This is echoed in *Scarborough v Micron Security Products Ltd* in which the Employment Court commented:<sup>2</sup>

... The Court of Appeal has recently confirmed that the Court is entitled to enquire into the merits of the redundancy business decision. The genuineness of the redundancy remains a key focus. Once it is established, if an employer concludes that the employee is surplus to its needs, the Court is not to substitute its business judgment for that of the employer.

[68] The fair and reasonable employer acts in good faith. Section 4(1A) of the Act is relevant to a redundancy situation and states:

(1A) The duty of good faith in subsection (1)-

...

- (a) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
- (b) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected-

(i) Access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) An opportunity to comment on the information to their employer before a decision is made.

### *Consultation*

[69] Mr Kiteley was presented with the Proposal on a Friday afternoon, 3 November 2017, just before Mr Mander was to leave on an overseas business trip. I accept that Mr Mander offered to delay any discussion on the Proposal until his return, however it was natural in the

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<sup>1</sup> *Michael Rittson-Thomas T/A Totara Hills Farm v Hamish Davidson* Unrep [2013] NZEmpC 39 20 March 2013

<sup>2</sup> *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 39 at [37]

circumstances for Mr Kiteley to wish to proceed immediately rather than be left in a place of uncertainty.

[70] I consider that Mr Mander should have been aware of this reaction and tried to ensure that the timing of the presentation of the proposal occurred at a more appropriate time.

[71] Mr Kiteley was presented with the Proposal, no immediate response was expected and the timetable for feedback was a week. Mr Kiteley did not take a week to provide his feedback, doing so on 8 November 2017.

[72] The feedback contained a statement to the effect that Mr Kiteley saw the merits in disestablishing his position, and provided detailed feedback on the specifics of the Proposal.

[73] The Employment Court in *Vice Chancellor of Massey University v Wrigley* stated that:<sup>3</sup>

The purpose of s 4(1A)(c) is to be found in paragraph (ii) which requires the employer to give the employees an opportunity to comment before the decision is made. That opportunity must be real and not limited by the extent of the information made available by the employer.

[74] There is no indication that Mr Kiteley did not have sufficient information on which to base his feedback. Mr Kiteley was a senior level employee and I consider it reasonable to conclude that he would have been fully able to articulate a need for further information had he considered it necessary in order to provide his feedback, and also to request an extension for providing his feedback had he considered this necessary.

[75] The fact that he did neither suggests that he did not consider he had insufficient information on which to base his feedback.

[76] I accept that there were discrepancies in the information contained in the Proposal documentation, not only in that provided to Mr Kiteley - in particular regarding his criticism of the use of the F17 projected figures - but also between the documentation presented to him and that presented to the Head of Strategy and Product and the Head of Brand, Communications, People and Culture.

[77] However this did not prevent Mr Kiteley from understanding the Proposal as having a commercial basis as indicated by his comment: "... I see the merits of disestablishing my role in order to make costs savings and to enable the sale of one of the business divisions."

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<sup>3</sup> *Massey University v Wrigley* [2010] NZEmpC 37 at [55]

[78] I find Mr Mander was entitled to accept the statement that Mr Kiteley saw the merits in disestablishing his role and detailed comments on the Proposal contained in his feedback as indicating that he understood and accepted the rationale for the Restructuring Process.

[79] Mr Mander had held a teleconference with Mr Kiteley to discuss his feedback on 10 November 2017. I note that Mr Mander had offered to hold a face-to-face meeting upon his return and that it was Mr Kiteley's decision to proceed via the teleconference.

[80] I do not find that there was any unfairness to Mr Kiteley arising from the feedback discussion taking place by teleconference given that such forms of communication are increasingly usual in many organisations given the sophistication of current technology.

[81] The response to Mr Kiteley's feedback was confirmed in the letter dated 10 November 2017. I accept that the phrase contained in the response letter dated 10 November 2017 that (with slight variations): "the Proposal is about creating a more effective management structure" is repetitive, however I find that the letter nonetheless sets out a detailed response to the specific comments made by Mr Kiteley in his feedback.

