

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Andrew Miller (Applicant)

**AND** Air New Zealand Limited (Respondent)

**REPRESENTATIVES** Phil Ahern, Counsel for Applicant  
Kevin Thompson, Counsel for Respondent

**MEMBER OF AUTHORITY** Y S Oldfield

**INVESTIGATION MEETING** 4 August 2005, 5 August 2005, 16 September 2005

**INFORMATION RECEIVED  
BY TELECONFERENCE** 21 September

**SUBMISSIONS** 8 November, 28 November, 13 December, 16 December 2005

**DATE OF DETERMINATION** 26 June 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] This matter concerns a very senior executive of Air New Zealand who lost his job when the airline was restructured in late 2003. Mr Miller says that the termination of his employment was unjustified. Although he accepts that his position as Chief Operating Officer (COO) genuinely became redundant, he says that he was not properly consulted about alternatives to redundancy and was not fairly considered for redeployment. To remedy this he seeks reimbursement of lost wages (\$450,000.00); compensation for hurt and humiliation (\$150,000.00); and compensation for loss of benefit being the 2003-2004 bonus which he says he would have received were it not for his dismissal (\$150,000.00). If I conclude that the consultation and redeployment processes were unfair to Mr Miller and the dismissal was unjustified, further issues will arise about the level of loss he sustained and whether he attempted to mitigate that loss.
- [2] After he was made redundant, Mr Miller developed a second concern related to what he says were misrepresentations made to him when he took up the position of COO in 2002. He alleges that he was misled into thinking that he was a prospective future Chief Executive of the airline and accepted the COO position on that basis. He now believes that all along the Board of Air New Zealand held a view that he would never make a Chief Executive. He says that this was withheld from him for fear that he would leave if he knew that he had no chance of promotion. Mr Miller says he passed up other opportunities to stay at Air New Zealand and would not have done so if he had known the truth about his prospects.

- [3] The second part of Mr Miller's problem has been categorised as both a disadvantage grievance and a claim under the Contractual Remedies Act. To remedy it he seeks damages relating to other employment opportunities which he says he would have pursued and damages relating to loss of opportunity to take up the benefit of a termination payment in his employment agreement with Air New Zealand. The issues for determination in relation to this part of his claim are whether there was a misrepresentation, whether he remained at Air New Zealand in reliance on it, and what if any loss he incurred as a result. There is also an issue relating to whether the disadvantage grievance was raised within 90 days, although Mr Ahern argues that this may be academic since in his submission, a finding in Mr Miller's favour on the facts would equally support relief under the Contractual Remedies Act.

First issue: were the consultation and redeployment efforts adequate and fair to Mr Miller?

- [4] In April 2003 Chief Executive Ralph Norris set up a small team of people from various parts of the airline and charged them with the task of "business transformation." They were to look at all aspects of the business with the goal of improving its efficiency. An outside contractor was used as a facilitator and by July 2003 she had told Mr Norris that it was felt that the current structure would not deliver what was needed for the organisation. She, Mr Norris and the Director of Human Resources, Vanessa Stoddart, proceeded to work on developing a new structure for the whole organisation.
- [5] On 1 September 2003 Mr Norris and Ms Stoddart presented the senior management team (all those who reported directly to the Chief Executive) with what they had come up with so far: a proposal for a new high level structure for the airline. It was aimed at reducing costs and improving accountability and involved the collapsing of five old divisions into three new ones. In addition, Mr Miller's position of COO (responsible for strategy and planning) was disestablished. Although as COO Mr Miller did not run a division of his own, his position was the most senior of those affected since the COO deputised for the Chief Executive when necessary. (Civil Aviation regulations required that specific provision be made for this.)
- [6] Along with the proposed structure, the senior executives were also presented with a timetable for the restructure process. The next step (4-10 September) was for each of them to provide feedback on the merits of the restructure proposal. Mr Miller developed his into a substantial written document. On 5 September he met with Mr Norris and Ms Stoddart, to discuss it. He was critical of several aspects of the restructure. In particular he questioned the removal of the COO role and the proposed separation of profit and loss functions.
- [7] It was planned that feedback would be collated and considered by the Board between 11 September and 19 September and the new structure announced on 22 September. However there was some slippage with the timetable and 22 September came and went without an announcement.
- [8] On 27 September Mr Miller left the country for a trip that was partly business and partly personal; after attending a conference he went on to a family wedding in Scotland. On 30 September, while he was away, the final form of the restructure was confirmed. The COO position and each of the positions heading the five existing divisions were to go. Instead there would be three new positions respectively running three new divisions. It was proposed that one of these positions would deputise for the Chief Executive as needed. As foreshadowed from the outset of the process, the new jobs were not to be advertised externally. Instead, the six senior executives who were affected were advised of a timeframe

