Determination Number: AA 56/06
File Number: AEA 458/05, 469/05 & 486/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Vaughan Robertson, Robert McCallum & John Hagen (Applicants)
AND	Carter Holt Harvey Ltd t/a Oxygen Business Systems (Respondent)
REPRESENTATIVES	Michael McFadden/Dean Organ for the applicants Phillipa Muir for the respondent
MEMBER OF AUTHORITY	James Wilson
DATE OF DETERMINATION	1 March 2006

DETERMINATION OF THE AUTHORITY:

APPLICATION FOR INVESTIGATION TO BE REOPENED

Background

[1] In May 2005 the applicants, John Hagan, Robert McCallum and Vaughan Robertson lodged individual statements of problem with the Authority. All three had been made redundant by their former employer, Carter Holt Harvey Ltd, trading as Oxygen Business Systems (OBS), in September 2004. In March 2005 they were advised by OBS that they would not be entitled to bonus payments under the Management Incentive Plan (MIP). Messrs Hagan, McCallum and Robertson said that the failure to pay their bonus entitlements unjustifiably disadvantaged them in their employment and that the failure to pay the MIP indicated an improper motive for their redundancies, rendering the dismissals unjustified. They also asserted that the personal grievances were raised with OBS within 90 days of the grounds coming to their attention.

[2] In response to the applicants' claims OBS said that Mssrs Hagan, McCallum and Robertson had not raised the grievances within the 90 day period set out in section 114(1) of the Employment Relations Act 2000. After some preliminary discussion it was agreed that the Authority would first consider, on the papers, the preliminary issue regarding whether or not the applicants had raised the grievance within the 90-day statutory period required. Having received affidavits and submissions on behalf of both the applicants and the respondent the Authority issued its determination on 7 September 2005 (AA 343/05). The Authority said:

> *[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.*

The Authority went on to find that:

> *[13] I am not persuaded on the information received that a sufficiently arguable basis exists to say that the applicants' earlier evaluation that their dismissals where justified should be put aside. Messrs Hagen, 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 the dismissals runs from 16 September 2004.*

And:

> [*16] There is no evidence Messrs 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 Messrs 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*[1]
>
> *[17] However, the remedy of personal grievance is not available to Messrs Hagan, McCallum and Robertson. Any disadvantage they suffered regarding the exercise of the MIP did not arise "on the job"*[2] *but after their employment ended with OBS.*

The application to reopen the investigation

[3] The applicants have now requested that this matter be reopened. In support of this application Mr McFadden argues:

1. The original application was in 3 parts;
(1) Failure by the respondent to pay the applicants their entitlements under the MIP (The recovery action)
(2) The terms and conditions of the applicants had been effected to their disadvantage by the non payment of the MIP payment (The disadvantage personal grievance)
(3) The applicants had been unjustifiably dismissed (The dismissal personal grievance).

2. The respondent claimed that the applicants grievance claims were not raised within the 90 day period required. The Authority conducted an investigation on this preliminary matter. The applicants gave evidence by affidavit, and made submissions on this 90 day issue only. Limited other evidence was provided solely by way of background.

3. The Authority in determining the issue of eligibility for MIP bonus has denied the applicants the opportunity to provide full evidence and legal submissions in support of the wages recovery claims. The Authority was wrong in making a determination on matters other than the 90 day issue and should reopen its investigation to consider this aspect of the applicants claim.

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[1] *Dorset v Chemcolour Industries (NZ) Ltd*, A Dumbleton, AA 117/04, 8 April 2004
[2] *Wellington Area Health Board v Wellington Hotel, etc Trades Union* [1992] 3 NZLR 658

[4] Ms Muir, on behalf of the respondent, argues that the investigation should not be reopened because:

> 1. The applicants' claims were personal grievance claims, not wage arrears claims, and were dealt with in the Authority's Determination. The facts upon which the new wage arrears claims are based are those which were the basis of the original personal grievance proceedings. The applicants are therefore estopped from proceeding with wage arrears claims which are res judicita.
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> 2. The MIP bonus scheme is totally discretionary and there is therefore no basis on which to bring a wage arrears claim.