#### *Head of Marketing role*

[82] The letter dated 10 November 2017 invited Mr Kiteley to indicate if he had an interest in the Head of Marketing role, but did not provide him with a job description although this had been provided to the Head of Strategy and Product and the Head of Brand, Communications, People and Culture.

[83] The provision of a job description might have assisted Mr Kiteley in deciding whether or not he wished to express an interest in the Head of Marketing role, and I find it should have been provided to him as it had been to the Head of Strategy and Product and the Head of Brand, Communications, People and Culture.

[84] The letter dated 10 November 2017 further stated that if Mr Kiteley did express an interest in the role, he would be contacted with a view to progressing the matter, however Mr Kiteley did not express an interest in the Head of Marketing role.

[85] Mr Kiteley did not express an interest in the Head of Marketing role which I find this was attributable more to the fact that he was not interested in the role rather than the non-provision of the job description, noting his evidence at the Investigation Meeting that he had not considered himself to be: "a suitable candidate".

[86] I find that the non-provision of a job description for the Head of Marketing position was not a major factor in this position not being pursued by Mr Kiteley.

### *The Supply Chain Manager Position*

[87] An employer must consider redeployment options and offer redeployment, if a suitable redeployment opportunity exists.<sup>4</sup> In that respect an employer is entitled to determine whether or not the applicant for redeployment has the requisite skills and experience for the role sought.

[88] Mr Kiteley's evidence was that he would have applied for the Supply Chain Manager position had he been aware of it, it was within his capabilities and was at a similarly senior role.

[89] While the position had been advertised anonymously on Friday 27 October 2017, the evidence of Mr Mander was that the position of Supply Chain Manager had not been actively pursued after Monday 30 October 2017 due to the perceived unacceptable risk of losing both the Group Logistics Manager and the Planning & Procurement Manager.

[90] A subsequent decision to appoint a Global Supply Chain Manager position was made in mid to late December 2017 when the Group Logistics Manager unexpectedly resigned on 15 December 2017.

[91] This was a month after Mr Kiteley's position had been disestablished and he had received his six months' salary in lieu of notice and contractual redundancy compensation.

[92] I find that at 15 December 2017 Mr Kiteley was no longer an employee of Carbine or owed a duty of good faith by Carbine.

[93] Turning to the procedure followed by Carbine regarding the disestablishment of Mr Kiteley's position as Head of Operations and Business Transformation I find that there were discrepancies in the Proposal documentation provided to Mr Kiteley and there was a failure to provide him with the Head of Marketing job description.

[94] However I find that these are minor flaws which, when viewed as part of the overall process, did not result in any unfairness to Mr Kiteley.

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<sup>4</sup> *Jinkinson v Oceania Gold* [2010] NZEmpC 102, *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142

[95] Whilst the process was fairly speedy in nature, I find that this was mainly driven by Mr Kiteley who stated in his feedback document on 8 November 2017 that he wanted certainty sooner rather than later.

[96] I determine that Mr Kiteley was not unjustifiably dismissed by Carbine by reason of redundancy.

**Is Mr Kiteley owed any monies in respect of STI and/or LTI payments by Carbine?**

*LTI Payments*

[97] Mr Kiteley had been a participant in the previous LTI Scheme between 2011 and 2014. It was stated at clause 4.1 that any matter affecting the LTI Scheme was to be determined by the Board: “in its sole discretion”. Clause 3.2 stated that the rights to benefit under the LTI Scheme were lost upon termination of employment unless the Board exercised its discretion, which pursuant to clause 7.2, the Board might chose to do in a redundancy situation again: “in its absolute discretion”.

[98] Although the 2011 LTI Scheme had not been replaced after 2014 I find that Mr Kiteley was aware in relation to that LTI Scheme that the Board had absolute discretion in relation to LTI payments as he confirmed in his oral evidence at the Investigation Meeting.

[99] The Minutes of the Board meeting held on 23 August 2017 which Mr Muir attended state that in relation to the LTI incentive payment: ‘This incentive will not be payable if an individual is terminated for serious misconduct or resigns prior to 31/3/18 (or the end of your notice period, whichever is later).’

