

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 214/08  
5087353

BETWEEN

HUNTER DOLAN  
Applicant

AND

FILTA VACUUM PRODUCTS  
LIMITED  
Respondent

Member of Authority: R A Monaghan

Representatives: R Harrison, Counsel for Applicant  
L Campbell, Counsel for Respondent

Investigation Meeting: 17, 18 and 19 March 2008

Submissions received: 11 April and 15 May 2008 from Applicant  
28 April 2008 from Respondent

Determination: 19 June 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] At the relevant time Filta Vacuum Products Limited (“FVPL”) employed Hunter Dolan as its general manager. Mr Dolan’s remuneration package included provision for a bonus payment. FVPL believed Mr Dolan was wrongly overpaid bonuses which he had calculated and paid himself. It dismissed him primarily as a result of this, although other concerns were discussed and incorporated in the reasons for dismissal.

[2] Mr Dolan filed a statement of problem saying the dismissal was unjustified. In particular he denied both that his bonuses were overpaid and that he was guilty of any wrongdoing.

[3] Further, Mr Dolan sought payment of unpaid bonuses and holiday pay. He had referred his claim for holiday pay to a Labour Inspector independently of this employment relationship problem. Following agreement during the investigation meeting that the claim be addressed in the Authority's investigation, I was advised that the complaint to the Labour Inspectorate would be withdrawn. The investigation of the claim for holiday pay proceeded in reliance on that advice.

[4] For its part, as well as denying any unjustified action by it, in its statement in reply FVPL:

- (a) sought an inquiry into the sum due to Mr Dolan under the bonus arrangement, and the recovery of any sum overpaid to Mr Dolan;
- (b) denied any bonus payment is owed to Mr Dolan;
- (c) accepted Mr Dolan had an outstanding entitlement to holiday pay in the sum of \$8,303.90, but says it was entitled to withhold that payment in terms of the parties' employment agreement; and
- (d) sought a penalty for Mr Dolan's breach of the obligation of good faith in relation to the overpayment of the bonus.

[5] This determination addresses all matters raised by both parties.

### **Events leading to dismissal**

#### 1. The entitlement to a bonus

[6] Mr Dolan began his employment with FVPL in June 2001, in the position of company accountant. There was no written employment agreement at the time, but it was common ground that Mr Dolan's remuneration package included a profit share payable by way of bonus. The staff - then being Mr Dolan and the general manager - would have equal shares in 50% of the company's net profit above budgeted profit. This meant that, overall, Mr Dolan would receive 25% of the net profit above budgeted profit. For convenience I shorten this to 'profit over budget'.

[7] When the general manager left his employment in or about September 2002, Mr Dolan was appointed to the position. By agreement, Mr Dolan became entitled to a greater share in the staff share of the company's profit over budget. His share reverted to the original arrangement on the appointment of a new sales manager in June 2004.

[8] Mr Dolan's entitlement to a bonus was eventually recorded in a written employment agreement dated 1 July 2005 as follows:

“ Schedule C

...

Other benefits

...

. Bonus system of 25% of any amount of net profit over the budget figure set each year

...”

[9] The bonus paid to Mr Dolan in respect of the year ending 31 March 2002 is not in contention.

## 2. Discussions in October 2003

[10] The present difficulties started with the bonus for the year ending 31 March 2003.

[11] The general approach was that calculations were carried out at the end of each quarter, using the management accounts for the quarter. According to Mark Waters, who at the time was an independent accountant assisting FVPL, the methodology each time was that a year to date profit figure was identified from the accounts. Various adjustments might then be needed in order to obtain a fair measure of the profit for the quarter, ensuring for example that any payment (or provision for payment) made during the quarter in respect of a bonus attaching to a previous quarter did not unfairly reduce the profit figure. Such payments (and any provisions for payment) were 'added back' to the profit figure and the staff members' shares were calculated with reference to the new profit figure. There was also an intention that one half of the bonus be paid at the end of the relevant quarter or when cash flow permitted, with half being retained for a final balancing at year end. At the end of the fourth quarter there

was a further calculation of the year to date profit and entitlement to a bonus, bonuses already paid were subtracted from the resulting figure, thus identifying the balance of the bonus owed to the employee.

[12] The original calculation based on the figures for the year ending March 2003 was not available, and attempts to reconstruct it for the purposes of the Authority's investigation yielded totals varying from \$40,000 - \$50,000. Fluctuations in cash flow leading to a series of part payments of bonuses, as well as the other necessary adjustments to the calculation for the year, make it likely the original calculation looked complicated to a layperson.

[13] The calculation was probably at least broadly of the kind Mr Waters set out in evidence. It was presented to the sole shareholder (who was also a director), Andrew Black, at a meeting in October 2003 held to discuss the March 2003 year end accounts. The meeting was attended by Messrs Waters, Dolan and Black. Mr Black's response to the presentation was that he wanted a simpler method of calculating the bonus.

