

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN James Mather

AND Pacific Island Business Development Trust

REPRESENTATIVES Paul Junior Pa'u, counsel for James Mather
Prue Kapua, counsel for Pacific Island Business Development Trust

MEMBER OF AUTHORITY Rosemary Monaghan

INVESTIGATION MEETING 21 and 22 November 2006
ADDITIONAL INFORMATION PROVIDED 10 January and 7 February 2007
SUBMISSIONS RECEIVED 1 December 2006, 10 January and 16 February 2007
DATE OF DETERMINATION 27 February 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Pacific Island Business Development Trust ("the trust") employed James Mather as its chief executive officer.

[2] According to the statement of problem Mr Mather's employment relationship problem included a personal grievance in that his employment was affected to his disadvantage by unjustified actions of the trust's in relation to:

- (a) terms of his employment in late 2004;
- (b) the trust's dealings with him in late 2004;
- (c) his performance review; and
- (d) his performance bonus.

[3] Mr Mather also said the trust failed to deal with him in good faith in respect of these matters, breaching the requirement in s 4 of the Employment Relations Act.

[4] A further personal grievance alleging unjustified constructive dismissal was withdrawn at the investigation meeting. For that reason I do not address aspects of the evidence which had been identified in the statement of problem as supporting a constructive dismissal, but were not raised in that document or anywhere else in support of any other cause of action.

The history of the employment relationship

1. The written terms of employment

[5] A written employment agreement between the parties, dated 28 May 2002, provided that Mr Mather would be remunerated in accordance with the provisions of Schedule 2 to the agreement. Schedule 2 identified a base salary, as well as a performance payment in the following terms:

"A performance payment of up to per annum may be paid in accordance with the performance agreement."

[6] Provisions relating to the performance agreement were contained in clause 6. They included an obligation to review the ceo's performance on a 3-monthly basis, either generally or in respect of any particular matter. The review was to take into account the performance agreement between the trust's governing board and Mr Mather, and any other relevant matters. Performance payments were to be made in conjunction with these reviews.

[7] Clause 6.3 obliged the board to prepare an annual performance agreement with the ceo, and the agreement was to detail:

- . the objectives of the ceo's position for the year, including quarterly performance objectives;
- . the process and criteria by which the ceo's performance would be assessed for that year; and
- . a written agreement between the parties that the objectives were considered realistic and achievable.

[8] Clause 6.4 provided that the decision of the board on the contents of any performance agreement would be final, although the board was obliged to consult with the ceo on those contents and consider the ceo's views before finalising the contents.

[9] Clause 6.5 obliged the ceo to co-operate with the board during all stages of the performance review process, and provide the board with such information as it may properly require in order to carry out any review.

[10] Clause 1.2 of the employment agreement required the trust's board to act as a good employer in all of its dealings with the ceo. Clause 1.3 provided:

"For the purposes of this Agreement a good employer is an employer who treats employees fairly and properly in all aspects of their employment."

[11] I have not addressed this matter further or separately because the facts that might relate to the obligation are addressed under the remaining headings. Neither party addressed the matter in its own right.

2. The parties' 'terms of employment' and 'dealings' in late 2004.

[12] The statement of problem and Mr Mather's brief of evidence were discursive and included details of several disagreements between the parties in late 2004. Some of the references were relevant in an employment context to the extent that they illustrated the state of the parties' relationship at the time, and I do not otherwise take them any further. For example there was a disagreement between the board and Mr Mather about the appropriateness of a trust purchase of Pacific art. There was a disagreement over the engagement of consultants for a strategy session for the new governing board of the trust in July 2004. There was also disagreement over funding for sponsorship of 'Style Pasifika 2004' and over the quality of Mr Mather's reporting to the board on activities associated with 'Thrive Pasifika 2004'.

[13] Aside from problems of that kind, it seems that most of the concerns about the parties' 'terms of employment' and 'dealings' with each other were related to the performance review and performance bonus to which I now turn.

3. The performance review

[14] Mr Mather was appointed in mid-2002. In 2002 and 2003 he achieved high ratings for his performance and received his full incentive payment in respect of each quarter.

