

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 320/07
5074496**

BETWEEN GRANT FORSYTH
 Applicant

AND TELSTRACLEAR LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Andrew Steele, Counsel for Applicant
 Peter Kiely, Counsel for Respondent

Investigation Meeting: 24 August 2007

Submissions Received: 28 August 2007
 29 August 2007
 4 September 2007
 14 September 2007

Determination: 15 October 2007

DETERMINATION OF THE AUTHORITY

The problem

[1] At issue between these parties is an incentive payment to the applicant Mr Grant Forsyth ("Mr Forsyth") of about \$15,611.00. Mr Forsyth contends that he pursues the matter primarily as one of principle and asks the Authority to order his former employer TelstraClear Limited ("TelstraClear") to comply with an alleged agreement to pay him incentive pay. He also seeks interest and penalties, as well as compensation because he says TelstraClear's failure to pay his incentive constitutes unjustifiable punishment of him for alleged misconduct without due process.

[2] TelstraClear says no agreement was actually concluded to pay Mr Forsyth because various conditions were not met and therefore there is no basis for any compliance order. It further says there is no entitlement to compensation because Mr Forsyth does not have a personal grievance.

[3] The parties were unable to resolve the problem between them by the use of mediation.

The facts

[4] Mr Forsyth was employed by TelstraClear as Regulatory & Industry Affairs Manager from 1 April 2002 until 31 March 2006. His role was a senior one and involved responsibility for public policy development and managing TelstraClear's relationships with the Government and various telecommunications industry agencies and bodies. He was responsible for a team of three employees as well as managing relationships with a number of external providers.

[5] The terms of Mr Forsyth's employment were recorded in an individual employment agreement in the form of a letter of offer dated 28 March 2002 ("the IEA"). Mr Forsyth signified his acceptance of those terms on 6 May 2002.

[6] The IEA contained this provision as to an incentive payment under the heading *Remuneration and Benefits*. The parties refer to this incentive as a "bonus" and so I shall too. Clause 3.3 provides:-

3.3 A discretionary annual incentive based on percentage of your total remuneration, outlined in the Statement of Remuneration Appendix A, will be applicable to the position. This will be effective from 1 April 2002. Your current variable pay scheme will operate until 31 March 2002. Such a discretionary payment will be based upon the achievement of agreed business objectives. The level of payment would be dependent on you meeting the performance standards set by your manager and agreed with you. These will be subject to review every six months to ensure they remain aligned to the Company's business plan. Your achievement on meeting those standards and the level of the incentive actually paid will be determined at the discretion of your manager at the end of each applicable period. In the event that your employment ceases before the end of an applicable period solely by reason of redundancy, your performance will be reassessed and, the Company may, at your manager's discretion, pay you all or part of the incentive on a pro rata basis. If you leave the Company by reason of resignation or dismissal you will not be eligible to receive the annual incentive.

[7] The *Statement of Remuneration* at Appendix A of the IEA specifies this:-

*Incentive Pay (Note 2)
Your Current Incentive Pay is 15% Of Your Total Remuneration
\$29,400*

Notes:

2. *Incentive pay represents potential earnings, which are not guaranteed. TelstraClear's incentive pay scheme is discretionary and may be changed by TelstraClear on reasonable notice to you.*

[8] It is not disputed, that notwithstanding the stated annual entitlement from 1 April 2002 as the period of entitlement, it subsequently evolved to 1 July each year. As well, at the time of his resignation the incentive pay component of Mr Forsyth's remuneration had increased to \$31,037.55.

[9] For about six months before the end of his service, Mr Forsyth reported to TelstraClear's General Counsel and Company Secretary Mr Gordon Wong ("Mr Wong") after Mr Wong took over responsibility for TelstraClear's regulatory affairs. On 21 December 2005 Mr Forsyth advised Mr Wong in person that he was resigning and later that same day he confirmed his resignation in writing by email to Mr Wong giving three months notice of resignation as required by the IEA.

[10] By email of 8 January 2006, Mr Forsyth wrote to Mr Wong in relation to his final twelve weeks of employment. He wrote:-

...

You will see that I would like to schedule my last day as 31 March

Some other matters that I would like to cover off include

1. *Annual salary review - expected in November effective 1 January*

2. *KPIs*

3. *Bonus payment*

4. *Planned leave*

5. *Attendance at the Competition Law Conference in Wellington 27 & 28*

Feb

6. *Participation at the ICANN meeting in Wellington*

7. *Hosting of industry gatherings*

Give me a call when you are able to discuss these and any other matters.