[14] Mr Waters sought to identify a method that would satisfy both Mr Black and Mr Dolan. To achieve that, as he put it, he 'played with numbers' until one of his approaches yielded a figure which Mr Black and Mr Dolan found acceptable. As he also commented, 'there was not much logic to it'. The figure found to be acceptable was \$39,279.75. Mr Waters obtained it simply by taking the year to date accounting profit figure (shorn of any add backs, deductions or accruals) from the final accounts, identifying the difference between that figure and the budgeted figure, reducing the resulting amount by the 50% allocated as the staff share, and applying a further 50% reduction reflecting Mr Dolan's own entitlement.

[15] In doing this Mr Waters took on an unusual role which amounted in part to that of a mediator. He worked on various sets of numbers and calculations himself, then put the result separately to Mr Black and Mr Dolan. Neither Mr Black nor Mr Dolan embarked on a process of discussion or negotiation about the calculations with each other or with Mr Waters, rather the process was a purely pragmatic one whose outcome was determined by whether Mr Black and Mr Dolan found the resulting dollar figure acceptable. Their agreement to the figure of \$39,279.75 did not include

any discussion or negotiation concerning the methodology Mr Waters used to obtain it. It was simply a figure on which the parties could compromise.

[16] Mr Dolan says the process yielded an agreed new method of calculating bonuses, which he followed subsequently. Mr Waters disagreed, saying the calculation was a one-off to finalise the bonus for the year ending March 2003.

[17] I accept that the figure to which Mr Dolan agreed was probably less than the amount payable if the bonus had been calculated as it should have been, although the extent of the difference has been the subject of much debate. However this does not in itself mean there was an agreement to a change in methodology.

[18] I find on the facts that there was no agreement that the methodology be changed. I consider it obvious from Mr Waters' evidence - which was not materially disputed - that the only agreement concerned the actual amount of the bonus to be paid. Such negotiation as was embarked upon centred on that, with any discussion about the ways in which Mr Waters could justify or explain the various 'numbers' he proposed being secondary.

[19] I would say, too, that even if there was an agreed change to the methodology, the agreement was not in the terms Mr Dolan subsequently applied.

[20] That is so because the evidence reveals no meeting of the parties' minds or common intention to that effect, and because in profitable years the result would lead to a share of more than 25% of the profit over budget. The latter would amount to a variation to the employment agreement, and no such variation has been alleged.

[21] Further, the pre-October methodology (sometimes referred to as the 'old' method) ensured there was a fair measure of the profits from each quarter, and sought in particular to limit distortions created by the calculation and payment of bonuses. The methodology Mr Dolan says was agreed not only removed that approach to limiting distortions in the profit figures, but it created a new distortion. Using the year to date figure at the end of each quarter, and not applying any corrective calculations at all, meant profits from previous quarters were carried over in each subsequent

quarter until the end of the financial year, and bonuses were effectively calculated and paid on them again each time.

[22] Another way of putting this is that Mr Dolan would receive a bonus calculated as a share of: the profit over budget for the entire year; plus the profit over budget for the first three quarters; plus the profit over budget for the first two quarters; plus the profit over budget for the first quarter. That is not what his employment agreement provided.

[23] None of this means Mr Dolan was necessarily guilty of misconduct in taking a different view. I turn now to the circumstances of the dismissal.

### 3. Concerns arise about the bonus payments

[24] The bonus paid in respect of the year ending March 2004 is not in contention. The bonus paid in respect of the year ending March 2005 is in contention, and is part of FVPL's claim to recover an overpayment.

[25] As far as the dismissal is concerned, the methodology Mr Dolan was using was not identified until October 2006 when Messrs Dolan and Black attended the offices of the company's accountant, Leicester Gouwland to discuss the accounts for the year ending March 2006. Mr Gouwland's firm prepared the company's annual accounts.

[26] Mr Gouwland noted that the staff bonus payment figure for the year 'looked enormous'. It was \$186,299. Mr Gouwland asked Mr Dolan for the supporting calculation, which Mr Dolan provided on 1 November 2006 in the form of a spreadsheet. In respect of each quarter the spreadsheet listed the year to date profit as identified in the management accounts, the year to date budgeted profit, the difference, and 50% of that difference (being the bonus to be shared by the two staff members).

[27] Using the same actual and budgeted profit figures as Mr Dolan had used, but following the methodology Mr Waters had used, Mr Gouwland calculated that the total bonus payments should have been \$124,945. He queried Mr Dolan's

calculations, saying 'is there a double up' and suggesting in conversation with Mr Dolan that 'it seemed to be calculating on itself'. He also informed Mr Black of his concern.

[28] Mr Dolan's figures indicated the total bonus payments for the staff for the year were 75% of the profit over budget rather than 50%. Mr Gouwland did not believe that was the intention. He asked Mr Dolan in the first instance to look again at the calculations for 2006, particularly the payment of a bonus on profits which had already attracted a bonus payment in preceding quarters (the 'double up'). Mr Dolan replied by referring to the October 2003 meeting, and asserting simply that a 'year to date' method had been applied since that time.