in which to advise which if any of the new jobs interested them. After this they would be interviewed, selections would be made, and all concerned would be advised whether they had been redeployed or were to be made redundant.

- [9] In order to ensure that Mr Miller heard the news at the same time as his five colleagues Mr Norris arranged for all the relevant information to be couriered to him. At Ms Stoddart's suggestion he also telephoned him to check that he had received it and arrange a time and date upon his return for him to be interviewed for the new jobs.
- [10] In his witness statement Mr Miller asserted that the news came as a shock to him. Ms Stoddart challenged this evidence, saying that delays in the consultation phase had caused slippage in the timetable and that by 27 September those affected had been told that the confirmation date had been pushed out to 30 September. Mr Miller cannot recall this specifically. However he conceded that he was aware when he left the country that the timetable was running behind and the announcement would be a little later than originally planned. He conceded that he knew it was possible that his job would go and that he would be finding out about it some time soon. Since this was exactly what happened, I consider it cannot have been a shock to him or anyone else.
- [11] Amongst the information Mr Norris had sent Mr Miller were the job descriptions for the three new "level two" positions and information on the criteria/competencies required for each of them. There was no information about the remuneration packages intended for the new roles. However, Ms Stoddart told me that it was intended that these would be much lower than Mr Miller was currently receiving, and that the jobs themselves were at a lower level jobs than positions he had held previously. Ms Miller conceded in his evidence that the jobs did not appear to be at the level or scope of his old job or the job he had held at Ansett immediately prior to his return to New Zealand.
- [12] Because Mr Miller was away, Mr Norris delayed the selection process for the new positions until his return. In order to prevent further slippage in the timetable it was crucial that Mr Miller advise his preferences, and be interviewed, very soon after arriving back in the country. He met with Mr Norris for this purpose on 7 October. In a one hour interview he told Mr Norris (in Mr Miller's words) that he "*had some concerns about the business and that another restructure would only exacerbate its problems.*" He indicated which job was his first choice but told Mr Norris "*ideally it had to have the profit and loss and balance sheet accountability included, which in the job description it did not.*"
- [13] Ms Stoddart explained to me that the new structure separated revenue (sales) from costs/operations (airlines) as part of "derisking" the business. Mr Miller was however looking for a bigger job which included responsibility for both. Mr Miller also indicated which job would be his second choice but said he felt it was not "*meaty enough*" as it was similar to the role he had held in the bigger Air NZ/Ansett Group. Mr Miller agrees that he was making the point that he was over qualified for both these jobs. He did not express any interest in the third of the new jobs.
- [14] As a result of what Mr Miller said at this interview Mr Norris felt that Mr Miller was still very resistant to the restructuring and that the new structure did not have his commitment or support. Mr Norris told me that he deliberated for two days before appointing other candidates to the two roles in which Mr Miller had expressed an interest. He says he took into consideration performance, experience and the interviews. Mr Norris told me that the appointees were very experienced and highly regarded in the industry.

- [15] It emerged later that succession planning was also a criterion in the selection process. (This matter is at the heart of Mr Miller's claim of misrepresentation.) Mr Miller alleges that Mr Norris's failure to tell him of this added a further element of unfairness to the selection process.
- [16] On 13 October (in accordance with the timeline) Mr Miller was told that he had not been successful. He was told that the new structure took effect immediately and that he was to be placed on garden leave for six months from that date.
- [17] Mr Miller's employment agreement provided as follows:

***“Payment in lieu of Notice/ Alternative duties:***

*If you give notice of termination of your employment, or if Air New Zealand gives you notice of termination under clause 4.3, Air New Zealand may, at its sole discretion:*