[11] Mr Forsyth says that subsequently Mr Wong repeatedly assured him his incentive pay would be addressed prior to Mr Forsyth's departure. Mr Wong agrees only that he gave repeated assurances to Mr Forsyth that he would be treated fairly. It was agreed that Mr Forsyth's last day of work would be Friday 31 March 2006.

[12] On 15 February 2006 Mr Forsyth emailed Mr Wong essentially expressing concern and desirous of having discussions in relation to his severance entitlements well in advance of his departure. He sought Mr Wong's dialogue on these matters.

[13] Mr Wong responded by email of 16 February 2006 suggesting he and Mr Forsyth meet when Mr Wong would be in Auckland the following week. He advised he would send Mr Forsyth a meeting invitation.

[14] Although both Mr Wong and Mr Forsyth cannot particularly recall it, I find that they did meet on 24 February 2006.

[15] On 15 March 2006 and unknown to TelstraClear, Mr Forsyth met with a reporter for the *New Zealand Herald*, a daily newspaper publication. Mr Forsyth participated in an interview about the New Zealand telecommunications market. Mr Forsyth gives evidence on oath to the Authority that this interview was given on the express condition that it referred to him as an ex-employee and that it be published after he ceased to be an employee of TelstraClear. The article was subsequently published in the Weekend edition of the *New Zealand Herald* on Saturday 1 April 2006. TelstraClear was informed of this interview at the end of the day on Mr Forsyth's last day of work. Mr Forsyth did not at any time disclose to Mr Wong his interview with the New Zealand Herald before it was discussed at the close of Mr Forsyth's final day at work with TelstraClear.

[16] I find that Mr Forsyth also gave an interview to the *National Business Review* a business news publication, while he was still employed. There was no article published arising out of that interview however.

[17] Mr Forsyth and Mr Wong also met again around mid-March. Mr Forsyth followed up that meeting with an email to Mr Wong of 20 March 2006. He wrote:-

Hi Gordon

Thank you for taking the time to meet with me for a discussion on your and the company's plans to address my remuneration review and bonus performance consultation prior to my departure.

I was heartened by your positive reflection as to my past and current contribution and reassurances that your handling of the review would appropriately reflect my contributions and effort for the last 12 months.

Similarly I was comforted that while you did not think that it was appropriate for the company to "make an exception" in its processes for the review of one staff member, you did not expect that I need concern myself that the matter of the remuneration review and bonus calculation would be dealt with fairly and finally by the time I left next Friday.

In planning my final days here at TCL, I would like to know when you planned to conclude your review and the usual bonus performance "consultation", and of course, make final payment - particularly given that I will be leaving New Zealand just 2 days after leaving TCL.

Regards

Grant Forsyth

[18] Mr Wong responded by email of 20 March 2006. He wrote:-

Grant,

I'll talk to you on Wednesday when I'm up in Auckland. But let me just correct one thing you assert in your email. At our meeting on 24 February, I said the calculation of your bonus would appropriately reflect your contributions and performance over the last 12 months. I said nothing about the remuneration review which should create any expectations or assumptions in your mind. As to any payments to be made to you, presumably you will keep a bank account open in New Zealand after your departure date.

Regards

Gordon

[19] Subsequently on 21 March 2006, Mr Forsyth approached TelstraClear's Head of Customer Experience and Human Resources Ms Margaret (Maggie) Anne Robertson ("Ms Robertson") with a view to expediting matters with her involvement. Ms Robertson however, referred Mr Forsyth back to Mr Wong.

[20] I accept Ms Robertson's evidence that sometime on 30 March 2006 she gave her approval in principle to Mr Wong to pay Mr Forsyth an incentive payment outside the terms of the IEA.

[21] As of 3.00pm on 31 March 2006 being Mr Forsyth's last day of work, his severance entitlements had not been finalised. Mr Forsyth and Mr Wong had a telephone discussion at 3.00pm that day. Mr Wong was in his office in Wellington where both he and Ms Robertson were based.

