

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 37
3114972

BETWEEN	DAVID MORELLO Applicant
AND	WASTE MANAGEMENT NZ LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Greg Bennett, representative for the Applicant Daniel Erickson, counsel for the Respondent
Investigation Meeting:	23 November 2021 (by audio visual link)
Information and submissions received:	25 November 2021, from the Applicant 25 and 29 November 2021, from the Respondent
Determination:	14 February 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Morello was employed by Waste Management Limited (WML) for six years until he resigned on 16 February 2020. His last day of employment was 2 March 2020. He says he was disadvantaged in his employment by the unjustified actions of WML when it failed to pay his sales performance incentive (SPI payment) when it was due and owing on 15 March 2020.

[2] WML says Mr Morello has received all monies due and owing under the terms of his employment agreement and under the terms of the SPI guidelines his resignation disallowed his entitlement to the SPI payment.

The Authority's investigation

[3] By consent the investigation meeting was held by audio visual link. The Authority received evidence from Mr Morello, Marsha Cadman, who at the relevant time was WML's general manager customer and sustainability and Janine Thomson who was Mr Morello's immediate manager.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter the Authority has carefully considered all the material before it, including all information provided by the parties and their submissions.

Issues

[5] The issues identified for investigation and determination are:

- a) Was Mr Morello unjustifiably disadvantaged by actions of WML with regard to the SPI payment?
- b) If so, is Mr Morello entitled to a consideration of remedies sought including:
 - i. Reimbursement of monies lost (SPI payment) pursuant to section 123(1)(b) of the Act?
 - ii. Compensation pursuant to section 123(1)(c)(i) of the Act?
- c) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Morello which contributed to the circumstances which gave rise to his grievance?
- d) Is either party entitled to an award of costs?

The relevant terms of employment

[6] The parties entered a written individual employment agreement (IEA) when Mr Morello's employment commenced which included at schedule C:

Sale Reward Scheme

You are entitled to a Sales Reward; subject to the conditions and criteria as per the "Sales Reward Scheme" (attached) in conjunction with satisfying the set KPI's and Objectives.

The scheme may also become subject to a further review; details of any changes to the scheme and criteria will be provided to you should this occur.

[7] On 20 March 2019 WML wrote to Mr Morello inviting him to join the 2019 SPI program. Similar invitations had been sent to Mr Morello in preceding years. The letter states the SPI programme guidelines (the guidelines) are attached to the letter. The guidelines include:

2.4 Participant termination and resignation

Where a SPI Participant's employment is terminated for any reason, or the employee has submitted their resignation, on or before the date any approved SPI payments are processed for payment, the participant will not be eligible for a payment upon termination, or at any other time. This is irrespective of whether the company or the employee initiates the termination of their employment.

5.2 End of financial year SPI Payments

...

- c) Final SPI payments will not be made until:
 - i. Company financial performance results have been confirmed by the Chief Financial Officer; and
 - ii. the National Human Resources Manager and the Chief Financial Officer approve the payments calculated against each participant's approved Final Performance Evaluation.
- d) End of financial year SPI payments will be made in February, following satisfactory completion of the evaluation and review process, unless otherwise advised.

5.5. Processing SPI Payments

- a) SPI Payments will not be made until all participants have had their evaluation completed and reviewed for the relevant period.
- b) All SPI Payments will be made in cash into the same bank account as a Participant's base salary.

- c) SPI Payments will be gross payments subject to normal income tax provisions, other tax liabilities and any deductions that may be relevant to the participant.
- d) Any other payment arrangements will be advised to participants in their invitation letter, and only with the approval of the relevant General Manager and the National Manager Customer First.

7.0 Changes to the SPI Program

- a) The Managing Director, with the approval of the Board, has the right to adjust Waste Management's financial performance criteria targets to reflect events not included in the development of the Performance Criteria.
- b) The SPI Program is subject to change, with the Managing Director having ultimate discretion over eligibility, calculation and payment of incentives, including the timing of such payments.

Relevant law

The test for justification

[8] When the Authority considers justification for the actions of WML it does so by applying the test of justification in s 103A of the Employment Relations Act 2000 (the Act). In determining justification of actions, as in this matter, the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of WML and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the alleged unjustified actions.