[15] However the trust was undergoing a change in focus in 2003 and 2004. Late in the 1990s and at the beginning of the new century its future was uncertain and it had been in what was described as 'survival mode'. By 2003 a plan for reversing the trust's position was

nearing completion and the trust sought to consolidate and develop, with the impetus for change being underlined by the appointment in 2004 of several new members to the board. The new board had different expectations of the ceo, as well as of the overall operation of the trust. There was to be emphasis on creating a strong financial base, understanding clients' needs and meeting those, and setting and measuring service delivery standards. There were difficulties between the parties as they attempted to identify and come to terms with the changes.

[16] In association with all of this, in mid-2003 a management consultancy, Farrow Jamieson, was engaged to re-size Mr Mather's position and review his remuneration accordingly. At the end of 2003 the parties agreed on a new remuneration package including a base salary and an at-risk component of 15% of base salary, although the re-sizing of the position had not been completed.

[17] Those matters were the subject of ongoing discussions in 2004, while Mr Mather again received his full incentive payment for the quarter ending March 2004. There was a delay in addressing Mr Mather's next quarterly performance review, partly because of the appointment of the new board members and the focus on the planning for and implementation of the trust's new direction. In addition, and for similar reasons, no performance agreement had been concluded for the 2004-2005 year. The incentive payment due in respect of the June 2004 quarter (being the final quarter for the 2003 – 2004 financial year) was paid in full in September 2004.

[18] None of this meant the matter of Mr Mather's performance agreement and performance review was being overlooked. A Farrow Jamieson representative was assisting the board with these matters, and had discussions with Mr Mather about them. Ultimately, however, it was the board's responsibility to prepare and present to Mr Mather its proposals. That is what it did.

[19] Thus, in October 2004 the board's human resources subcommittee recommended that:

"the performance agreement 2004/5 be the at risk component of the [remuneration] package and is measured at the end of the 05 year. A variation to the CE employment agreement is required for this."

[20] The board accepted the recommendation, and it was part of the proposal put to Mr Mather.

[21] I digress from this chronological account to say that a variation to clause 6 of the employment agreement was required to allow performance reviews to be held annually rather than quarterly. Mr Mather resisted the change from a quarterly to an annual review, although when the proposal was put to him he did seek to negotiate a reduction in the at-risk component of his remuneration to offset the change. The attempt was not successful. Mr Mather raised the possibility of mediation assistance in association with these negotiations, although mediation did not go ahead.

[22] In the account he gave in the statement of problem Mr Mather seemed to consider those circumstances amounted to a breach of the provisions in the employment agreement regarding the resolution of disputes. It is unclear what the breach was considered to be, and I was not addressed on the matter in submissions.

[23] However the relevant provisions – found in clause 14 and schedule 3 of the employment agreement - amounted to the explanations required under s 65(2)(a) of the Employment Relations Act 2000. They included an obligation to attempt to resolve certain employment relationship problems, as well as an explanation of the availability of mediation although there was no contractual obligation to pursue it. On the facts as I will shortly detail them, the parties did attempt to resolve the matter. Not only that, while Mr Mather originally suggested mediation, it was he who subsequently indicated his position was not negotiable so that mediation need not be pursued.

[24] Another aspect of the need for agreement to the change from quarterly to annual performance reviews concerned the involvement of the State Services Commission ("SSC"). The trust is a crown entity under relevant legislation, and had obligations to consult with the SSC on certain matters. Thus clause 15.2 of the employment agreement provided:

"It is expressly recognised that the parties may from time to time agree to vary the terms and conditions of this agreement and that the board must consult/obtain the written consent of the State Services Commissioner before finalising any such variation. No variation shall have legal effect unless it is in writing and signed by both parties."

[25] No allegation regarding a breach of cl 15.2 was made in the statement of problem. Instead Mr Mather expressed concerns about the involvement of the SSC. In particular he seemed to doubt the nature and extent of the trust's discussions with it. However no evidence was offered in support and the doubt rested on suspicion alone. I accept the evidence of the board's chair, Pauline Winter, that she did consult with the SSC over the variation to the employment agreement. Mr Mather doubted Ms Winter's statement that the SSC indicated that it considered annual (rather than quarterly) assessments to be appropriate for the ceo's position, but again no grounds for the doubt were offered and I accept Ms Winter's account.

[26] Returning to the chronological account, the performance review for the September quarter did not go ahead because the performance agreement for the year – incorporating the proposal that reviews be held annually - was still being developed. The December quarter review did not go ahead because the performance agreement had still not been finalised, and by then Mr Mather had submitted his resignation. Both reviews were subsumed in the review carried out early the following year.