- (a) pay your remuneration to you in lieu of some or all of any period of notice; or*
- (b) place you on garden leave for some or all of the notice period;*
- (c) direct you during some or all of your notice period to perform such alternate duties as Air New Zealand may reasonably require having regard to the best interests of Air New Zealand and its business (and you acknowledge that such alternate duties may be less in status and responsibility than your duties and responsibilities prior to notice being given.”*

(Clause 4.3 is the provision relating to: “*Company Termination- Without Cause/Redundancy.*”)

- [18] Mr Miller packed up and vacated his office that day. Twice during the afternoon, before he left, Mr Miller was offered input into what the media would be told about his departure. He declined to take up this opportunity. Later, the company issued press releases about the changes. These contained nothing adverse to Mr Miller, although he now says that the simple fact of being made redundant, and widespread knowledge of that, were very damaging to his career. Mr Miller was also told that, should he wish to avail himself of this, a consultant was on hand to provide support. Subsequently, Mr Miller did contact this person and used his services in assisting him with job search.
- [19] Mr Miller told me that as the most senior of the executives affected he never doubted that he would be offered one of the three new positions. He was therefore very shocked when he was not. He takes issue with what he considers the rushed and informal nature of the interview process, which he says indicates a lack of good faith on the part of the respondent. He also takes great exception to the manner in which his departure was advised and managed. He considers he should have been permitted to work out at least some of his notice rather than, as he sees it, being hurried off the premises.
- [20] In response the airline says it could not have incremental change in accountabilities at the highest levels of the organisation. It says that this was not just unworkable but impossible given the airline's statutory obligations to report to the Stock Exchange. It was felt that any need for handover could be met by the garden leave arrangement. As for the timeframe, it had originally been planned to tell the affected individuals one week before the

final deadline for making the news public however the slippage had meant that time had run out.

[21] Of the three other members of the senior management team who were also unsuccessful in gaining new level two positions, one eventually accepted a level three position while the other, like Mr Miller, was made redundant. The airline offered him and Mr Miller a farewell function but Mr Miller declined to participate.

[22] Mr Miller continued to receive his salary for the six months of his garden leave. At the end of this time (April 2004) he received his contractual entitlements to redundancy pay and outstanding holiday pay. He did not however receive a bonus payment for the 2004 year. At the end of his garden leave he was presented with a severance agreement which offered "*the sum of \$125,000.00 gross, less appropriate taxation, representing pro rata bonus payment of ten months of the FY04 performance year under Mr Miller's Employment Agreement.*" However, this was on a "full and final settlement" basis and Mr Miller declined. He now seeks compensation for loss of benefit of the bonus for the 2004 year.

#### Determination

[23] I am satisfied that Mr Miller was properly consulted about the proposed restructure, both in regard to its merits for the organisation and its consequences for him personally. Mr Miller has argued that he should have been involved in discussions about restructuring from the outset and presented with the proposal before the rest of the senior management team. I do not accept this. The August presentation to the senior management team provided adequate detail about the substance and process of what was proposed and sufficient time was allowed for feedback. Mr Miller did give feedback and it received due consideration, as evidenced by the follow up discussion Mr Norris held with him upon receiving it.

[24] I am also satisfied that the selection process, though quick and relatively informal, was not inherently unfair to either Mr Miller or any of the other participants. Mr Miller was asked which if any of the positions he wished to be considered for, advised of the competencies for the roles, and given the opportunity to discuss his suitability in interview. By virtue of their existing roles all the applicants were realistic contenders for the new positions and were well known to those making the final decision. Mr Norris made his selection on the basis of merit as demonstrated by past performance, experience and interview. It was open to him to do so.

[25] It is correct (as asserted by Mr Miller) that he was not advised that succession planning was a factor in the selection process. Respondent witnesses told me that it was important that at least two of the three appointees were Chief Executive material. In relation to this point, I consider it self evident that succession planning would be a factor in the selection process. I would not expect this to need spelling out. In addition, I note that it was not essential that every appointee be a contender for further promotion. For these reasons, I do not consider that there was any unfairness to Mr Miller arising out of this point.