[22] Mr Forsyth had expected to meet with Mr Wong in person and was not pleased they had not. This is what his prepared witness statement says of the 3.00pm telephone discussion he had with Mr Wong:-

I had a telephone discussion with Mr Wong in which we discussed the basis for my bonus. It was an amicable discussion even though it was last minute. Mr Wong offered 2 options. First, to pay the bonus immediately. In which case, the bonus would reflect a 100% achievement at the personal and team levels, but only 34% at the company level to reflect the financial performance of the company at that time. The alternative and second option was I could wait until September to chance on the company's performance improving, and so, increasing the "company level" part of the bonus. While that was tempting, because I had faith in TelstraClear's full year performance, I decided after some thought to opt for immediate payment as it was tidier.

[23] I established with Mr Forsyth at my investigation meeting the conversation was more extensive than that. I find, having questioned Mr Forsyth, that Mr Wong began by reading out a letter sent to all employees advising that following review Mr Forsyth's remuneration would remain unchanged. Mr Forsyth was not pleased with that outcome, and says he expressed his anger to Mr Wong with reference to both the outcome and the delay. He told Mr Wong it was the very situation he had feared and foreshadowed when he had first written to Mr Wong on 8 January 2006. He told Mr Wong he regarded the outcome incongruous given his work and history and the delay.

[24] They next discussed Mr Forsyth's bonus. I find that Mr Wong advised Mr Forsyth that TelstraClear recognised Mr Forsyth was about to leave and it was prepared to make a concession to Mr Forsyth and pay him a bonus. Mr Wong then detailed the various components of a bonus for Mr Forsyth which I find were as Mr Wong outlined to the Authority. I find that Mr Wong concluded by presenting Mr Forsyth with the option of either being paid a bonus assessed as at that time or waiting until a final assessment in September. Mr Forsyth responded and I quote his evidence to the Authority as I have recorded it and as I immediately confirmed with him:-

I said okay, put that in writing then I'll come back to you on my decision whether I would take it now or wait until September. He undertook he would and offered to fax it to me.

[25] Mr Forsyth says Mr Wong said "he would do it right then" which I assume meant that Mr Forsyth was then waiting by the fax and Mr Wong would have

appreciated that. Mr Wong however says he apprehended that he would revert to Mr Forsyth by 5.00pm.

[26] Between 4.00pm and 4.30pm, I find that Mr Forsyth telephoned TelstraClear's Mr Mathew Bolland ("Mr Bolland"). In anticipation of an article in the *New Zealand Herald* the following day, Mr Forsyth informed Mr Bolland of the interview he had given to the New Zealand Herald on 15 March 2006. Mr Forsyth explains to the Authority he did this "*as [he] thought the article might give rise to questions from other media*" and he wanted TelstraClear to be forewarned so as to permit it to be in a better position to respond.

[27] Ms Robertson was immediately made aware of Mr Forsyth's advice to Mr Bolland. She interrupted Mr Wong as he was dictating to his personal assistant a facsimile communication to Mr Forsyth. Ms Robertson I find was genuinely annoyed and very unhappy with Mr Forsyth's actions. She gesticulated and advised Mr Wong there would be no incentive payment to Mr Forsyth. Mr Wong terminated his dictation and the almost completed facsimile advice was not sent to Mr Forsyth. The facsimile advice has been produced to the Authority.

[28] As a result of these events, Mr Forsyth did not hear from Mr Wong as he had expected. Consequently, Mr Forsyth composed an email which he sent at 4.26pm to Mr Wong and, interestingly, copied to his lawyer. He wrote:-

Gordon

As part of our discussion regarding the conclusion of remuneration matters pending my departure from the company today, you offered to pay my bonus now under the following conditions: -the personal portion of my bonus would be paid at 100% -the team portion of my bonus would be paid at 100% - the company portion of my bonus would be paid at 34% as a reflection of the current position and performance of the company The overall calculation would be prorated to reflect that it covered only 9 months of the 12 month bonus period. The alternate was for me to wait until September when the rest of the company would be paid their bonus and at that time, to have the company portion of the bonus determined according to the company's position and performance for the full 12 months. Thank you for extending to me the option of being paid my bonus now. I accept your offer as detailed above. I am sending this to you, as I have not received a faxed copy of the offer I had expected to receive.

[29] Mr Wong emailed Mr Forsyth a reply at 4.51pm. He wrote:-

That offer is rescinded. The offer was conditional upon compliance with your contractual and fiduciary duties as an employee. You are proposing to talk to the media in flagrant disregard of TelstraClear's policy and specific directions to you. The offer was also conditional on a written acknowledgement from you that it is in full and final settlement of any claims you may have against the company for any further remuneration. These conditions would have been specified in the fax I was about to send you. Regards Gordon

[30] Mr Wong tells the Authority that contrary to this advice, he did not mention "conditions" in telephone discussions with Mr Forsyth. He says he was not explicit on the conditions, but used the phrase "all things being equal." So Mr Forsyth is correct when he gives evidence no conditions were expressly mentioned to him.