[100] There is no specific reference in the recorded Minutes of the Board meeting to the LTI not being payable in the event of redundancy, however the email Mr Muir sent to the senior executive team the next day, 24 August 2017, stated that an LTI would be established with the following criteria: “Contingent on continuing employment at the 31/3/18.”

[101] I find no ambiguity in the email sent to Mr Kiteley by Mr Muir following the 23 August 2017 Board meeting. There is also nothing in it that suggests that Board approval would not be required on matters relating to remuneration for the senior executive team, in particular in relation to LTI payments.

[102] Mr Loughlin’s response to the email sent to him by Mr Muir on 30 August 2017 in regards to his proposal that a member of the executive team made redundant prior to 31 March 2018 was that he was: ‘happy in principle with this in respect of senior executive employee who refer directly to you’.

[103] Mr Muir's evidence was that he had informed the senior executive team at the senior executive meeting on 31 August 2017 that Mr Loughlin agreed 'in principle' with his proposal that if in the event that he or she was to be made redundant, they would still be entitled to a redundancy payment. His evidence was also that he knew that this arrangement still required Board sign-off.

[104] Whilst Mr Kiteley said he did not recall Mr Muir stating that Mr Loughlin had agreed 'in principle' at the meeting on 31 August 2017, the evidence of two members of the senior executive team, Ms Atmore and Mr Hadwin, was that they also recalled that Mr Loughlin's agreement was 'in principle'.

[105] I find that the evidence supports Mr Muir having conveyed that Mr Loughlin's agreement was given in principle. The dictionary definition of 'in principle' is: "as a general idea or plan, although the details are not yet established." and: "used to indicate that although something is theoretically possible, in reality it may not occur."<sup>5</sup>

[106] Mr Loughlin reiterated that his approval was given 'in principle' in a conversation with Mr Muir on 8 September 2017 and he directed Mr Muir to: "hold on" to the email he proposed sending to members of the senior executive team in an email of the same day.

[107] The text message sent by Mr Muir to members of the senior executive team later on 8 September 2017 stated that he had sent a draft email to Mr Loughlin concerning their STIs etc for his approval, but the response had been that he (Mr Loughlin) would follow it up with Mr Mander.

[108] Whilst Mr Muir stated in the text message that he did not see: "anything sinister in this", I find that Mr Loughlin had not given his unqualified approval or that of the Board to Mr Muir's proposal. Further, whilst the text message to the senior executive team dated 8 September 2017 conveyed Mr Muir understanding that the proposal would be confirmed as approved, it did not state that the proposal had been confirmed as approved by the Board as at that date.

[109] Mr Kiteley had been informed in the email from Mr Muir dated 24 August 2017 that payment of the LTI was contingent upon his continuing in employment until 31 March 2018. This position was reconfirmed by Mr Mander in the senior executive team meeting held on 28 September 2017 held after the Board meeting dated 25 September 2017 which confirmed this as the position of the Board.

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<sup>5</sup> Oxford dictionaries *Online*: <http://www.oxforddictionaries.com/words/the-oxford-english-dictionary>

[110] There had been no formal notification of the situation regarding the payment of the LTI between the email Mr Kiteley was sent dated 24 August 2017 which stated clearly that the Board had agreed to an LTI which would be contingent on continued employment as at 31 March 2018 and the reiteration of that situation made on 28 September 2017.

[111] I find that informal notification that there might be a change in the Board's stance came via Mr Muir, but extended only so far as the information that Mr Loughlin had agreed in principle. There was no communication that the Board had agreed and approved the proposal made by Mr Muir.

[112] On that basis I find that Mr Kiteley was not entitled to payment of the LTI upon the termination of his employment which took place prior to 31 March 2018.

### *Estoppel*

[113] It is submitted by Mr Kiteley that he entered into financial commitments based on the representation that he would be paid the LTI if he was made redundant before 31 March 2018. Accordingly Carbine is estopped from resiling from a commitment to pay him the LTI.