[29] That exchange was copied to Mr Black, who replied to Mr Dolan in a message dated 23 November 2006. He pointed out that the staff were to receive 50% of the profit over budget, and suggested to Mr Dolan that he had made an error. Mr Dolan's reply was to assert again that he was acting in accordance with the arrangement reached in October 2003. He also indicated that Mr Waters had confirmed the arrangement.

[30] It is unfortunate that Mr Dolan took that view, and has persisted in it. He should have engaged with Mr Gouwland regarding the methodology he had used and why, rather than simply making the assertions he did. Further, he should have engaged with Mr Gouwland about the possibility at least that there had been a misunderstanding if not an error.

[31] Mr Dolan sought support from Mr Waters. It seems that when the matter was first raised Mr Dolan did little more than seek Mr Waters' confirmation that in October 2003 Mr Black had requested a different arrangement. It is also unfortunate that for some time argument centring on the initiator of change in October 2003 obscured the real question of whether there was an agreement on the matter and, if so, what were its terms.

[32] Mr Waters wrote Mr Dolan a letter dated 11 January 2007, the terms of which suggest he was responding to a request that he set out his recollection of the 'period when the bonus calculation changed in October 2003'.

[33] The letter 'confirmed' that the method of calculation was changed at Mr Black's request, because Mr Black sought a simpler method. The letter did not go further and confirm there was an agreement to use the October 2003 methodology in all subsequent calculations although Mr Dolan, who already believed there was such an agreement, read such a meaning into it.

[34] Similarly, the letter addressed the methodology apparently used in October 2003 by saying: "the calculation sheet labelled as being for the quarter ended 31 March 2003 was for the quarter" and "the calculation sheet labelled as being for the quarter ended 31 March 2003 was for the quarter". The letter did not detail the methodology any further at all. Mr Dolan has invoked comments such as these in support of his view that the agreed methodology was to perform a bonus calculation each quarter without any add backs or any other adjustments. Mr Waters meant that the bonus identified on the calculation sheet was not intended to amount to the bonus for the entire year. Again, although there was some ambiguity in the terminology, Mr Dolan read more into the letter than was there.

[35] Mr Black also approached Mr Waters in or about late November 2006. He asked Mr Waters to look at Mr Dolan's bonus calculations. In an emailed message to Mr Black dated 3 December 2006 Mr Waters recorded that he had reviewed the calculations. He went on to make the very sensible suggestion that Messrs Black, Dolan and Gouwland - and possibly Mr Waters himself - get together to 'sort the situation out properly'. Even more sensibly (and helpfully), he identified the information that would be necessary to track through the bonus calculations as well as a procedure for doing so. Finally he expressed a wish to avoid the situation becoming 'messy'. He was concerned about the likelihood of any meeting turning into a 'yelling match' between Messrs Black and Dolan. Unfortunately his concern was well founded.

[36] Even more unfortunately, Mr Black did not take Mr Waters' advice. Instead he replied to Mr Waters in a tone deeply suspicious of Mr Dolan, and raised a number of matters of concern to him in respect of the calculations. In an emailed message to Messrs Gouwland and Waters dated 18 December 2006 he set out a lengthy list of

concerns about particular aspects of a number of transactions dating back to 2003, together with the view:

“I have had a feeling something was wrong for some time and despite some effort on my part the cause of this bad smell had eluded me. I have been so close to nailing this a few times and so, when I let slip the dogs of war I want all my ducks in a row.

.... Your knowledge of accounting is much greater than mine and as you read this please keep in mind the legal requirements to prove a fraud.”

[37] The list of concerns ended with a conclusion that there appeared to be a deliberate subterfuge to hide the full nature of the bonus calculations. Later in the message Mr Black said:

“I have given the impression that I have lost interest in this matter, not wanting to spook the target. For a multitude of reasons I want the noose pretty tight before I kick his stool away. My best chance for reclaiming anything is surprise and organisation.”

[38] I acknowledge that, in the message, Mr Black also asked Messrs Gouwland and Waters whether they saw matters as he did. Even so, in all of the circumstances I find his query about whether there was a chance Mr Dolan’s budget and bonus calculations were innocent was rhetorical rather than real.

[39] I take into account, too, that a person is free to express suspicions and concerns to a professional advisor in a frank way, as Mr Black was doing. However in a disciplinary context Mr Black was obliged to keep an open mind about these matters until he had completed a proper investigation and obtained Mr Dolan’s responses to any remaining concerns. If he had done so, then formed conclusions based on reasonable grounds, there would probably not have been a need to comment on the 18 December email. I have commented on it because it was apparent from all of the evidence that Mr Black did not keep an open mind, he was wedded to a scenario in which Mr Dolan was defrauding him, and the contents of the email embody the attitude with which he proceeded.

[40] At the same time, in or about the Christmas-New Year period, Mr Waters embarked on a more detailed review of the company’s accounts directly with Mr Dolan. He said in evidence that he went through the bonus calculations and other matters with Mr Dolan, and was satisfied with them from an accounting perspective.