[31] At 4.57pm Mr Forsyth emailed Mr Wong and copied his lawyer. He wrote:-

You offered no such conditions when you made the offer to me. I do not accept that I have breached any contractual or fiduciary duties. While I requested a written offer - it was not offered - and you undertook to do so, I did not receive such a written offer so stand by my email as a record of the offer. Regards

[32] I find that Mr Forsyth and Mr Wong then spoke on the telephone. Mr Wong acknowledged Mr Forsyth's initial email of 4.26pm. He explained to Mr Forsyth he had prepared a facsimile but had not sent it. He repeated that payment of the bonus was conditional and Mr Forsyth had breached the conditions. He told Mr Forsyth he knew of Mr Forsyth's advice to Mr Bolland of the interview with the *New Zealand Herald*. Mr Forsyth attempted to assuage Mr Wong that the article would not be injurious or harmful to TelstraClear. He sought to dispel Mr Wong's assumption of an adverse article and emphasised he had expressed only his personal views. They agreed to talk further.

[33] At 5.39pm Mr Forsyth sent this email to Mr Wong:-

Gordon
I have now had the opportunity to speak to my lawyer. 1. This matter - payment of bonus - is not a matter of offer and acceptance 2. Even if it was a matter of offer and acceptance there were no conditions attached to your "offer" 3. Even if it was an offer and acceptance - I have accepted the "offer" you are now bound to conclude. In light of your concerns regarding my actions and the threats you have made regarding my remuneration (withdrawal of bonus) and unless I (on 09 488 7883) or my lawyer, David Courtney (on 021 908 193) hear from you

within the next 30 minutes ie by 6.10 pm, I will attempt to contact the Herald to request that they withdraw the personal piece from the Herald tomorrow with an explanation as to the grave consequences that will befall me should the article appear.

[34] Some days later on 4 April 2006, Mr Forsyth wrote to Mr Wong by email noted as sent at 5.38pm:-

Gordon

Following our telephone conversation on Friday night I understood that you were going to contact me prior to my departure on Sunday evening after considering our discussion. I did not receive any communication from you and am now in transit to the UK. As noted in prior emails and also during our telephone call, the arrangement offered, of paying my bonus now, was not contingent on any extra "conditions" and has been accepted by me. You made the suggestion on our call, that you might wish to wait to review the personal media articles that I contributed to, prior to responding and fulfilling the payment of the bonus. I thought after discussion that you agreed that this would not be appropriate. Please would you respond by email to my lawyer, David Courtney, with a copy to me, by 5pm (NZT) today as to what course of action TelstraClear is going to take regarding the accepted arrangements of paying my bonus this week. Additionally I note that an amount has been deposited into my personal bank account on Friday. I presume that this is my final pay as currently calculated. Thank you. Please would you provide to me by email (this email), an analysis as to how this amount has been arrived at. Specifically in the analysis I would like to see the calculation of the payment of outstanding miscalculated holiday pay arising from the time of CLEAR (this is a matter that I have been in discussion with payroll for, for some time now and am not aware of it having been resolved). Thank you

[35] Mr Wong responded by email the same date at 5.41 pm:-

Grant,

I am not in a position at this stage to respond to your query relating to your bonus, but it may be useful if you see the faxed offer that would have been sent to you on Friday afternoon had we not learned of your interviews with the New Zealand Herald and the NBR, in breach of company policy. ...

There followed an analysis of Mr Forsyth's final pay.

[36] Mr Wong subsequently on 13 April 2006 provided Mr Forsyth with a substantive response:-

I am now in a position to respond to your query relating to your bonus. We do not consider that we are contractually obliged to make a bonus payment to you, either under the terms of your written employment agreement or otherwise. I do not consider that an offer was made to you during the course of our discussions,

but rather that I communicated to you that consideration was being made to making a recommendation to those empowered to authorise such a payment, that one be made. Whether such a recommendation would be made was dependent on factors such as complying with your contractual obligations and entering into an agreement that this was in full and final settlement of any claims you have to any remuneration payable by TelstraClear. Neither of these conditions was met, and a decision was made not to make a recommendation for the payment of a bonus. As you will appreciate, there was not entitlement pursuant to the terms of your written agreement to make payment of a bonus, and while consideration was being given to making a payment outside of the terms of that agreement, no offer was crystallised at any time that was capable of acceptance. I assume you will refer this matter further to your lawyer prior to responding to us. We reserve our rights in relation to any action arising out of your interview with the media, which was outside company policy and in our opinion was in breach of your duty of fidelity as an employee.