Reopening of investigation: legal considerations

[5] The power to order the reopening an investigation is contained in the second schedule to the Employment Relations Act at clause 4:

> ***4 Reopening of investigation***
> *(1) The Authority may order an investigation to be reopened upon such terms as it thinks reasonable…*

[6] As with any discretionary power the Authority must use its discretion in a principled way and not arbitrarily. In considering requests to reopen it is appropriate to look to the principles applied by the Courts in exercising their discretion to grant a rehearing. In *Waterfront Workers Union v Ports of Auckland* [1994] 1 ERNZ 604 the full bench of the Employment Court said:

> *We observe, as the Court did in the Cavalier Carpets case, that there are no restrictions on the grant of the rehearing except as to time. It is undesirable that the court should supply restrictions that appear nowhere in the statute. However, every judicial discretion must be exercised according to clear principle.*
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> *What considerations should move the Court to order to be reheard a case that has already been concluded? Obviously if a positive finding can be made that a miscarriage of justice has taken place that would be enough. The likelihood of a miscarriage of justice should also be enough, especially in cases such as this where contrary to the Court's usual practice the question of rehearing or no is separated from the rehearing. The particular species of miscarriage of justice will include those listed in Cavalier Carpets but is not confined to them. A mere possibility or suspicion is however not enough to warrant disturbing a considered judgement reached after a full and well exercised opportunity to the parties to be heard.*
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> *Our view is that in general the Court must look toward the possibility of a miscarriage of justice, but should not look for proof of the possibility to a high standard. For balance, it must give equal weight to the importance of certainty in litigation and the right normally enjoyed by successful litigants, particularly in dispute resolution cases like this one, to enjoy the fruits of a judgement in its favour.*

The Court of Appeal subsequently found *no error in the approach adopted by the full Court.*

Discussion

[7] In determining whether this matter should be re-opened it is necessary, as set out in the *Ports of Auckland* case, to decide whether or not *a miscarriage of justice has taken place.* In her Determination, the Authority Member, having indicated that she would consider, as preliminary matter, *whether the grievances of where raised in time*, went on to determine that the applicants were not entitled to payment in terms of the Company's MIP scheme. At first reading it is possible to gain the impression that this conclusion was reached without the applicants *being given a full and well exercised opportunity … to be heard (*see *Ports of Auckland* above. If such an impression was a correct interpretation of the Authority's determination this may create the consequential impression that a miscarriage of justice may have occurred. However, as also set out in Ports of Auckland, *a mere possibility or suspicion is not enough to warrant disturbing a considered judgement.*

[8] In the Determination the Authority Member addressed the question of the eligibility of the applicants to receive MIP payments. She reached conclusion that they are not eligible for such payments for two reasons:

- The applicants had not been told they would receive MIP payments. They had been told that would be eligible for consideration under MIP scheme. Payments under the scheme were at the discretion of the company.
- The fair exercise of that discretion was a condition of their employment. However any disadvantage they suffered regarding the exercise of MIP did not arise "on-the-job" but after their employment ended with OBS.

[9] Arguments for and against the payments in terms of the MIP scheme were contained within the respective statements of problem and statements in reply. Evidence regarding the MIP scheme is set out in the affidavits of the applicants and representative of the respondent. All of this information was before the Authority Member when she made her decision. The applicants believe that they should have been given an opportunity to bring further evidence and submissions in support of this aspect of their claims. However the lack of such an opportunity does not, by itself, constitute a miscarriage of justice. All of the evidence before the Authority suggests that Messrs Hagen, McCallum and Robertson were not eligible to receive the payments. To reopen this matter would subject the parties to additional expense and there is little likelihood that further investigation and argument would result in a different outcome.

Determination

[10] After considering the submissions of the parties and the Authority's determination, and reviewing all of the information available to the Authority in reaching that determination, I have come to the clear conclusion that no miscarriage of justice has occurred in this matter. The application to reopen is therefore declined.

Costs

[11] Costs are reserved and the parties are urged to attempt to settle this matter. If they are unable to do so OBS may file and serve a submission in respect to costs. Should this occur the applicants will be given the usual opportunity to respond.

James Wilson
Member of Employment Relations Authority