[27] Otherwise the development of the performance agreement and the criteria to be applied in calculating the bonus converged. I now turn to the bonus.

4. The performance bonus

[28] On 21 October 2004 Ms Winter put to Mr Mather the detail of the proposed performance agreement and formula for calculating the bonus. Mr Mather believes the arrangement was put to him without proper consultation and negotiation, and as a *fait accompli*. He has also criticised what he says in effect was the off-hand way in which Ms Winter presented the proposals to him.

[29] I regard Ms Winter's actions of 21 October as amounting to the commencement of a consultation process about the contents of the proposal. Someone had to identify the starting point for discussions, and the board was not only entitled but obliged to take the lead by preparing and presenting the document it did. I do not accept that the fact there had obviously been discussion and consideration of the matter at board level meant the arrangement was a *fait accompli*, or that Mr Mather was deprived of his right to be consulted when he did not participate in that preliminary discussion. I do not accept Ms Winter indicated to Mr Mather that the document was a final document. On the contrary, Ms Winter was now seeking Mr Mather's input.

[30] In addition to a backdated salary increase and the move to annual reviews, the proposed arrangement was this:

"%	Component	Details	
40	Financial	Achieve the 2005 Budget performance target	80%
		Building lease income to target levels	20%
20	Business performance	Delivery of all Purchase Agreement targets	80%
		Diversification of income base	20%
20	Strategic Plan 2005 – 2015	The development of ten year strategic and financial plans inclusive of: Research Plan	

		Sponsorship Plan	
		Communications Plan	
		Organisational Development Plan	
		Resource Management Plan	
		Reserves Plan	
		Budget Plan	
		Overall Business Plan	50%
		Achieving LTP objectives/milestones in the plan	
		For the 2005 year	50%
10	Organisation	Leadership	25%
	Development	Team building and coaching	25%
		Succession planning	25%
		Quality management systems	25%
10	Stakeholder	Development of excellent relationships with the:	
	Communications	Board	
		Community	
		Partners	
		Funder(s)	
		Government	
		Customers	100%

[31] Mr Mather responded in an email message to Ms Winter dated 21 October 2004, setting out a number of concerns. He also prepared a note of the concerns for the purposes of a meeting with Ms Winter which appears to have gone ahead on 29 October 2004. Mr Mather divided his issues into concerns about matters such as the delays in the performance review process and lack of consultation, and his responses to the proposal just presented to him.

[32] Regarding the latter, Mr Mather raised questions about how the proposed 'organisation development' and 'stakeholder communications' components would be measured. Indeed he indicated a general concern to avoid criteria that were subjective and not measurable. He also said he required a specific column for KPIs. Finally he asked what would happen if he were no longer employed prior to the completion of an annual performance review.

[33] There were discussions and correspondence in November during which the possibility of mediation, to which I referred earlier, was raised.

[34] Mr Mather and Ms Winter met again on 3 December and there was further discussion about the contents of the agreement, as well as the change to an annual review and Mr Mather's attempt to renegotiate the at-risk percentage of his remuneration. A basis for Mr Mather's concern about the change to an annual review was that he sought more frequent feedback about his performance. In response to that point Ms Winter's view was that he received feedback informally, particularly at board meetings.

[35] As for the proposed performance agreement, Mr Mather and Ms Winter went through each of the components. Mr Mather sought a change in the financial component so that lease income was to be built to "budgeted" target levels'. The business performance, strategic plan and organisation development components were agreed at the time, except that Mr Mather said at the investigation meeting he was uncertain of the meaning of 'diversification of income base', and was unclear about aspects of the strategic plan. He said he was also uncertain of how the 'organisation development' component would be measured. Finally he expressed a concern about how 'stakeholder communications' would be measured.

[36] At the time, Ms Winter advised that the measurements would be based on evidence, including material Mr Mather presented. During the investigation meeting Ms Winter and Sara Lunam, a member of the board's human resources subcommittee, indicated that matters such as the diversification of income, the strategic plan and organisation development were covered in wider terms in numerous board and other meetings including the strategic planning sessions. They doubted Mr Mather's expressions of uncertainty.