[26] The final issue in relation to the fairness of the dismissal relates to what Mr Miller experienced on his final day and the fact that he was not permitted to work out any of his notice period. It is not generally good employment relations practice for redundant employees to be required to depart the workplace in the swift and unceremonious fashion Mr Miller experienced. In general however redundancies are not of such significance that that they must be notified to the stock exchange. It is a matter of public record that the period in question was a very sensitive one for the airline. It could not afford further damage

to its credibility and it was essential that investors and other key stakeholders had complete certainty about who was accountable for its performance. In this unusual set of circumstances, the speed with which the changeover was conducted was justified, as was the garden leave arrangement (provided for in the agreement.)

[27] As for the way his leaving might have been construed by the public here and overseas, it was open to Mr Miller to “position” his departure in the media in a way favourable to him; he chose not to take up this opportunity. No blame can attach to the company for that.

**[28] Mr Miller has therefore failed to establish a personal grievance of unjustified dismissal or even a claim of unjustified disadvantage.**

[29] It becomes unnecessary for me to proceed to consider the remaining issues of loss and mitigation. However, for completeness, I record that even if I had found that there were elements of unfairness in the way Mr Miller was made redundant, it is unlikely that any award of remedies would have come close to what he has claimed. Both the restructuring and the disestablishment of the COO position were for genuine commercial reasons, and the redeployment opportunities went, very appropriately, to individuals who had previously held similar positions (unlike the unique role of COO.) This all indicates that Mr Miller’s redundancy was genuine, which would preclude an award for lost earnings.

[30] In addition, Mr Miller received six month’s notice and approximately nine months redundancy pay. Because of this, even if his redundancy were not genuine, it would have been a big task to show that a further award for loss of earnings was justified.

**Second issue: were Mr Miller’s prospects at the airline misrepresented to him?**

[31] Mr Miller first joined Air New Zealand in 1997. From about February 2001 he was Senior Vice President of Sales and Distribution for the Ansett/Air New Zealand Group, based in Australia. When Ansett Australia collapsed in September 2001 he returned to New Zealand to help with the recapitalisation of Air New Zealand. At this time Mr Miller knew that the incumbent Chief Executive was planning to leave. He told me that if this had not been the case he would have taken his redundancy compensation and left when Ansett collapsed. He says he came back with the primary purpose of pursuing the job of Chief Executive.

[32] Mr Miller entered into a new employment agreement as “Senior Vice President, Strategy and Planning” on 1 November 2001. It contained the following clause:

*“Change of CEO clause*

*The Company recognizes the need for a close working relationship between the Senior Vice President and the Chief Executive Officer. There needs to be a high degree of mutual trust and respect in such a relationship and the chemistry between the Executive team is an important factor. The Company will provide you with an option to terminate this contract within defined parameters on the appointment of a new CEO.”*

[33] This option was exercisable by either party, on three months notice, within 12 months of the appointment of a new CEO. Upon its exercise, Mr Miller would receive a payment (inclusive of redundancy compensation and notice) equivalent to 12 months salary. In this way, the redundancy entitlements that Mr Miller had when Ansett collapsed were preserved.