In other words, he was satisfied that the accounting entries accurately reflected the associated transactions and that Mr Dolan's calculations were correct (aside from any question about whether Mr Dolan was using an agreed methodology in respect of the bonus). That outcome should have satisfied many of the items in Mr Black's list of concerns.

[41] Nevertheless by message dated 10 January 2007 Mr Black posed a number of questions to Mr Dolan, saying he wanted to meet with Mr Dolan once the answers had been prepared. The questions concerned, first, the detail of various calculations undertaken in respect of the year ending March 2003, the point of which I do not understand because the matter of that year's bonus had been addressed in October 2003. The questions went on to query an aspect of the bonus calculation for the year ending March 2004, then advised that Mr Waters had calculated a much lower bonus for the year ending March 2005 and commented on other particular accounting entries for that year. There followed questions and comments of a similar kind in respect of the year ending March 2006. The last set of questions raised the concern that bonus calculations for the third and fourth quarters in each of the last three years were missing, suggesting that the absence was intended to hide the compounding nature of Mr Dolan's methodology. The message ended by commenting that the treatment of the calculations, and disclosure of payments, was sloppy.

[42] Mr Dolan provided his responses in a message dated 15 January 2007. He said in the message that he had been through Mr Black's questions with Mr Waters, who was 'happy with the accounting treatment of all fifteen queries'. Next he gave his account of the October 2003 discussions and associated calculations, ending by saying the new method did not involve add backs. He went on to answer the specific queries about accounting entries and to deny any failure to provide Mr Black with accounts to review.

[43] The message ended with Mr Dolan saying he was concerned about the way in which the issues had been raised, and about Mr Black's attitude to him. He said he had sought legal advice and suggested a meeting.

[44] A meeting went ahead on 18 January. Mr Dolan attended with Mr Harrison, and Messrs Black, Gouwland and Waters also attended. There was very little

evidence about the content of the discussions, although at some point they turned to the negotiation of an exit package.

[45] A meeting note of Mr Gouwland's suggests some attention was given to whether a new methodology had been agreed in October 2003. According to the note, Mr Black denied that he had approved a new method while Mr Waters said the calculation was to be a one-off and non-compounding. Mr Gouwland also noted that the calculation was in dispute, as obviously it was. At the same time it was clear from the surrounding evidence that the discussion became heated. The discussion probably included Mr Black's allegations of fraud.

[46] The parties could not reach agreement, and Mr Dolan took two weeks' leave. He did not return to work. Counsel embarked on an exchange of correspondence in continuing efforts to resolve the matter. I infer a stand off developed in that Mr Dolan considered it untenable to continue in his employment but was not prepared to say he was terminating it, no exit agreement could be reached, and any disciplinary action was on hold.

#### 4. The decision to dismiss

[47] In a letter dated 14 March 2007, Mr Black grasped the nettle by asking Mr Dolan to attend a meeting to discuss: unauthorised bonus payments; stock ordering errors; the unauthorised removal or destruction of business records; and budgeting.

[48] The letter set out details of these concerns. Regarding the bonus payments, it said preliminary calculations showed overpayments in the years ending March 2005 and March 2006. The amounts cited there were approximately twice the amounts eventually sought by way of recovery in the Authority. The letter said the overpayments were deliberate, and not the result of an error.

[49] The reasons given for that conclusion were that from October 2003 Mr Dolan: ceased to have Mr Black sign off the bonus; failed to advise Mr Black of the calculations in the third and fourth quarters of each year although he had done so in the first and second quarters; and delayed the dates of calculation and payment to obscure the erroneous calculations and payments.

[50] Mr Harrison responded to FVPL's solicitor in an emailed message dated on the morning of Friday 23 March indicating that he and Mr Dolan had concluded no purpose could be served by a meeting, and that a written response would be forwarded. Mr Harrison advised that he hoped the response would be available by Monday (26 March) but that it would be provided no later than 28 March 2007. The company's solicitor replied by a message of the same date, saying:

"I look forward to receiving your response within the timeframe indicated. In the absence of such a response and given your position on the proposed meeting we will make any further decision based on the information available to us."

[51] There was no response by 28 March, and no communication about when a response could now be expected. There was still no response by the end of the day on 29 March. By emailed message of that date, apparently sent at 4.33 pm, the solicitor forwarded Mr Black's letter of dismissal for serious misconduct to Mr Dolan through Mr Harrison.

[52] The letter said:

"I have lost trust and confidence in you as a result of my concerns about the unauthorised bonus payments, your misleading me over the stock ordering errors, the unauthorised removal and destruction of business records and your imprudent and irresponsible approach to budgeting. "

[53] Unfortunately the reason for Mr Harrison's failure to respond within the timeframe he indicated was that he became involved in another matter. He said he had not been able to advise the solicitor of this, but did not explain why. FVPL was entitled to rely on the timeframe Mr Harrison had given, and it was Mr Harrison's responsibility to advise the solicitor in advance if he was unable to meet it.

[54] However Mr Harrison had prepared a reply on behalf of Mr Dolan, which he forwarded on 30 March. It addressed all four of the concerns in Mr Black's letters.

[55] Regarding the payment of the bonus, the reply essentially repeated Mr Dolan's view that there had been an agreement in October 2003 to change the method of

calculating the bonus, that the new method was to use a year to date figure without add backs, and that it was applied thereafter. The reply said further that there had been no mention in October 2003 that the calculation performed at the time was to be a one-off, and asserted that the new method of calculation was consistent with the express terms of the employment agreement.

[56] The reply also denied the allegations that the overpayments were deliberate and that Mr Dolan sought to mislead Mr Black about them. It denied Mr Black had signed off bonuses prior to October 2003 and that information was withheld after October 2003. It said further that the bonus calculations were shown in the management accounts for each quarter as ‘consultancy’ and were subject to intense scrutiny. On that point, I comment that the bonus figure was identified as ‘consultancy’, but the underlying calculation was not set out.

[57] Regarding the alleged stock ordering errors, Mr Dolan provided explanation and comment. I do not discuss the evidence in any detail both because at the investigation meeting Mr Black said he did not regard the matter as amounting to serious misconduct, and because the evidence suggested the accusation could not be substantiated.

[58] Regarding the unauthorised removal and destruction of business records, Mr Dolan replied that he had retained copies of documents but returned originals of files. There was no evidence to suggest otherwise. There has also been an issue about what caused the company’s computer to crash on 11 January. Mr Black accused Mr Dolan of being at fault. There was no evidence to support that accusation.

[59] Regarding the imprudent and irresponsible approach to budgeting, Mr Dolan explained his approach and said he did not understand the allegation. I do not understand it either. I infer that the allegation arose from the parties’ unsuccessful attempts to agree on a budget for the year ending March 2007. Details of the disagreement were aired extensively during the investigation meeting, and I infer that Mr Dolan’s allegedly imprudent and irresponsible approach was illustrated by the various items discussed. That evidence amounted to nothing more than evidence of disagreement and in many cases misunderstanding on Mr Black’s part. On the

evidence provided I do not accept there were reasonable grounds for the accusation against Mr Dolan, let alone that it was substantiated.

### **Justification for the dismissal**

[60] The justification for Mr Dolan's dismissal must be determined, on an objective basis, by considering whether FVPL's actions were the actions of a fair and reasonable employer in all of the circumstances at the time of the dismissal. Relevant considerations include whether the employer had conducted a fair and reasonable investigation which disclosed information on which it was safe to rely.

[61] Regarding Mr Black's conclusions in respect of stock ordering, the removal and destruction of business records, and the imprudent and irresponsible approach to budgeting, I have found the underlying allegations were not substantiated on the evidence provided to me. Such limited evidence as is available regarding the investigation of those matters at the time indicates that the investigation was not fair and reasonable. Indeed, beyond the exchanges of correspondence, it was difficult to see that an investigation had occurred at all. The outcome of the exchanges did not disclose information on which it was safe to rely.

[62] Regarding the conclusions in respect of the payment of the bonus, while the parties identified during the meeting in January 2007 that there was a dispute about the method of calculating the bonus, the matter was not clearly resolved. Nor was the existence of a dispute placed in its proper context when assessing Mr Dolan's subsequent conduct. Mr Black's position was that he had not authorised a changed methodology, which was at least correct. Mr Waters had indicated that the methodology was not intended to be compounding, which Mr Dolan should have accepted. Mr Dolan continued to insist he was acting in accordance with an agreement to a changed methodology.

[63] Mr Black did not stop to consider what all of that meant in terms of Mr Dolan's understanding of his entitlements, and how he applied that understanding, before leaping to conclusions about possible fraud. It was necessary to give cool-headed consideration to alternatives, even if the result was an adverse view of Mr Dolan's interpretation of the October 2003 discussion, the quality of his subsequent

actions and the reasonableness of the stance he was taking. In its proper context, Mr Dolan's conduct in respect of the bonus might have called for some level of disciplinary action. Instead, on the evidence I have, all of these matters became swept up in Mr Black's suspicions of fraud.

[64] Part of the reason for this is probably that Mr Black's mind was closed to the possibility of misunderstanding or error. Mr Dolan's own persistent refusal to acknowledge such a possibility aggravated the problem.

[65] Not only that, Mr Black concluded that Mr Dolan had engaged in misleading, deceptive, or fraudulent conduct intended to cover up what Mr Black had decided (on inadequate grounds) were deliberate overpayments. Mr Black relied on three key points in support of the alleged cover up, namely:

- (a) he no longer signed off bonuses;
- (b) Mr Dolan did not advise him of bonus calculations in respect of the third and fourth quarters each year; and
- (c) dates of calculation and payment were delayed.

[66] The evidence about signing off bonuses was that, in 2001 when Mr Waters was responsible for calculating bonuses, Mr Waters had presented calculation sheets to Mr Black on a quarterly basis. Mr Black had authorised and signed off the calculations. At an unspecified time after 2001 Mr Dolan took over responsibility for the bonus calculations. Such evidence as was available on the point suggests that a less carefully documented approach to bonus calculations began well before October 2003 and continued afterwards. However Mr Black seems to have acted on no more than his impressions in that respect. There was no evidence of any systematic examination of source material in respect of the suspected cover up, nor of a systematic putting of such material to Mr Dolan for his response. There was little more than accusation and denial. That does not amount to an investigation.