[37] The query about what would happen in the event of a termination of employment was answered by agreement that the bonus would be paid on a pro rata basis.

[38] On 21 December 2004 Mr Mather tendered his resignation, effective on 14 February 2005. The effective date was later brought forward by agreement to 11 February 2005. Mr Mather was leaving to take up a new, high profile position.

[39] By letter dated 10 January 2005 Mr Mather advised the trust that, given his resignation, he accepted the offered increase to his base salary and:

“Based on a pro rata payment prior to my departure, I accept retention of the at-risk component at the level of 15%, ie \$16,686 and the revised performance agreement criteria.”

[40] Mr Mather did that because he sought to depart from the trust without any issues outstanding. Indeed he was insistent that the performance review be completed before he left. However the effect of his action was to pre-empt further discussion or negotiation about the content of the performance agreement, even if certain matters remained unclear or less than acceptable to him. The action also had the legal effect of communicating Mr Mather’s agreement to the level of the at-risk component and to the performance agreement criteria as worded.

[41] I digress again to say I was not addressed on the application of clause 6.3 to this part of the facts, and nor could I discern that any breach was being asserted. If, however, there was a breach, there would be some difficulty in identifying a remedy. For example I would find the combination of the 10 January letter and Mr Mather’s wish to have the performance review completed before he left this employment contributed very substantially to the circumstances of the breach.

[42] Early in February 2005 Ms Winter asked Mr Mather for his comments on how he had met the performance agreement criteria as set out at [30] above. He replied by a relatively brief email message dated 4 February 2005. In essence, the reply was:

(a) Financial - acknowledged the year to date budget figures showed a net negative variance, but pointed out there were some variables still to be factored in (in particular a distribution of funds budgeted for November);

(b) Business performance – commented that purchase agreement performance-related costs were under budget, and said initiatives had been developed to counteract target areas falling behind projections;

(c) Strategic plan – recorded that a draft strategic plan had been presented to the board at its January meeting, along with long term objectives and milestones;

(d) Organisation development – recorded that a succession plan was being implemented with the appointment of an acting ceo, and a quality assurance manual was to be completed by 11 February 2004;

(e) Stakeholder engagement – in Mr Mather’s view this had been maintained at a consistently high level.

[43] There was further discussion about whether Mr Mather’s performance would be assessed as at 31 December 2004, or as at the date of termination of employment. Board papers presented and discussed in early January 2005 could be used for the former. A difficulty with the latter was that, because in a message dated 6 February 2005 Mr Mather had advised he required confirmation that his performance review would be completed by 10 February 2005, there would be no data available for an assessment in respect of January and early February 2005.

[44] By exchange of email messages dated 7 February 2005 the parties agreed:

'... we proceed and review the period to Dec 04 on the evidence provided and work out a reasonable consideration for the remaining period'.

[45] The assessment was referred for consideration by and recommendation from the human resources subcommittee. The subcommittee comprised three members, Ms Winter, Ms Lunam and Manu Sione. The material available to them for the assessment included:

- . the chief executive's report to the board dated January 2005;
- . financial material including statements of financial performance for the period ended 31 December 2004 and the financial position as at 31 December 2004, the projected income to 30 June 2005, and the budget to 30 June 2005;
- . Mr Mather's quarterly purchase agreement report to 31 December 2004;
- . the business development monthly report;
- . a report from a property consultant regarding the trust's leases;
- . Mr Mather's draft strategic plan;
- . the purchase agreement; and
- . Mr Mather's comments on his performance.

[46] The subcommittee's conclusions were:

(a) Financial

(i) Meet budget. As at 31 December 2004 the actual year to date net operating deficit exceeded the budgeted year to date figure¹ so the subcommittee concluded the budget had not been met. As for the distribution Mr Mather said had been budgeted for November, Ms Winter said the budget would not have been met even if the distribution was received because there was also a reversal of an income accrual following a shortfall in contract funding. Overall the subcommittee did not consider there was any room for giving a partial credit when it came to meeting budget – either the budget was met or it was not. If it was not, there would be a nil award.

(ii) Building lease income to target (budgeted) levels. The trust occupied 23% of the space in a business centre, and had budgeted for income from 70% occupancy by subtenants by year end. The statement of financial performance for the period ended 31 December 2004 showed income was slightly exceeding budget. However the budget had been set on the basis of a steady increase in the number of tenancies through the year in order to achieve the target of 70% occupancy. The property consultant's report of early January indicated no new leases had been entered into, so that subsequent monthly income projected as at December 2004 did not meet budget.