[114] Estoppel is an equitable doctrine which applies in a situation in which it would be: “unconscionable to allow a party to succeed in light of its previous stance which has induced the other party to act, or to omit to act, in a manner which is now compromised.”<sup>6</sup>

[115] I turn to examine this issue against the principles of estoppel as summarised by the Employment Court in *Harris v TSNZ Pulp and Paper Maintenance* at paragraph [76]:<sup>7</sup>

There are four essential constituents of an estoppel:

- a belief or expectation must have been created or encouraged through some action, representation, or omission to act by the party against whom the estoppel is alleged;
- the party relying on the estoppel must establish that the belief or expectation has been reasonably relied on by that party alleging the estoppels;
- detriment will be suffered if the belief or expectation is departed from;  
and

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<sup>6</sup> *Harris v TSNZ Pulp and paper Maintenance Limited* [2015] NZEmpC at [75]

<sup>7</sup> N 6 above at [76]

- it must be unconscionable for the party against whom the estoppel is alleged to depart from that belief or expectation.

[116] Mr Kiteley submits that he had a belief and expectation that the LTI would be paid based on his understanding of what he had been told by Mr Muir.

[117] I have found that what had been presented by Mr Muir was that he had made a proposal regarding payment of the LTI in the event of redundancy to the senior executive team and that the Chairman of the Board was in agreement with the proposal in principle. This proposal was not confirmed as having been approved and agreed by the Board.

[118] On that basis what was presented to Mr Kiteley by Mr Muir on 31 August 2017 was a proposal which had still to be endorsed with Board approval.

[119] The belief or understanding held by Mr Kiteley that the LTI would be paid to him even if he were to be made redundant must be ‘reasonably relied upon’. The Court amplified this principle in paragraph [78] stating:<sup>8</sup>

... this must be reasonable (judged objectively) in three senses. These are, first, that the belief or expectation must have been reasonably held; second, it must have been reasonable for the plaintiff to have relied on the belief or representation; and, third, ongoing reliance on it must also have been reasonable. The representation must be clear and unambiguous, although it is not necessary for it to be susceptible of only one interpretation.

[120] Mr Kiteley had received the email dated 24 August 2017 confirming that his entitlement to a LTI payment was contingent upon his continued employment as at 31 March 2018.

[121] Mr Kiteley submits that he relied upon the statement made by Mr Muir at the senior executive meeting held on 31 August 2017 and purchased a business in reliance on the fact that it would be part-funded by his continued salary income and earnings from the LTI and STI payments.

[122] Not only have I found that Mr Muir’s statement held a caveat, but I observe that, irrespective of Mr Muir’s proposal regarding a redundancy situation, the targets set for the achievement of the LTI, namely delivery of the F18 RR EBITDA, had still to be met and that therefore there was no guarantee of the level of payment at 31 March 2018.

[123] I also consider that, accepting that the 2011 LTI Scheme had expired and it had not been replaced with an LTI Scheme with similar documentation, Mr Kiteley nonetheless had

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<sup>8</sup> N6 above at [78]

an awareness arising from his participation in that previous LTI Scheme that the Board controlled remuneration and in particular LTI payments.

[124] The Board control was also indicated in the email sent to Mr Kiteley by Mr Muir dated 24 August 2017 which stated that: “As discussed at today’s GPD meeting the Board has agreed revised terms for your F18 incentives.”

[125] That situation had not been confirmed in writing as altered in respect of Board control after the 24 August 2017 email provided to Mr Kiteley.

[126] Mr Kiteley stated that he had continued to work at Carbine in reliance on Mr Muir’s statement in respect of payment of his LTI even if he was made redundant; however this is in direct variance with his evidence that he and his wife purchased a business in reliance in part on his ongoing employment.

[127] By 28 September 2017, and before the restructuring process commenced in regard to his role, Mr Kiteley was informed that the situation regarding the LTI payment was as indicated in the 24 August 2017 email.