[67] It would have been prudent for Mr Dolan to take a comparable approach to Mr Waters' when it came to the authorisation of bonuses, but he did not do so. Indeed, in failing to provide regular clear and transparent sets of bonus calculations Mr Dolan opened the door for some of Mr Black's subsequent suspicions. On the other hand,

Mr Black did not require such an approach of Mr Dolan when he could have, and for some years the less formal approach suited both parties.

[68] Even so, Messrs Black and Dolan discussed the management accounts and Mr Black perused and signed off the final accounts. The bonus amount was identified and available for discussion. Indeed in an emailed exchange in October 2004 Mr Dolan commented on the bonus for the September quarter, then asked whether the bonus was approved. Mr Black replied 'yep'. When Mr Black was pressed during the investigation meeting regarding how many more such exchanges there were, he demurred, saying he had over 1,000 messages on his laptop. Mr Black should not have made the sweeping allegations he did about Mr Dolan's approach to bonuses given the existence of messages such as the one dated October 2004, and his apparent failure check on how many similar messages had accumulated over the years.

[69] Regarding the alleged failure to advise of calculations in respect of the third and fourth quarters each year, there was little evidential basis for the allegation. Moreover there was no evidence that Mr Black took a systematic approach to identifying the pattern for which he contends. He asserted to Mr Dolan in January 2007 that he had opened all of his emails, and found there was 'never any information about the third or fourth quarters', but again the assertion appears to have relied on impression or memory alone. This was not sufficient.

[70] I am uncertain of the basis of the allegation that dates of calculation and payment of bonuses were delayed. The allegation seems to arise out of the dates of forwarding of quarterly figures in 2005 in particular, and possibly 2006. In May 2005 Mr Dolan forwarded draft accounts for the year ending March 2005. The accounts identified a bonus figure of some \$55,000. Mr Black said he assumed at the time that the figure covered all four quarters for the year, but it transpired that it covered only the first three quarters. It is at least true that there was no accompanying calculation. Mr Black did, however, peruse the final accounts for the year, so was not prevented from identifying the total bonus actually paid. This is not a cover up.

[71] There was also a delay in 2006. I can do no more than speculate about whether and how that matter might be relevant to Mr Black's conclusion.

[72] None of this is sufficient to warrant a conclusion that Mr Dolan had sought to cover up deliberate overpayments of the bonus. I do not accept that Mr Black investigated his suspicions adequately or that he had reasonable grounds for his conclusions.

[73] Overall Mr Black has not acted as a fair and reasonable employer, and the decision to dismiss was not one an employer acting fairly and reasonably would have made.

[74] The dismissal was unjustified. Mr Dolan has a personal grievance.

### **Remedies for unjustified dismissal**

[75] Mr Dolan obtained alternative employment two months after his employment with FVPL was terminated. He seeks the reimbursement of remuneration lost during that period, in the sum of \$13,750.00.

[76] Mr Dolan also seeks compensation for the injury to his feelings arising out of his grievance. He believes Mr Black has passed comment about him in their mutual social circle, and says mutual acquaintances have accused him of ripping Mr Black off. He says he has suffered stress and humiliation.

[77] In deciding both the nature and extent of the remedies to be provided in respect of Mr Dolan's personal grievance, I am obliged to consider the extent to which Mr Dolan's actions contributed to the situation which gave rise to the grievance. If those actions so require, the remedies that would otherwise have been awarded are reduced accordingly.

[78] As the general manager, and someone qualified in accounting, Mr Dolan was not as careful as he should have been in his approach to calculating and paying the bonuses. He should have seen that the methodology he was applying was unlikely to amount to a reasonable method of calculating net profit for the purposes of the bonus calculation, even bearing in mind that in general differing methodologies may yield different outcomes. With his qualifications, he should have been able to appreciate that the approach he was applying was unsound in any circumstances.

[79] Secondly, given his background and experience Mr Dolan should not have been as quick as he was to form the conclusion that the discussions in October 2003 amounted to negotiation and agreement regarding a methodology to be applied from then on.

[80] Thirdly, the level of transparency associated with the bonus calculation was less than could be expected of someone with Mr Dolan's experience holding the position of trust that he did.

[81] Finally, although Mr Black's suspicions were not properly investigated, Mr Dolan did not assist matters by failing to acknowledge the possibility of mistake when he should have. This tendency continued during the Authority's investigation, when Mr Dolan made unconvincing attempts to justify his position when he should have admitted to the fundamental flaw in his approach.

[82] For these reasons I conclude Mr Dolan contributed to the situation giving rise to the grievance to the extent that his remedies should be reduced.

[83] FVPL is therefore ordered to reimburse Mr Dolan for remuneration lost as a result of his grievance in the sum of one month's salary. The amount is \$6,875.

