

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Vaughan Robertson, Robert McCallum & John Hagan (Applicants)  
**AND** Carter Holt Harvey Limited (Respondent)  
**REPRESENTATIVES** Dean Organ, for Applicants  
Phillipa Muir, for Respondent  
**MEMBER OF AUTHORITY** Marija Urlich  
**INVESTIGATION MEETING** 1 September 2005  
**DATE OF DETERMINATION** 7 September 2005

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

**Employment relationship problem**

[1] John Hagan, Robert McCallum and Vaughan Robertson were made redundant from their positions with their former employer Carter Holt Harvey Limited trading as Oxygen Business Systems (“OBS”) with an effective date of 16 September 2004. On 2 March 2005 they were advised by OBS that they would not be entitled to bonus payments under the Management Incentive Plan (“MIP”). Messers Hagan, McCallum and Robertson say the failure to pay their bonus entitlement under the MIP has unjustifiably disadvantaged them in their employment and further that the failure to pay the MIP indicates an improper motive for their redundancies rendering their dismissals unjustified. They say their personal grievances were raised with OBS within 90 days of the grounds coming to their attention.

[2] OBS says the grievances were not raised within the 90-day period set out in section 114(1) of the Employment Relations Act 2000, that it does not agree to those grievances being raised out of time and that there are no grounds on which the Authority should grant leave to raise the grievances out of time.

[3] This determination deals with the preliminary matter of whether the grievances were raised in time. The applicants have not sought to rely on one of the grounds of exceptional circumstances (section 114(4)) in raising their personal grievances because they say there was no delay.

[4] The investigation into this preliminary issue was conducted on the papers with the agreement of the parties. All evidence was provided by affidavit.

**(i) unjustified dismissal**

[5] Section 114(1) of the Act provides (my emphasis):

“Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.”

[6] The Authority must consider whether there is a “*tenable, sufficiently arguable basis*”<sup>1</sup> upon which Messers Hagan, McCallum and Robertson can say the 90-day period for their claims of unjustifiable dismissal should start running from 2 March 2005 rather than 16 September 2004.

[7] There is no dispute that the MIP scheme operates at the sole discretion of OBS. Eligibility for a payment under the MIP scheme depended on meeting the set targets. These targets include a minimum personal performance target of 95%.

[8] The applicants were advised by letter dated 16 September 2004 that their positions were redundant effective 15 October. In relation to the MIP the letters state:

Under the rules of the MIP scheme a participant whose employment terminates during a MIP year because of redundancy (provided the effective date of redundancy is within six months of the financial year end of the plan) may, at the discretion of the Committee be eligible for consideration for a pro-rated award based on the period of active employment during the MIP year. John [Robert] [Vaughan], we are still awaiting the decision about your eligibility for the 2004 MIP and will communicate as soon as have (sic) we have clarity.”

[9] On 12 October OBS’s chief executive Mike Smith wrote to the applicants:

“Further to your Notification of Redundancy dated 16 September I am pleased to confirm that you will be eligible for the 2004 Carter Holt Harvey MIP. This decision has been endorsed by the CFO on behalf of the CEO of Carter Holt Harvey.

Any payment will be made on a pro-rated basis for the period of your employment with Oxygen Business Solutions in 2004 and in accordance with the rules of the MIP plan.”

[10] The applicants did not challenge their redundancies at the termination of their employment, they declined offers of redeployment and accepted redundancy compensation payments.

[11] On 2 March 2005 Mr Smith wrote to Messers Hagan, McCallum and Robertson advising they were ineligible for a MIP payment and setting out their performance ratings. They each received a rating of 80%, below the 95% performance target.

[12] Having received the MIP assessments the applicants have re-evaluated their view of their dismissals and concluded their dismissals were unjustified. They say they now believe their dismissals were unjustified because they understood their performance was acceptable up to dismissal and their ineligibility for a MIP payment shows the true reason for their dismissals was masked. The affidavit evidence of OBS is that the MIP assessments were conducted after the applicants’ employment with OBS ended and it was not until then that the performance issues came to light. This is confirmed by the email chain from Mr Smith to the applicants.

[13] I am not persuaded on the information received that a sufficiently arguable basis exists to say the applicants’ earlier evaluation that their dismissals were justified should be put aside. Messers Hagan, McCallum and Robertson have not established any link, other than speculative, between the outcome of the MIP assessment and their dismissals for redundancy. The test in *Warburton* is not met. I find the 90-day time period to raise a personal grievance for their dismissals runs from 16 September 2004.

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<sup>1</sup> *Warburton v Mastertrade Ltd* [1999] 1 ERNZ 636, 648

**(ii) Unjustified disadvantage**

[14] Messers Hagan, McCallum and Robertson say they expected to receive a MIP payment because:

- (i) by email dated 12 October 2004 they had been advised they would be eligible to receive 2004 MIP payments;
- (ii) they had performed to a high standard during 2004;
- (iii) OBS had not indicated their performance was below target prior to March 2005;
- (iii) they do not accept their performance had dropped off.

[15] OBS says the MIP was not a term of employment and was a discretionary scheme under which the applicants had no entitlement to payment and that at most they were entitled to consideration of a payment under the scheme.

[16] There is no evidence Messers Hagan, McCallum and Robertson were told they would receive MIP payments. What they were told was that they would be eligible for consideration under the scheme. The MIP scheme was not a condition of employment. The exercise of the discretion under the MIP was extended to Messers Hagan, McCallum and Robertson and OBS owed an obligation to them to exercise that discretion fairly and reasonably. The fair exercise of that discretion was a condition of their employment<sup>2</sup>.

[17] However, the remedy of personal grievance is not available to Messers Hagan, McCallum and Robertson. Any disadvantage they suffered regarding the exercise of the MIP did not arise “on the job”<sup>3</sup> but after their employment ended with OBS.

[18] It is unlikely that Messers Hagan, McCallum and Robertson can claim any other remedy in the Authority following the recent decision in *BDM Grange Ltd v Parker & Ors*<sup>4</sup>.

**Costs**

[19] Costs are reserved. The parties are entitled to attempt to resolve this issue themselves. If they are unable to do so they should.

Marija Urlich  
Member of Employment Relations Authority

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<sup>2</sup> *Dorset v Chemcolour Industries (NZ) Ltd*, A Dumbleton, AA 117/04, 8 April 2004

<sup>3</sup> *Wellington Area Health Board v Wellington Hotel, etc Trades Union* [1992] 3 NZLR 658

<sup>4</sup> High Court, 19/7/2005, Baragwanath and Courtney JJ, CIV-00-404-993