- [34] Mr Miller did apply for the position of Chief Executive, and underwent the selection process along with other (external) short listed candidates. Board members who had been involved in the process (Mr France and Mr Palmer) told me that Mr Miller was an excellent manager and initially appeared to be a very strong candidate. However, one of the key requirements the Board had of the incoming Chief Executive was an ability to inspire and motivate the very demoralised staff, and the committee felt that Mr Miller lacked critical leadership skills. As a result, at the conclusion of the selection process the committee were not confident that either he or any of the candidates were suitable for appointment.
- [35] At this point, one of the committee members, Ralph Norris, decided to step down from the committee (and resign from the Board) in order to put his own name forward for the position. He then underwent the same procedures as the other applicants had and was ultimately successful.
- [36] The airline was aware that there was a risk that Mr Miller might choose to take up the change of CEO provisions in his agreement. It was keen to avoid this and to retain Mr Miller's expertise. Shortly after being advised of Mr Norris's appointment, Mr Miller was approached by Mr Norris and the Deputy Chairman of the Board, Mr France, with a proposal that he accept a new appointment as Chief Operating Officer with the responsibility of deputising for the Chief Executive when necessary.
- [37] During the ensuing conversation Mr Miller reiterated that his goal continued to be the CEO role. He says he was reassured that he was "*a realistic potential candidate for the role following Mr Norris's tenure and my continued tenure in the new COO role would only improve my candidacy.*" I was told by Mr France that the Board expected Mr Miller to develop and improve his leadership skills by working closely with, and modelling himself upon, Mr Norris. In addition, as COO, Mr Miller would be given the opportunity of attending Board meetings and of developing abilities to command, influence and persuade.
- [38] Mr Miller told me that if it had not been for these reassurances he would have resigned at this point and taken his termination payment. However he decided to accept the COO position and on 1 June 2002, he entered into another new employment agreement. Pursuant to this agreement his total remuneration was significantly increased and he retained entitlements to compensation in the event of redundancy. Unlike his previous agreement, however, the agreement did not contain a "Change of CEO" clause. Instead it provided for a "separation payment" as follows:
- "Should you give notice of termination of your employment from Air New Zealand within 24 months from the commencement date of this agreement, you will be paid a separation payment of \$200,000.00 gross."*
- [39] It is not in dispute that the scaling back of the separation payment was due to attempts to trim a perceived "culture of excess" and was acceptable to Mr Miller at the time.
- [40] Over the months which followed Mr Miller undertook the role of COO and deputised for Mr Norris on occasions when he was on leave or out of the country. However, the two men did not always have an easy working relationship. Mr Norris felt that Mr Miller displayed poor teamwork and intolerance of the views of others, while Mr Miller felt that Mr Norris made decisions which "*showed no foresight or a complete lack of understanding of the airline business.*"

- [41] During March 2003 another substantial sized company based in Auckland was engaged in a search for a suitable Chief Executive. Mr Miller was interested in this opportunity and met first with the recruitment consultant concerned and later, on two occasions, with the Chairperson of the Board of that company. While considering what to do about it, he asked Mr Norris *“whether there were any known impediments as to my future CEO candidacy as and when it would arise.”* Mr Miller recalls that Mr Norris replied that *“that was a matter for the Board, it was not his sole decision, but he would be asked for his input and recommendation. He did however say that he knew of nothing that would be an impediment to my candidacy.”*
- [42] Mr Norris disputes this. He told me that Mr Miller may have mentioned that the job was coming up but did not tell him that he was a contender. Had he done so, Mr Norris said, he would have considered it of sufficient importance for him to advise the Board. He also says that because he was losing confidence in Mr Miller he would have probably have encouraged him to pursue other opportunities if he had known of them.
- [43] Mr Miller says that on the strength of what he believes Mr Norris had said, he decided not to pursue the vacancy at the other company. His withdrawal from the process came before any short listing had been done but I was told by the recruitment consultant concerned that he would definitely have been short listed. That witness also told me that it was impossible to assess whether he was likely to obtain the position as there was known to be at least one other very strong candidate.
- [44] The months between April and September were a challenging time for the airline but passed without incident relating to Mr Miller’s employment. Then began, as we have seen, the process which led to the termination of Mr Miller’s employment. Once that process was complete and while Mr Miller was still on garden leave he requested a meeting with John Palmer, Chairman of the Board of Air New Zealand, to discuss the termination of his employment.
- [45] This took place on 1 December 2003. Mr Miller maintains that during this conversation Mr Palmer told him that right back when he had taken the job of COO, Mr Palmer and others had already made up their minds that Mr Miller would never have the makings of a Chief Executive. He says that Mr Palmer admitted that they had deliberately withheld this information from him because they did not want to risk losing him from the organisation. Mr Miller says he would not have taken that job if he had known this at the time, and says he only stayed at Air New Zealand in the expectation that he would be a serious contender for the top job when Mr Norris eventually moved on.
- [46] Mr Palmer strenuously denies that he said any such thing to Mr Miller on 1 December, or at any other time. He told me that when Mr Miller was appointed to the position of COO in 2002 he was definitely seen as a realistic potential candidate for Chief Executive. However, by late 2003, he was no longer seen in this light. The Board felt that in his time as Mr Norris’s deputy he had failed to demonstrate the sort of leadership qualities that would be needed in the role of Chief Executive. This had impacted on his chances of getting one of the three level two positions at the time of the restructure because succession planning was one factor considered in the selection process.
- [47] Mr Palmer says that this was what he told Mr Miller during their conversation on 1 December. He says that there could never have been any question of misrepresentation. If at the time Mr Miller became COO he had been given to believe that he was a future contender for Chief Executive, this was no more than an accurate reflection of the Board’s thinking at

the time. Later, when that view began to change it was not for the Board to make a point of telling him so. In any event, he said, it was not something that was discussed until well into 2003, when restructuring was under consideration. There was no reason to do so since Mr Norris had no immediate plans to leave. (He stayed, in fact, until late 2005.)