(b) Business performance.

(i) Delivery of purchase agreement targets. The objective of the purchase agreement was to: "increase the number of New Zealanders of Pacific descent starting and/or developing successful businesses." Further to that, direct and indirect assistance targets were behind, as were the targets for setting up new businesses. This was apparent from Mr Mather's own business development monthly report. In addition the quarterly purchase agreement report detailed other variances which did not appear to be considered critical. In making its assessment the subcommittee decided to treat the targets as 'works in progress'.

(ii) Diversification of income base. Trust income was substantially derived from one or two government contracts, and the subcommittee was looking for evidence of activity aimed at increasing the sources of income – for example sponsorships, and broadening the spectrum of government contracts obtained. It did not believe Mr Mather had demonstrated the required activity in that area.

¹ There was to be a net surplus by the end of the financial year

(c) Strategic plan.

(i) Although a draft plan had been filed, it did not include the components specified in the performance agreement. Some credit was given because a start had been made.

(ii) Achieving objectives in the plan for the 2005 year. Almost all of the objectives and milestones set out in the plan were timetabled for dates after the termination of Mr Mather's employment, so were not capable of being achieved.

(d) Organisation development.

(i) The quality management system had not been completed by the scheduled date. Mr Mather had assured the trust the document would be ready by 11 February, but relatively contemporaneous documents indicate he did not provide it as part of his reaction to the assessment. The trust has never received it.

(e) Stakeholder engagement.

The board had a concern about the quality of Mr Mather's reporting to it, and it did not consider the relationship good. Otherwise the subcommittee weighed the existence of favourable community assessments, with some concern about 'slippage' in the relationship with the Ministry of Pacific Island Affairs.

[47] The following assessment resulted:

(a) Financial

- (i) – nil
- (ii) - nil

(b) Business performance

- (i) purchase agreement - 50% of 80% allocation
- (ii) diversification of income - nil.

(c) Strategic plan

- (i) development - 50% of 50% allocation
- (ii) implementation - nil.

(d) Organisation development

All assessed at full allocation, except quality management system assessed at nil.

(e) Stakeholder communications

60% of allocation.

[48] That meant Mr Mather would be paid \$2,725.76 of the at risk component of his salary – a pro rated amount calculated on the basis that he had worked .616 (or 62%) of a year. Assessment at full achievement of all criteria would have yielded a sum of \$10,285.90 on that pro rated basis. Since Mr Mather did not work for the complete year, and had agreed to pro rating the bonus if he did not remain in the trust's employ, I do not accept there could be any entitlement to the full amount of \$16,686.

[49] The parties planned to meet on 9 February 2005 – as Ms Winter put it to: "discuss the outcome of the pro rata at risk incentive, before it is finalised by the board."

[50] The meeting went ahead, and Ms Winter presented the subcommittee's assessment. Mr Mather found the assessment insulting and reacted angrily. Unfortunately, rather than seeking

an explanation of how the components had been assessed, or offering or seeking to offer further comment on the assessments himself, he made a number of wider criticisms of the board on matters unrelated to the assessment. Further, although he asked that the assessment be reconsidered, other than referring to the insulting nature of the assessment he did not indicate what the board should take into account in the process. His argument was emotional rather than reasoned.

[51] The subcommittee looked at the matter again but did not change its assessment and made its recommendation to the board accordingly. The board accepted the recommendation. It also accepted Ms Winter's recommendation as chair that a separate payment be made to recognise Mr Mather's contribution to the trust.

[52] Mr Mather responded to advice that the assessment would not be changed by expressing his feelings of insult to the board. He also forwarded a complaint to the chief executive of the State Services Commission by letter dated 11 February 2005, setting out his dissatisfaction and seeking an independent review of the assessment process. The request was declined and Mr Mather subsequently raised a personal grievance.

Determination - performance review and bonus

[53] Mr Mather does not accept that performance which had previously been rated at meeting 100% of requirements, could achieve a rating of only 26% in February 2005. Despite that outcome it is not quite accurate to say performance which had been outstanding was now regarded as sub par. Something different was being measured. For example earlier performance agreements contained minimal focus on financial matters - and factors such as performance against budget, meeting financial targets and focus on income streams were not present. The new agreement was consistent with the board's wish to embark on a new direction.