Regards Gordon

The merits

[37] I immediately note that Mr Forsyth sought to invoke dialogue aimed at the resolution of these issues in early January 2006. I regard it unsatisfactory that there was no final resolution until Mr Forsyth's last day of work, and then I find, only at his instigation. As a result, the discussions relating to Mr Forsyth's bonus were hurried. I also record that Mr Forsyth was also dissatisfied with how his final day was marked, or more correctly not marked by TelstraClear according to him. As I understand him, there was no exit interview held with him on his last day. Nor was there a farewell function for him.

[38] Clause 3.3 does not specify a process for ascertainment of the bonus and there are no clear procedures. I suggest it would be prudent for TelstraClear to clarify these matters. I accept however absolutely, as Mr Forsyth does too, that it is TelstraClear's discretion to pay. The bonus is entirely discretionary.

[39] I find that as a matter of law, these parties having agreed that TelstraClear is entitled to exercise its discretion, the manner in which that discretion is exercised must be in accordance with the statutory duty of good faith. However, TelstraClear's entitlement to make the decision and the decision itself are not circumscribed by any objectively determined requirements of reasonableness. So if Mr Forsyth has a claim at all, it can only be in relation to the manner of the exercise of TelstraClear's discretion.

[40] The issue for determination is whether the manner of exercise of discretion was in accordance with the statutory duty of good faith. Mr Forsyth says TelstraClear resiled from a binding agreement to pay him. TelstraClear says Mr Forsyth breached its media policy and is not entitled to the exercise of its discretion. I now consider these two contests.

[41] I accept Ms Robertson's evidence that where an employee departs with a partial year's service, her approval is necessary. I find that Ms Robertson approved the payment in principle to Mr Forsyth of a bonus prorated on his partial year's service and this was given and communicated to Mr Wong on 30 May 2006. But Ms Robertson eventually withdrew her approval.

[42] At no stage did Mr Wong inform Mr Forsyth that Ms Robertson had simply vetoed any payment of bonus to Mr Forsyth when she found out about his media interview. That is what I find actually happened. Instead and unhelpfully, Mr Wong thereafter corresponded with Mr Forsyth in terms of contract law principles denying any concluded arrangements with Mr Forsyth at all. This I suspect is the matter of principle Mr Forsyth now pursues. But to be fair to Mr Wong, it was Mr Forsyth who sought initially to characterise his discussions with Mr Wong in terms of contractual principles and had involved his lawyer.

[43] TelstraClear contends that Mr Wong's discussions with Mr Forsyth would result in a recommendation and not a concluded agreement. By this it means that whatever Mr Forsyth and Mr Wong agreed, Ms Robertson's approval was still ultimately required. Mr Forsyth argues that when he approached Ms Robertson on 21 March 2006¹ to expedite matters, her redirection of him back to his manager Mr Wong was a complete relinquishment by her of any final authority. I am not persuaded of this and I do not accept it. It is self serving in the sense that Mr Forsyth attempts to turn Mr Wong's accommodations (due solely to the urgency of Mr Forsyth's impending departure) to his own advantage as though Mr Wong's representations would be particularly binding on TelstraClear where in ordinary circumstances they would not be, I find. That said however, I say again that the matters in issue went unresolved too

¹ Mr Wong's evidence. Mr Forsyth does not specify a date.

long. Mr Wong was likely acting to rectify the delay.

[44] The evidence falls far short of any relinquishment of authority by Ms Robertson. I find that she did not relinquish her ultimate authority over payment of the bonus. I find that she simply referred Mr Forsyth back to his manager to continue discussions and she did not delegate her ultimate authority to Mr Wong in doing so. There is no evidence of her doing that.

[45] When I asked Mr Forsyth about the telephone conversation with Mr Wong at 3.00pm on his last day of work and what mention there was of any requirement for higher authorisation, Mr Forsyth told me *"it was Maggie's role to authorise remuneration and bonus payments. I presumed that he (Mr Wong) had the authorisation"*. I regard this as a clear statement that Mr Forsyth appreciated Ms Robertson retained ultimate authority.