[128] Therefore I find that Mr Kiteley was aware by 28 September, if not earlier, that to retain his entitlement to a LTI payment he needed to remain in employment until 31 March 2018. Given his six month notice period, his employment would have easily exceeded this date and he would have retained an entitlement to the LTI payment. However it had been a decision initiated by him to have his notice period paid in lieu and his employment thereby ceased prior to 31 March 2018.

[129] I do not find that given these considerations that Mr Kiteley altered his position in reasonable reliance on Mr Muir’s statement on 31 August 2017.

#### *Detriment*

[130] At the time when Mr Kiteley states he and his wife purchased the business, he was still employed at Carbine and there was no reason for him to be anticipating that his position would be disestablished.

[131] The first intimation he had of that arose on 3 November 2017 which was just over a month after Mr Mander informed the senior executive team that the situation regarding the LTI remained as stated in the 24 August 2017 email i.e. that it was contingent on continued employment at 31 March 2017.

[132] I do not find any detriment to Mr Kiteley arising from Mr Muir's statement at the 31 August 2017 senior executive team meeting.

#### *Unconscionability*

[133] In all the circumstances I do not find unconscionability in Carbine confirming to Mr Kiteley at the 28 September 2017 senior executive team meeting that the eligibility criteria for the LTI was as stated in the 24 August 2017 email i.e. that it required Board approval.

[134] I do not find estoppel to apply in this case and I determine that Mr Kiteley was not entitled to payment of the LTI upon the termination of his employment prior to 31 March 2018.

#### *STI Payments*

[135] The Employment Agreement stated that Mr Kiteley was entitled to a STI based on:

- 50% of base salary;
- 25% of base salary based on KPIs for the financial year; and
- 25% based on over budget achievement

[136] The details and measures pertaining to the STI were reviewed and agreed on an annual basis and confirmed by letter, being paid by 15<sup>th</sup> June following the financial year end.

[137] The Minutes of the Board Meeting held on 23 August 2017 record that:

It was resolved that:

1. The FY18 executive team STIs would be reinstated and paid on the basis of FY18 group earnings against budget.
  - The STI will be paid at the rate specified in employment agreements.
  - The hurdle will be achievement of the Group F18 EBITDA budget (excluding one-off restructuring costs).

[138] The email sent to Mr Kiteley by Mr Muir on 24 August 2017 stated that: "The STI will be reinstated and paid on the basis of F18 group earnings against budget."

[139] The basis of payment of STIs to employees made redundant was set out in the Tru-Test Short Term Incentives (STI) Guidelines which stated in a section entitled: "**Employees who resign or are made redundant**":

...

Where an employee is made redundant at any time during the performance period, they will be eligible for consideration for a performance incentive based on achievement of KPIs in line with this policy.

Where Tru-Test decides that an employee who resigns or is made redundant during a performance incentive period is eligible, the performance incentive payments for these will be adjusted for performance achieved in the period worked .... The amount of the performance incentive available will be at the discretion of the manager and subject to endorsement by the Managing Director and the board remuneration committee.

[140] This is consistent with Mr Loughlin's evidence that the Board would examine STI payments on the following basis:

- a) If there had been an initiative the employee had been involved in which had been successful, the employee would receive an STI payment even if the year the STI related to had not concluded.
- b) If there was an ongoing initiative which had not been concluded but was not yet successful, the Board would likely pro-rata the STI payment.
- c) If there was no success relating to the initiatives or measurements to which the STI payment applied no payment would be made.

[141] Mr Mander stated in his letter to Mr Kiteley dated 16 November 2018:

**Short Term Incentive Bonus:** in regard to your eligibility to the short term incentive payment, I will consider your eligibility based on achievement of the KPIs as per the STI Guidelines. The next step will then be to discuss with the board remuneration committee for their approval. ...

[142] I find that the final payment was made to Mr Kiteley in accordance with the guidelines applying to STI payments.

[143] I determine that Mr Kiteley was not entitled to full payment of the STI upon the termination of his employment on 30 November 2017.

[144] The Respondent has agreed to pay holiday pay on STI payments. The parties have agreed to resolve this issue between themselves.

### **Costs**

[145] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the

date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[146] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[147] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>9</sup>

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>9</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].