[54] It was said in submissions that the process adopted for the final review, the criteria used, the assessment and the final calculation amounted to an unjustified disadvantage and that Mr Mather is entitled to be paid a full bonus. I now address those matters.

1. The process

[55] As it was expressed in submissions, Mr Mather's concern about the process adopted for the final review centred on an alleged lack of consultation about the content of the criteria. In particular, while Mr Mather consulted with Farrow Jamieson about the content of a performance agreement, he was not consulted in advance about the content of the different proposal Ms Winter put to him. I have already found that the responsibility for the content of the proposal was the board's, and it was entitled to prepare such proposal as it saw fit. Ms Winter commenced a consultation process when she presented the proposal to Mr Mather.

[56] The submissions about what happened after that misstated the evidence. As can be seen from my recitation of the facts the board, through Ms Winter, did consult with Mr Mather about the content of the proposal. The process ended when Mr Mather decided to agree to the terms in association with his resignation.

[57] Further to the process used in making the assessment, before the assessment was made Mr Mather was invited for his comments on how he had met the criteria, and he gave them. He said in evidence that, if the board wanted more from him on those matters, it should have asked him. However as a ceo Mr Mather must have been aware of how thin his comments were. They were brief and cursory, and should have contained far more than they did if Mr Mather expected to persuade the board he should be paid the full at-risk sum.

[58] Further, the board was acting in response to Mr Mather's wish to have the performance review finalised by the termination of his employment. There was some time pressure. As far as the process is concerned Mr Mather must take responsibility for his failure to put his case adequately to the board when he had the opportunity to do so.

[59] There was nothing in the material available to the subcommittee, or the use made of it, to suggest that the assessment rested on an inappropriate approach.

[60] The final aspect of the process was the request for reconsideration. Mr Mather was entitled to ask that the matter be reconsidered, but the board was not under any contractual obligation to act on the request and nor was it under an obligation to refer the matter to an independent body for reconsideration. I do not accept the submission that the failure to have an independent body reconsider the matter was unfair.

[61] Regarding the reconsideration itself, Mr Mather did not identify what should be taken into account in the reconsideration. Rather he expressed his insult and anger, and his wish to have the matter looked at again. That was done and the result did not change. Since no error, omission, mitigating factor or misunderstanding had been raised, it is not particularly surprising that the assessment did not change. I do not consider the decision to retain the assessment unchanged was unfair.

[62] I am not persuaded there was anything unfair or unjustified about that process overall.

2. The criteria used

[63] Mr Mather's evidence suggests his concerns are that the criteria were either subjective or not measurable. The difficulty is he agreed to them. He cannot now seek to undo that, and the Authority cannot rewrite the criteria.

3. The substance of the assessment and the conclusions reached

[64] Financial. The budget as at 31 December 2004 had not been met. The subcommittee took into account the possibility that a relevant payment had not been factored in, but even a reassessment of the position overall meant the budget remained unmet as at the date of termination of employment. Mr Mather says he should be given credit for a partial meeting of the budget, but that is not provided for in the criteria and I do not believe the board acted inappropriately in not taking that approach.

[65] As for 'building lease income to [budgeted] target levels', Mr Mather did not comment to the board on that at all. In the course of the Authority's investigation he very belatedly sought to challenge matters such as the setting of the budget and the board's tenancy criteria. He should have raised those with the board at the relevant time, and in any event it is not for the Authority to substitute its view for that of the board in respect of such matters.

[66] Mr Mather also relied on the fact that budgeted target levels had been met as at 31 December 2004, and said he should have been given the benefit of that.

[67] That matter depends on the proper construction of the exchanges of email messages on 7 February, incorporating the agreement recorded at [44]. Ironically, Mr Mather had required that the 'at risk' component be assessed with reference to the period ending on 11 February 2005. The board had intended that the incentive payment be 'as at 31 December 2004', based on the availability of material on which to make the associated assessment. On 7 February Ms Winter advised no papers were available for the period January to 11 February 2005 so the board could not review that period. She then made the suggestion I have recorded, and to which Mr Mather agreed.

[68] Mr Mather's essential concern was with the relationship between the pro rating of his bonus, and having his performance measured over a shorter period (and smaller proportion of a year) than he had actually worked. As I have said, the board's concern was with the availability of evidence. An attempt was made to bridge the gap by the proposal that the December period be reviewed on the evidence provided, and a 'reasonable consideration' be worked out for the remaining period. In terms of the agreement, I do not believe 'reasonable

consideration' for the post December period could be read as allowing the board to override the fact that the criterion had been met as at 31 December 2004.

[69] For that reason I find Mr Mather met the component relating to lease income. He should have been assessed at $20\% \times 40\% \times [\$16,686 \times 62\%] = \$827.62$.

[70] Business performance. Mr Mather had not delivered all purchase agreement targets by December 2004 or by the date of termination of his employment. It was appropriate to treat these matters as works in progress, and make an assessment accordingly. There are no grounds on which I can disturb the board's conclusion in that respect.

[71] There was a disagreement at the investigation meeting over whether Mr Mather had diversified the income base. Mr Mather believed he had, although his position relied heavily on the fact that he had renegotiated the renewal of a particular funding contract. The board did not find that satisfactory. Ms Winter and Ms Lunam also said the need for diversification was discussed frequently with Mr Mather, and he had not performed. I accept that the board was entitled to reach the conclusion it did. Mr Mather has subsequently said the criterion was unrealistic, and pointed out that some funding partnerships require the development of strategic relationships over a long period of time. He did not provide any detail of initiatives he had taken in that respect, but in any event he should have raised the point with the board and explained any initiatives he was taking when he had the chance.

[72] Strategic Plan. The strategic plan Mr Mather produced obviously did not address the matters identified in the performance agreement. The board was entitled to make the assessment it did, bearing in mind that the plan was considered a draft.

[73] The achieving of objectives for the 2005 year is problematic because, with the exception of the quality assurance programme, the objectives were not timetabled for completion until after Mr Mather left his employment.

[74] A number of objectives were identified in the draft strategic plan. Mr Mather has not sought to assert that he met any of them. Even if the timing of the departure from employment, rather than any lack of performance, means the criterion was not met, I do not accept Mr Mather was entitled to receive a payment anyway. Such a payment would be gratuitous. It is not unusual for the timing of a termination of employment to affect the calculation of incentive payments to the possible detriment of the employee concerned, but the fact that the calculation is so affected does not in itself mean the employer has acted unfairly. I do not believe the board's action here was unfair.

[75] Organisation development. Mr Mather did not produce the quality management system document to the board when he should have. Despite his anger and sense of insult, he should have completed the document and should have produced it. He now says very belatedly that he has it and will make it available, but it is too late to assert that – when it made its assessment - the board unfairly failed to give credit for it.

[76] Stakeholder communications. The evidence about their disagreements indicates Mr Mather and the board did not enjoy an 'excellent relationship.' Otherwise the board relied on feedback it had from time to time received. I have a concern about the transparency and measurability of such an approach, but since I accept there was reason not to award the full 100% on the basis of the relationship with a significant stakeholder like the board, I do not disturb the assessment.

4. Conclusion

[77] For all of the above reasons, with one exception I am not persuaded Mr Mather's assessment was unfair or unjustified.

[78] The exception is that I have concluded the assessment regarding lease income was not in accordance with the parties' agreement about how the part year's performance would be

measured. To that limited extent the assessment was unjustified and Mr Mather has a personal grievance.

[79] Accordingly I order the trust to reimburse him in the sum of \$827.62 in respect of that component, under s 123(1)(b) of the Employment Relations Act.

[80] Such a limited basis for finding there was a grievance would not suggest a significant award of compensation for injury to feelings was warranted. Not only that, the criterion had not been met as at the date of termination of employment. For that reason I make no award.

Breach of good faith

[81] Submissions on behalf of Mr Mather regarding breach of good faith contained a bare assertion there had been a breach of s 4 of the Act in respect of Mr Mather's treatment. To the extent that the claim of breach of good faith was intended to cover the matters set out in this determination, they have already been addressed. I do not accept there was a breach of good faith.

Costs

[82] Costs are reserved.

[83] If the parties seek a determination of the matter they shall have 28 days from the date of this determination in which to file and serve memoranda setting out their positions.

Rosemary Monaghan
Member of Employment Relations Authority