[46] Compelling too is another aspect of Mr Forsyth's evidence. In his email to Mr Wong of 15 February 2006, Mr Forsyth points out to Mr Wong (in relation to the bonus):-

your eventual decision is likely to require counter approval

[47] I find this statement is an acknowledgement by Mr Forsyth that the decision as a matter of course, would not be Mr Wong's alone. I also find that there was nothing which changed that position and so it remained true even on Mr Forsyth's last day when his entitlement was being considered.

[48] Having regard to these matters, I conclude that Mr Forsyth appreciated the decision was not Mr Wong's alone, even in the hurried discussions on his last day. There was nothing which changed the position and in these circumstances, Mr Forsyth could not reasonably consider that Mr Wong's word on the matter was final. I conclude therefore, that whatever Mr Forsyth and Mr Wong discussed, Mr Forsyth always knew the ultimate authority lay elsewhere. He appreciated that Ms Robertson had the ultimate power of veto. And that in my view is what eventually occurred.

[49] So if it is to be inferred that Mr Forsyth knew the decision would be approved higher than Mr Wong, what relevance is his correspondence with Mr Wong on the last day? I am led to find that the correspondence could only ever have concluded in a recommendation or proposal by Mr Wong that was always subject or conditional on final authorisation. I find this is also true of any and all correspondence between an employee and their manager in relation to the bonus. I am comforted in this conclusion, for I have little doubt that if Mr Forsyth did not agree with Mr Wong's assessment, he would have sought to have the matter revisited by Ms Robertson because he knew she had the ultimate authority.

[50] While it is argued for Mr Forsyth that Mr Wong held himself out as having authority to bind TelstraClear in the particular circumstances of the discussion that took place, because I have inferred that Mr Forsyth could not reasonably have held that understanding, I find that Mr Wong had no ostensible authority. For completeness I also find he had no actual authority. When he was asked by counsel Mr Forsyth agreed Mr Wong did not have final authority but he added that such authority can be delegated. I find that there was no such delegation.

[51] I conclude this point by finding that Mr Forsyth's entitlement to a bonus, was always conditional on final authorisation from Ms Robertson. Whatever Mr Wong may have proposed for Mr Forsyth, Ms Robertson had the final word. Mr Forsyth knew of this condition. I consider this particular finding determinative of the matter. Irrespective of communications between Mr Forsyth and Mr Wong, there was always the condition of final approval.

[52] I find that Mr Wong did intend to have a payment of bonus to Mr Forsyth approved. Mr Wong actually dictated a facsimile that was to present an "offer" that Mr Forsyth had asked Mr Wong to record in writing. That offer would have presented Mr Forsyth with an election whether to accept an immediate calculation or a calculation made in September. I find that this election, while discussed in the telephone discussion at 3.00pm, was not formalised until it was actually made in writing. That was Mr Forsyth's requirement. There was no oral offer because Mr Forsyth specifically required the offer be made to him in writing. He said:-

I said okay, put that in writing then I'll come back to you on my decision whether I would take it now or wait until September. He undertook he would and offered to fax it to me.

[53] The writing Mr Forsyth requested was not a written record of an oral offer. Mr Forsyth requested an actual offer be made to him in writing. He says it was left to him to decide his preference. He explains he had asked Mr Wong to record the situation in writing because he was gutted and angry as his concerns about Mr Wong's assurances of fairness to him had not transpired. He waited for the offer to be made to him in writing. But it did not eventuate because I find Ms Robertson's veto prevented payment. Ms Robertson had given her approval in principle the previous day but this was revoked. Mr Wong did not send his facsimile to Mr Forsyth. So I find there was no actual offer made to Mr Forsyth.

[54] And what was the effect of Mr Forsyth's email of 4.26pm to Mr Wong? He wrote *"Thank you for extending to me the option of being paid my bonus now. I accept your offer as detailed above. I am sending this to you, as I have not received a faxed copy of the offer I had expected to receive"*. Mr Forsyth could not make an offer for TelstraClear to himself. He purports to accept an offer made to him by Mr Wong. But I have found that Mr Wong did not make an offer, because the offer, at Mr Forsyth's own request, was required to be made in writing and was only effective in writing. Because it was not, there was no offer. There was nothing for Mr Forsyth to accept.

[55] Any consensus reached between Mr Forsyth and Mr Wong was always subject to final authorisation by TelstraClear, and specifically Ms Robertson. Mr Forsyth appreciated this final authorisation. Eventually, