



covered by the scheme anyway because he had not accepted an offer to join it, made to him in March 2023.

[3] Mr O'Rourke applied to the Authority for a finding that he was entitled to the payment because the "one-page sheet" about the incentive scheme sent to him in March 2023 did not refer to any such conditions or limitations for payment.

[4] McKay's reply to that claim said there were three reasons Mr O'Rourke had no contractual entitlement to the payment he sought:

- (i) The incentive scheme was not provided for in his initial individual employment agreement;
- (ii) He had not signed up to the scheme, when offered the opportunity; and
- (iii) He had not met a key condition of the scheme because, by the date on which the payment was made, he no longer worked for McKay.

### **The Authority's investigation**

[5] With the parties' agreement, this matter has been determined 'on the papers'. Those papers comprised:

- Mr O'Rourke's statement of problem;
- McKay's statement in reply;
- submissions lodged sequentially by the parties (on the dates recorded at the head of this determination);
- relevant documents, including Mr O'Rourke's employment agreement, McKay's incentive policy and correspondence between the parties; and
- written statements from five McKay personnel about interactions with Mr O'Rourke on employment and payment matters relevant to his claim.

[6] The following McKay personnel provided written statements:

- Lindsay Faithfull, managing director;
- Stuart McDonald, general manager People and Culture;
- Ryan Van Vuuren, a regional manager;
- Chané Botha, maintenance and roading asset manager; and
- Cautney Leitch, an estimator and project manager

[7] Those statements were not affirmed, and then tested through questioning, as would have occurred had an investigation meeting been held. Their contents have been

weighed along with Mr O'Rourke's own written account and relevant documents provided by the parties. Conclusions expressed in this determination are reached on the evidential standard of the balance of probabilities, that is what is more likely than not to have happened. This includes resolving some conflicting assertions made in the evidence by looking at what relevant documents may or may not corroborate and by assessing the likelihood that the parties' conduct and intentions were, in fact, as one or other party contends them to have been.

### **The issues**

[8] The issues for determination were:

- (a) Is Mr O'Rourke entitled to payment of a bonus for the year 1 January 2023 to 31 December 2023?
- (b) Should either party contribute to any costs of representation incurred by the other party?

### **Context**

#### *The employment agreement*

[9] The remuneration clause of Mr O'Rourke's employment agreement set a salary subject to annual review. It made no reference to any scheme for payment of a bonus or incentive in addition to that amount.

[10] Another clause allowed for terms and conditions in the agreement to be "varied by agreement between the employer and the employee". It did not state any such variation had to be recorded in writing.

[11] A further clause allowed the employer to institute policies and rules in relation to its activities. This clause had the effect of authorising McKay to implement a policy such as providing an incentive scheme.

#### *The incentive scheme*

[12] McKay managing director Lindsay Faithful said the company started its incentive scheme in 2011, initially with five or fewer people eligible to be part of it. By 2023 the scheme covered around 50 employees.

[13] At the time germane to Mr O'Rourke's claim McKay's scheme operated under a policy dated December 2023 and titled "Reward and Recognition and Incentive Scheme(s)".

[14] There was no evidence Mr O'Rourke was ever provided with a copy of, or had access to, this policy. Its terms were, nevertheless, relevant to the obligations or requirements McKay had set itself in operating the scheme.

[15] The policy outlined three schemes. Two related to work on individual projects or for recognition of exceptionally good work. A third scheme, the relevant one here, was called the Level 1 Incentive Scheme. It provided for payments to managers with functional or specific sales responsibilities.

[16] Incentive targets were to be set annually for the company's financial year from 1 January to 31 December. McKay's board was required to set a threshold level of NPBT (net profit before tax) each year and this level had to be achieved before any payment would be made. The payment made to each individual manager was also to be adjusted through a rating system which assessed whether their performance in meeting or exceeding approved annual targets was poor, average, good, excellent, or outstanding.

[17] Two further, specific requirements were particularly relevant to Mr O'Rourke's claim.

[18] Firstly, the policy required an employee to "be in current employment" with McKay at the time any payments were made. The policy gave two different descriptions of when the payment would be made. Clause 3.1(e)v said this was "by 30 April" in the following year. Clause 9 said this was "normally before 31 March each year".

[19] Clause 9 also included a provision for payment to participants in the scheme whose employment ended on an involuntary basis, such as by redundancy. They were to receive a payment assessed on a pro-rata basis. Employees dismissed for misconduct were disqualified from any payment. Neither of those circumstances applied to Mr O'Rourke's situation. He had submitted a letter of resignation on 12 December 2023, identifying 12 January 2024 as his last day of work for McKay. This was consistent

with the requirement in his employment agreement to give one month's notice to terminate the employment.

[20] Where the employment of a participant in the scheme ended on a "voluntary" basis, clause 9 stated "there is no entitlement to payment of incentive as the qualification is that an employee needs to be in employment at the time the incentive is paid". The clause continued, however, with a further provision allowing the managing director "the discretion to make a pro-rated payment if we deem the leaving employee merits the payment".

[21] The second, specific requirement said that the "incentive sheet must be signed by the employee and approved by the managing director by 31 January" for the employee to qualify for the incentive scheme in any particular year and to receive payment for it.

*Invitation for three managers to join incentive scheme*

[22] In 2022 McKay's board approved a request from Mr Van Vuuren for three managers working in his division of the business to be invited to join the incentive scheme – Mr O'Rourke, Ms Botha and Mr Leitch.

[23] An administrative error resulted in those invitations not being issued before the 31 January date required by McKay's policy. The invitations were sent to Mr O'Rourke, Ms Botha and Mr Leitch in March 2023 after Mr Van Vuuren had identified the oversight.

[24] Mr O'Rourke's invitation came in an email dated 10 March 2023 with the subject heading "2023 Incentive Letter". Mr Faithfull's executive assistant sent it to him on Mr Faithfull's behalf. It read:

Kia ora Kevin,  
Please find attached your 2023 Incentive letter.  
Please sign and return to Kellie [the executive assistant].  
Nga mihi  
Lindsay [Faithfull]

[25] A pdf attachment to the email was labelled: "Kevin O'Rourke 2023 Incentive".

[26] Ms Botha and Mr Leitch received the same message and attachment, also personalised to them. Although the email heading referred to a “letter”, the attachment to all three messages was a single sheet set out in a table format.

[27] Headed “Incentive Target Agreement for 2023” one field on the sheet read: “Variable income at 100% \$5,000”. This was the base amount from which an incentive payment could be calculated. Further fields set out the rating system for a performance assessment that could be used to adjust the base figure. It listed the following grades of rating and the factor by which the base figure could be adjusted: : poor 0.80; average 1.00; good 1.20; excellent 1.80; and outstanding 2.40. A table to calculate those adjustments was headed “the result section to be completed in April 2024”. The individual achievement calculated and recorded in that table was to then be included in a further calculation, if McKay had met its NPBT target, to identify a “payout amount”.

[28] The form had spaces for three signatures. One read “Agreed by Employee, Name/Date/Signature”, the next “Agreed by Manager Name/Date/Signature” and then “Approved by Executive Management Name/Date/Signature”.

[29] At the bottom left of the form was a note reading: “All variable income payments will be made in accordance with the Incentive Policy”.

[30] According to the information available to the Authority, through the written accounts from Mr O’Rourke, Mr Leitch, Ms Botha and Mr Van Vuuren, they had each discussed the scheme and its operation with Mr Van Vuuren after receiving the email invitation.

[31] Mr Van Vuuren said he told Mr O’Rourke, Mr Leitch, Ms Botha to ask Mr Faithfull’s executive assistant if they had any further questions about the scheme.

[32] Mr Leitch and Ms Botha both signed and returned their “incentive sheet” to Mr Faithfull’s executive assistant.

[33] Mr O’Rourke did not. He said Mr Van Vuuren told him not to sign or return the incentive sheet but “to just ignore that, it should never have been sent to you”. Mr O’Rourke said “no explicit instruction to sign the document was given”.

[34] Mr Van Vuuren denied Mr O’Rourke’s account. He said there was “no reason why I would have told him not to sign the form and told the others they should”.

[35] Mr O'Rourke said progress with financial results, their KPIs and how that would affect incentive payments had been discussed in work meetings with Mr Van Vuuren during 2023. He said this showed Mr Van Vuuren knew Mr O'Rourke was part of the incentive scheme. Mr Van Vuuren denied that description. He said he had assumed Mr O'Rourke had signed and returned the form to confirm his agreement to be part of the incentive scheme. Mr Van Vuuren did not know Mr O'Rourke had not.

### **Analysis**

[36] Mr O'Rourke made wide ranging submissions in support of his claim. They had been considered closely in preparing this determination. Only some of the propositions he advanced need be addressed to explain why the order he sought cannot be granted.

#### *No reliable verbal agreement*

[37] Mr O'Rourke relied on what he said was a verbal agreement made with Mr Van Vuuren that he was part of the incentive scheme, so it did not matter that he failed to sign and return the invitation to join it.

[38] Mr O'Rourke said he was reasonably entitled to believe Mr Van Vuuren had the authority to tell him to ignore the message sent on behalf of the managing director, to sign and return the form to join the scheme, and to enter a verbal commitment on behalf of McKay to nevertheless pay the incentive scheme bonus to Mr O'Rourke.

[39] This proposition failed to meet the evidential standard, on the balance of probabilities, that Mr Van Vuuren had acted in a way that resulted in a verbal agreement only with Mr O'Rourke. Ms Botha and Mr Leitch both signed and returned their forms after talking with Mr Van Vuuren about the scheme. There was, as Mr Van Vuuren said in his evidence, no reason for him to tell Mr O'Rourke not to sign and return the form but to tell the others they should.

[40] Given the nature of the invitation, in an email from the managing director requiring return of the form to his executive assistant, it was also unlikely Mr O'Rourke reasonably expected Mr Van Vuuren had the authority to verbally agree to his participation in the incentive scheme in some different way or on different terms.

[41] Due to his own managerial role Mr Van Vuuren had also been a participant in McKay's incentive scheme for the previous seven years. In that context, on the balance of probabilities, it was unlikely Mr Van Vuuren told Mr O'Rourke he could join and benefit from the scheme without signing and returning the annual agreement form.

[42] As a further example, it was unlikely Mr Van Vuuren told him the bonus would be paid in January or February, as Mr O'Rourke asserted, when Mr Van Vuuren knew from his own participation in the scheme that payments were made in March or April. This would also have been inconsistent with the reasonably plain indication on the form that the incentive payout would be made after the end of the first quarter of the following year. The 'results' section of the form indicated it was "to be completed in April 2024".

*Participation was conditional on meeting terms and conditions of the scheme*

[43] Mr O'Rourke submitted payment of the incentive amount in the McKay scheme was not discretionary. Rather it was, he said, a non-discretionary payment, to be made according to a specified formula on reaching measurable targets.

[44] His proposition is correct. The scheme included some subjective measures concerning the standard of performance (poor, average, good, excellent) that could alter one factor in the formula used to calculate an incentive payout. Once the NPBT threshold was crossed, however, the assessment of entitlement had to be made by applying the formula. If this resulted in an entitlement, it did not then depend on the discretion of the managing director or anyone else as to whether a payment was due.

[45] The fact, however, that eligibility for the payment was subject to some terms was apparent from the sheet attached to the 10 March 2023 email sent to Mr O'Rourke. The note in the left lower corner, just below where he was asked to sign the form, referred to "all" payments being "made in accordance with the Incentive Policy".

[46] Knowing the policy existed but not being provided with a copy, and not asking for it, did not release Mr O'Rourke from the terms on which McKay operated the incentive scheme.

[47] Mr O'Rourke argued McKay had not operated in good faith. In turn, however, he could not claim the benefits of a policy without observing the terms or limitations

on which it was provided to those employees who were offered and accepted the opportunity to join the scheme.

[48] His employment agreement allowed for terms and conditions to be varied by agreement, without specifying that the agreement had to be recorded in writing. In this case, however, the offer to join the scheme was made in writing, with a requirement for agreement to be provided in writing, by returning a signed version of the “incentive target agreement for 2023”. Doing so in writing was a condition of the offer made. He had not done what was necessary to accept the offer and be part of the scheme.

*Current employment was a reasonable requirement*

[49] Mr O’Rourke submitted McKay had acted unreasonably in limiting payment of the incentive to those still employed at the time that the payment amount was calculated and paid each year.

[50] He submitted that “the lack of a formal policy document [made] the condition of staying until the payout date unreasonable”. There was no lack of a policy. The incentive agreement he was sent in March 2023 expressly referred to the Incentive Policy and all payments being made in accordance with it.

[51] McKay, in reply, also said its incentive scheme was “both a reward and retention tool” to encourage employees to perform better and to remain with the company. In light of its purpose, it was reasonable for its incentive policy to require a participant in its scheme to still be in its employment at the time of the payment in subsequent months.

*Other shortcomings do not negate the limits of the policy*

[52] Mr O’Rourke’s submissions addressed shortcomings in how McKay had administered the scheme. This included a lack of follow up when he had not returned the form inviting him to join it, if it was truly important that he did so, and not providing him with a copy of its policy for the scheme.

[53] While those criticisms may be valid, they do not address the counterfactual situation if McKay had checked why Mr O’Rourke had not returned his signed form, thereby varying his terms of employment, and had provided him with a copy of the policy, including its requirement for current employment at the time of payment. If he

had then signed and returned the form and received a copy of the policy, he would still not be entitled to the payment he sought.

[54] Importantly, there was nothing to suggest McKay had acted in any deliberate or misleading way to deny Mr O'Rourke access to the incentive or payment of it if he met the same terms as any other participant in the scheme.

### *Conclusion*

[55] Ultimately, Mr O'Rourke had not established there was any solely verbal agreement, made on known and certain terms, with Mr Van Vuuren for payment to him of an incentive payment on a basis that was different from other employees who had signed up for the scheme. The terms applicable to those other employees included the requirement to still be in the company's employment at the time that the annual bonus for the previous year was paid out. It was a condition Mr O'Rourke had not meet. He had no entitlement to the payment he sought.

### **Outcome**

[56] For the reasons given Mr O'Rourke's application for an order requiring McKay to pay him an incentive payment is declined.

### **Costs**

[57] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If unable to do so, and an Authority determination on costs is needed, McKay may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. Mr O'Rourke would then have 14 days, from the date of service of that memorandum, to lodge any reply memorandum. If requested by the parties, an extension of time to resolve costs between themselves may be granted.

[58] 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>1</sup>

[59] Subject to submissions on any factors relevant to adjustment of the tariff, a preliminary indication may assist the parties resolve any costs issue themselves. The

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<sup>1</sup> See [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies).

starting point for assessing costs in this matter, resolved on the papers but requiring more extensive than usual exchanges of submissions, would likely be one half of the usual tariff.

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