[9] WML could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

Estoppel

[10] Mr Morello says MWL is estopped from not paying him the SPI payment because of representations made on its behalf on which he has subsequently relied. In *Checkmate Precision Cutting Tools Ltd v Tomo* the court stated:¹

The underlying purpose of the doctrine of estoppel is to prevent a party from going back on his/her word (whether express or implied) when it would be unconscionable to do so. There must be clear words or conduct by one party which creates a belief or expectation in the other, and the

¹ *Checkmate Precision Cutting Tools Ltd v Tomo* [2013] NZEmpC 54 at [20].

party to whom the representation or promise was made must have relied on it to such an extent that it would be inequitable to allow the promisor to go back on his/her word. ...

Background

[11] As stated above on 20 March 2019 Ms Cadman wrote to eligible staff, including Mr Morello, inviting them to join the 2019 SPI scheme for the period 1 January – 31 December 2019. The letter stated the on-target bonus Mr Morello may be eligible for was \$15,000 and that the guidelines for the SPI scheme were attached to the letter. The guidelines include those invited to participate in the SPI scheme would be eligible for assessment for quarterly and bi-annual SPI payments and an end of financial year SPI payment.

[12] In his oral evidence to the Authority Mr Morello said he did not receive the 20 March letter or, it is understood, the SPI guidelines. Mr Morello accepted he was evaluated for quarterly and bi-annual SPI payments, some of which he received and that his manager, Ms Thomson, and her manager recommended a final SPI payment to him of \$6,000. The basis and criteria for these payment are set out in the guidelines. Mr Morello does not dispute the appropriateness of the application of the guidelines with respect to any of the SPI payments or that different criteria to that set out in the guidelines ought to have been used to calculate those payments.

[13] In the letter dated 4 March 2020 raising a personal grievance for failure to pay the final SPI payment Mr Morello appears to rely on the guidelines for the basis of those payments. In the statement of problem signed and dated 8 August 2020 Mr Morello relies on the SPI guidelines as a basis for his personal grievance and attaches the invitation letter and SPI guidelines. In his witness statement dated 23 September 2021 Mr Morello states he was invited to join the 2019 SPI scheme, received bonuses under the scheme during the year and was successful in meeting the criteria of the scheme. I am satisfied Mr Morello was aware of the SPI guidelines at all relevant times and his knowledge of and understanding of the guidelines has informed the employment relationship problem he brings before the Authority.

[14] On 11 February 2020 Mr Morello attended MWL's national sales conference. Ms Cadman made an announcement to the conference concerning the SPI programme

- the SPI payments MWL had expected to pay on 15 February 2020 would not be paid until 15 March.

[15] Mr Morello resigned on 16 February 2020 with his last day of employment being 2 March. He accepted in his evidence to the Authority that prior to tendering his resignation Ms Thomson urged him not to until he had received his SPI payment because it would jeopardise the payment. Mr Morello said, despite this, he had to tender his resignation then because he had delayed the start of his new employment until after the expected payment date of the SPI in mid-February and his new employer could not wait any longer for him to start.

[16] On 19 February the SPI approval process occurred. On 24 February Ms Cadman wrote to Mr Morello that he was not entitled to the SPI payment under clause 2.4 of the SPI guidelines. Evidence before the Authority establishes he was not the only resigning employee 'caught' by the application of clause 2.4.

[17] On 4 March Mr Morello's representative wrote to WML that the failure to pay the SPI had unjustifiably disadvantaged him in his employment because Ms Cadman had told the national sales conference on 11 February payment of the approved SPIs had to be delayed for a month from 15 February to 15 March due to a 'systems glitch' and it was unfair and unreasonable for WML to subsequently refuse to make the payment. On 11 March WML replied there was no basis for a personal grievance due to the SPI guidelines.

Discussion

What did Ms Cadman say at the National Sales conference?

[18] Ms Cadman said in her evidence she was very careful about what she said to the National Sales Conference about the delay in SPI payments - she knew the announcement would be unpopular because staff were expecting the payments to be processed on 15 February. She said she explained the delay was because the approval processes had not yet been completed and that she deliberately gave no details of the reason for the delay. Ms Cadman was clear in her evidence that she did not say the payments had been approved because she could not say that given they had not yet been approved. Supporting evidence as to the reason for the delay has been provided. Ms

Thomson said in her evidence that she had had to resubmit the SPI recommendations for her team, which included Mr Morello, because the ‘numbers had to be re-run’.