[48] Mr Norris confirmed to me that in 2002 (although the decision was never going to be his anyway) he “absolutely” thought that Mr Miller could be his successor but by mid 2003, his view had changed. Like Mr Palmer, he did not see any reason to speak of this to Mr Miller as the Chief Executive’s job was not due to come up in the near future.

[49] Because the differences between what Mr Palmer and Mr Miller have each reported of the 1 December meeting are critical to the determination of this issue, my own investigation focussed on establishing exactly what was said, as opposed to the inferences that were taken from it. Mr Miller’s witness statement recorded that Mr Palmer had said:

*“the Board would have appointed me to the role of CEO some 2 years prior if they had thought that my leadership style and abilities were appropriate for Air New Zealand, but they were not and **the fact that I would not be CEO of Air New Zealand had been known since the time I had originally missed out on the role.**”*

(Emphasis added by the Authority.)

[50] Mr Palmer did not make notes of the meeting. Mr Miller did take some brief notes, and shortly afterwards he typed them up. He did not retain the original notes but provided the typed version to me. It does not contain the remarks that have been emphasised here. It records what Mr Palmer said about this issue as follows:

*“The Chairman had expressed the view to Ralph and the Board that Andrew Miller was not a likely CEO successor ...The Chairman went on to say that we would have appointed Andrew Miller to the role of CEO some 2 years prior if they had thought that his leadership style and abilities were appropriate when they were evaluating the differences between Ralph Norris and Andrew Miller...”*

*The Chairman said that if they give me [sic] an early indication of my lack of suitability that would have encouraged me to leave the business and take opportunities elsewhere and at that stage Air New Zealand needed the skills and talents ...For the Chairman or Ralph to indicate to Andrew Miller earlier that he was not going to be the CEO in the future would have put the company at significant risk with the departure of Andrew Miller.”*

[51] During my questions I asked Mr Miller to tell me, as precisely as he could recall, what exactly Mr Palmer had said. He replied that he said: *“its always been my view that you didn’t have leadership and style for CEO”*

[52] I asked Mr Miller to account for the difference between what his notes record and what his witness statement contains. He told me that it was his view that leadership style and abilities were to a degree immutable and harder to change once one reached a certain age. Having failed, on that basis, to get the job the first time, he considered it a given that he never would. He felt it unlikely that Mr Palmer saw things any other way, although Mr Palmer never told him anything about his views.