[84] The amount of compensation sought in the statement of problem was \$30,000. This is a substantial sum and little effort was made to support it by way of evidence. However I accept that Mr Black's very serious allegations were inherently likely to, and did in fact, cause injury to Mr Dolan's feelings and that he should be compensated. At the same time, a reduction in the amount I would otherwise have awarded is also appropriate for the reasons I have set out.

[85] For these reasons FVPL is ordered to pay to Mr Dolan the sum of \$10,000 as compensation for the injury to his feelings resulting from his grievance.

### **Repayment of bonuses overpaid**

[86] FVPL's claim to recover from Mr Dolan repayment of overpaid bonuses was identified in the statement in reply. Calculations quantifying the relevant overpayments were detailed in witness statements filed some 10 days in advance of the investigation meeting, together with a series of supporting documents. When a concern was raised during the investigation meeting about the appropriateness of dealing with what can be called a counterclaim at the same time as the applicant's grievance, I ruled that there was sufficient before the Authority and the parties to address and resolve the counterclaim in the course of the investigation. Mr Dolan indicated he was in a position to comment on the evidence in support of the counterclaim, and did so.

[87] I would accept that FVPL's intention to recover from Mr Dolan repayment of bonuses which Mr Dolan calculated and paid to the sales manager in respect of the same periods had not been made clear. When that matter was raised at the investigation meeting I said I would expect the legal basis for such a claim to be properly identified. At the time Mr Campbell was able to say only that that for various reasons FVPL could not recover the money directly from the individual concerned, and its only recourse was to proceed against Mr Dolan.

[88] No legal basis was advanced at the time or in submissions for any right to recover directly from Mr Dolan overpayments made to the sales manager. I am unaware of any such basis and decline to make an order to that effect.

[89] I turn now to whether Mr Dolan was overpaid.

#### 1. Year ending March 2005

[90] No issue has been taken for present purposes with Mr Dolan's calculation of the bonus for the June 2004 quarter.

[91] In each of the next three quarters Mr Dolan took the year to date profit figure from the management accounts, then identified the 'surplus' and calculated his share of the staff allocation. He did not carry out any add backs or other adjustments. The total bonus paid for the year was:

$$\begin{aligned}
 & \$2,058.05 \text{ (June)} + \$14,889.62 \text{ (September)} + \$10,563.99 \text{ (December)} + \\
 & \$19,266 \text{ (March)} \\
 & = \$46,777.67.
 \end{aligned}$$

[92] Mr Waters' recalculation of the figures was based on the same budgeted and net profit figures as Mr Dolan had used. Beginning with the year end net profit using accounts dated May 2005, he added back bonuses calculated in respect of each of the preceding quarters to obtain a new profit figure before bonus payments were taken into account. He identified the 'surplus' net profit, and calculated the amounts of the staff shares, giving a total of \$33,021.83 for Mr Dolan.

[93] This is less than the total payment actually made, in the amount of \$13,755.84.

## 2. Year ending March 2006

[94] Using the same method as he had before, Mr Dolan calculated and paid bonuses as follows:

$$\begin{aligned}
 & \$14,080.14 \text{ (June)} + \$19,364.63 \text{ (September)} + \$27,910.10 \text{ (December)} + \\
 & \$31,795 \text{ (March)} \\
 & = \$93,149.60
 \end{aligned}$$

[95] Mr Waters' recalculation of the figures used the same year to date figures as Mr Dolan had used. Mr Dolan's figure appeared to have been taken from accounts dated August 2006, and included an added back 'quarterly bonus' for the March 2006 quarter. Mr Waters further added back the bonuses from the remaining three quarters to generate the 'surplus' net profit from which he calculated the amounts of the staff shares. The total was \$62,472.25.

[96] This is less than the total payment actually made, in the amount of \$30,677.35. FVPL has deducted \$8,149.50, being a credit for part of a bonus calculated but not paid to Mr Dolan. The remainder is \$22,528.10.

## 3. Conclusions

[97] Since I do not accept that from October 2003 there was an agreed methodology of the kind Mr Dolan contends, I adopt Mr Waters' calculations and find Mr Dolan has been overpaid in the amounts identified. He was not entitled to those payments, and is ordered to repay the overpaid amounts to FVPL.

### **Payment of bonuses owed**

[98] Mr Dolan says his bonus for the year ending March 2006 was underpaid in the sum of \$8,149.50, and that he is owed payment of a bonus for the year ending March 2007 in the sum of \$33,919.40.

#### 1. Year ending March 2006

[99] The sum of \$8,149.50 has been recognised in the calculation of the bonus overpayment for 2006. There is no need for any further order.

#### 2. Year ending March 2007

[100] The parties were unable to agree on a budget for the year.

[101] FVPL has used the previous year's budget for the purposes of Mr Dolan's bonus calculation, saying the total profit over budget was \$4,492, of which Mr Dolan is entitled to \$1,123. Mr Waters obtained that figure by using a similar approach to the one he had used in October 2003. He took the net profit for the year ending 31 March 2007 and identified the difference between that figure and the budgeted figure for the year ending 31 March 2006, obtaining the figure of \$4,492.