[19] I am satisfied Ms Cadman did not represent to the sales conference payment of approved SPI payments was delayed until 15 March because at that date no such approval had occurred.

Were the SPI guidelines part of Mr Morello’s terms of employment?

[20] Under the IEA a ‘Sales Reward’ was part of Mr Morello’s terms of employment. The conditions and criteria of the ‘Sales Reward’ were to be set out in a ‘Sales Reward Scheme’ which the IEA provided could change and that any changes to the scheme would be notified. I am satisfied the SPI guidelines are the conditions and criteria of the sales reward scheme provided for in the parties’ IEA.

[21] There is a suggestion in Mr Morello’s evidence that the SPI guidelines are in conflict with the IEA ‘Sales Reward’ provision. He says under the terms of the IEA he is entitled to a sales reward, he has met the criteria and he should therefore be paid. The difficulty with this argument is the criteria Mr Morello seeks to rely on to calculate the payment he says he is entitled to is set out in the SPI guidelines which also contains a criteria concerning the impact of resignation. The IEA is clear WML can set the terms and conditions of the ‘Sales Reward Scheme’. WML has set those terms and conditions in the SPI guidelines within, I am satisfied, the terms of the IEA.

Did Mr Morello’s resignation make him ineligible to receive the SPI?

[22] Under clause 2.4 of the guidelines if an employee resigns before “any approved SPI payments are processed for payment” the employee becomes ineligible for the payment.

[23] Mr Morello submits ‘processed for payment’ must mean the events including his manager’s recommendation and the approval of the recommendation. This argument cannot succeed because:

- (i) under the terms of clause 2.4 a resignation would invalidate a SPI payment if it occurs on any date up to the date such a payment was ‘processed for payment’;
- (ii) ‘processed for payment’ cannot include the approval of the recommendation because the wording of cl 2.4 describes the payment to be ‘processed for payment’ is an ‘approved SPI payment’;
- (iii) an approved SPI payment is defined by guidelines cl 5.2(c)(ii) and requires the approval of the payments by the National Human resource Manager and the Chief Financial Officer; and
- (iv) until this approval occurs payment will not be made (guidelines cl 5.2(c)).

[24] The approval of the payment, in compliance with the guideline requirements, did not occur until 20 February 2020, four days after Mr Morello tendered his resignation. The evidence does not establish the approval process required by clause 5.2 of the guidelines occurred prior to resignation.

Was WML estopped from not paying the bonus?

[25] The estoppel argument does not succeed because the evidence does not establish WML represented to Mr Morello his SPI payment had been approved at the sales conference.

[26] In addition to the approval argument Mr Morello says he has done the work to achieve the bonus, his manager and her manager recommended the bonus be paid to him and but for the payment delay announced by Ms Cadman at the sales conference the payment would have been processed. He says he cannot be expected to know how the approval mechanism operated and given this, his knowledge of the managers’ recommendations is sufficient to trigger eligibility and given these circumstances it is unfair and unreasonable for WML to seek to refuse to pay him the bonus in reliance on “...one very small paragraph of the entire guidelines.”

[27] This argument cannot succeed because the evidence establishes Mr Morello was aware of the SPI guidelines which include the approval mechanism and the resignation criteria. Even if I had found there had been a lack of clarity or ambiguity as to the

application of the SPI guidelines in resignation circumstances, any such lack of clarity or ambiguity was resolved prior to Mr Morello's resignation by the clear statement of his manager as to the effect of any resignation on his SPI payment. In addition, this is not a situation where WML had a discretion to exercise and it has failed to do so fairly or reasonably. Under the terms of the SPI guidelines the effect of resignation on the SPI payment is clear and the evidence establishes WML applied the guideline consistently.

Outcome

[28] Mr Morello's claim is unsuccessful.

Costs

[29] Costs are reserved. The parties are encouraged to resolve this issue between them. If this is not possible, WML is to file and serve any costs memorandum within 10 working days of the date of determination and Mr Morello may file and serve any reply memorandum within a further 5 working days.

Marija Urlich
Member of the Employment Relations Authority