## Determination

- [53] Credibility is clearly critical to the determination of this issue. Mr Ahern's submissions amount to an argument that I should prefer the evidence of Mr Miller over that of Mr Palmer, Mr France, Mr Norris, and on some points, Ms Stoddart.
- [54] Mr Ahern has pointed to an important discrepancy in the evidence which he says undermines the credibility of Mr Palmer in particular. This relates to arrangements for the meeting of 1 December 2003. Mr Miller has said all along that he and Mr Palmer met alone and that Mr Palmer had made it a condition of the meeting that no lawyers be present. Mr Palmer and Ms Stoddart (who helped set it up) initially disagreed with this. Ms Stoddart said that Mr Miller had asked that the meeting be one and one and specifically requested that Mr Norris be excluded. Examination of the documentary record eventually confirmed the facts: Mr Miller had requested that Mr Norris be excluded, and Mr Palmer had said that he did not wish lawyers to be present. The meeting proceeded on that basis.
- [55] For his part, Mr Miller demonstrated a tendency to embellish the plain facts and a readiness to jump to conclusions. For example, in his witness statement, Mr Miller stated in relation to the opportunity he had explored in March 2003: "*I had been told that I was the preferred candidate.*" When the consultant gave different evidence (as recorded above) Mr Miller conceded that his evidence was not accurate. Further on in his statement Mr Miller asserted that he received no feedback in response to the paper he prepared on the restructuring, but on being questioned conceded that during his meeting with Mr Norris and Ms Stoddart he did in fact receive some response to it. He also conceded that it was not correct at all when he stated in his witness statement that on his last day: "*I requested the opportunity to remove my personal belongings from my office this was denied saying that security would go through my drawers later on.*"
- [56] The most significant example can be seen in the highlighted remarks recorded above. Mr Miller's witness statement reads as though Mr Palmer uttered these words when in fact it was later acknowledged that they reflect the inference Mr Miller drew from what Mr Palmer had said.
- [57] Observing examples such as these has led me to be cautious in accepting Mr Miller's evidence at face value. Notwithstanding the evidence around the setting up of the meeting of 1 December, I have found Mr Palmer and Mr Norris to be the more credible witnesses and prefer Mr Palmer's account of what he said to Mr Miller on 1 December. **On balance the evidence does not establish that in 2002 Mr Miller's prospects at the airline were misrepresented to him.** Mr Miller's second and third causes of action therefore fail and it becomes unnecessary for me to decide whether he relied on the alleged misrepresentation, suffered loss as a result, or raised a disadvantage grievance within 90 days.
- [58] Because Mr Miller's claim has failed at the first hurdle it has not been necessary for me to traverse much of the evidence I heard. Before concluding however I wish to record some observations on remedies.
- [59] It was less than two years from Mr Miller's return from Australia until the end of his six months' garden leave. In that time he was paid, with bonuses and redundancy pay, \$1,736,908.00. Had he been prepared to accept the respondent's severance offer, he would have received a further \$125,000.00 on top of this. That is to say, for a period of less than 18 months actually worked, the total paid out or otherwise offered to him was \$1.86 million. He

also received employer contributions to his superannuation scheme and extensive free travel for him and his partner (which continues for almost four years after termination.)

[60] Mr Miller did not have evidence of any firm job offer from anyone else. The job he had expressed an interest in was for a period of three years, but he did not know what the salary would have been or whether (even with his separation payment) his total remuneration would have exceeded what he received as things were. On the evidence I heard, therefore, even if I had preferred Mr Miller's evidence as to what was said on 1 December, Mr Miller would have struggled to show that any misrepresentation caused him loss.

## Outstanding issues: Bonus and Costs

[61] Mr Miller's employment agreement provides as follows:

*"You will be eligible to take part in a performance bonus system. The performance bonus payments will be to a maximum of 25% of TEC. Criteria for the bonus will include individual, Company, and divisional performance. Allocation of a performance bonus is at the discretion of the company."*

[62] Bonus payments were made in September of each year following the end of the Company's financial year on 30 June. Mr Miller's TEC ("Total Employment Cost" although not inclusive of certain benefits) was \$600,000.00. Thus the maximum bonus payable to him for a full year of employment would have been \$150,000.00. On termination the company offered Mr Miller a bonus payment of \$125,000.00 as part of a severance offer in "full and final settlement." It was rejected by Mr Miller because of that.

[63] The respondent maintains that the payment of a bonus is entirely discretionary. In his submissions Mr Thompson noted:

*"Mr Miller appears to be advancing a claim for a bonus payment regardless of whether he is successful with any of the three causes of action set out in his Statement of Problem.*

*However, the Authority will only need to consider the claim for a bonus payment in the event that Mr Miller is successful in one or more of his claims."*

[64] In reply, Mr Ahern has noted that even if his client is unsuccessful in establishing his principal claims, the claim for payment of the bonus "*would represent a wages claim which would simply be brought again.*"

[65] There is clearly a live issue between the parties as to whether Mr Miller is entitled to a bonus payment. Although I did hear submissions on the bonus issue, they were not directed specifically at the question whether a case could be made for arrears of wages in relation to the bonus and I do not consider that I have sufficient information on the issue to proceed to determine it on that basis. I recommend therefore that the parties address this issue between themselves, along with the issue of costs, with the assistance of a mediator if necessary. In the event that they cannot resolve these issues they do of course have leave to request that I determine those matters.