[102] A budget for the year ending March 2007 was finalised in discussions between Mr Black and Mr Gouwland. Mr Dolan prepared a series of calculations based on what was said to be that document, as well as a series of calculations based on the budget for the year ending May 2006.

[103] These calculations were provided as an appendix to the submissions, and amount to new evidence in circumstances that would usually be unacceptable. However I had addressed the matter during the investigation meeting. The statement

of problem specified amounts Mr Dolan sought by way of unpaid bonus. His statement of evidence did not provide any calculations in support. When the matter was raised during the investigation meeting, I required Mr Dolan to provide the calculations if he sought an order for payment. He has now done so.

[104] FVPL says merely that it does not accept Mr Dolan's calculations. Since it was aware that I required the calculations, I take it that as its only response.

[105] I turn first to the question of which 'budget' should be used. I take into account that it would be unfair to deprive Mr Dolan of a bonus to which he would otherwise be entitled, merely because either no budget was set or it is difficult to identify a suitable approximating document from which to work. I consider, too, that if suitable figures from the relevant period are available, it is preferable to use those figures rather than figures from some other period.

[106] This leads me to the figures discussed in the course of the attempts to set a budget for 2007. A series of draft budgets was produced at the investigation meeting, with Mr Dolan having been involved in some if not all of them. Mr Dolan's calculation of the bonus owed to him for the year ending March 2007 was based on version 4 in the set of draft budgets. This is a suitable set of figures on which to base the calculation.

[107] I am reinforced in this view because the employment agreement refers only to 'the budget figure set each year'. It does not require Mr Dolan's agreement to the budget figure, only that a budget be set. Accordingly the approach I have indicated is not inconsistent with the employment agreement.

[108] The calculation should be performed using the 'old' method. Mr Dolan's calculation using that method gives a figure of \$25,395.37. Payment is ordered accordingly.

### **Holiday pay**

[109] Clause 3 (e) of the employment agreement provided:

“In the event that the employment agreement ends, the Employee authorises Filta Vacuum Products to deduct any money that it may be owed in the employment relationship from the final pay and to pursue any other outstanding payments.”

[110] Leaving aside broader issues concerning the lawfulness or enforceability of such a clause, I do not accept that it can be read to authorise a deduction from ‘any money that may be owed’ when there is a dispute about whether money is owed. Here there was a dispute, because Mr Dolan did not accept that he had overpaid his bonuses.

[111] On the termination of his employment Mr Dolan was entitled to prompt payment of \$8,303.90 as holiday pay. FVPL is ordered to make that payment.

### **Penalty for breach of good faith**

[112] According to the statement of problem FVPL seeks a penalty against Mr Dolan on the ground that Mr Dolan paid bonuses to himself in breach of his duty of good faith.

[113] Section 4A of the Employment Relations Act 2000 provides that penalties for breach of good faith may be payable in the following circumstances:

“A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if, -

- (a) the failure was deliberate, serious and sustained; or
- (b) ...”

[114] For the reasons indicated by the decision on the justification for the dismissal, I do not accept that a penalty for breach of good faith is warranted.

[115] In any event, FVPL faces a barrier in the form of the 12-month time limit contained in s 135(5) of the Employment Relations Act.

### **Summary of orders**

[116] FVPL is ordered to pay to Mr Dolan:

- (a) \$6,875 as reimbursement of lost remuneration;
- (b) \$10,000 as compensation for the injury to his feelings arising out of his grievance;
- (c) \$25,395.37 as the bonus for the year ending 31 March 2007;  
and
- (d) \$8,303.90 as holiday pay

[117] Mr Dolan is ordered to pay to FVPL:

- (a) \$13,755.84 in respect of the overpayment of his bonus for the year ending 31 March 2005; and
- (b) \$22,528.10 in respect of the overpayment of his bonus for the year ending 31 March 2006.

[118] No interest was sought in respect of the personal grievance. Interest was sought and is payable on the various bonus payments and repayments summarised at [116] (c) and [117] above. It is to be paid at the rate of 8.7% pa calculated from 1 April 2005, 2006 and 2007 in respect of the bonus payment attaching to the respective years ending 31 March, to the date of payment. Interest is also payable in respect of holiday pay, and is to be calculated at 8.7% from the date of termination of employment to the date of payment.

### **Costs**

[119] Costs are reserved.

[120] The parties are invited to agree on the matter. In the event that the parties seek a determination from the Authority counsel should agree on a timetable for the filing and service of memoranda and advise the Authority of it in writing at their earliest convenience. If I have not been advised of a timetable by the end of 28 days from the date of this determination I will conclude that no award of costs is sought and the matter will be at an end.

[121] This employment relationship problem has been bedevilled by failures to meet agreed timetables. The parties are therefore warned that they are required to adhere to

any timetable they may advise in respect of costs. Failing to do so will mean the party in breach risks my issuing a determination without hearing from that party.

R A Monaghan

Member of the Employment Relations Authority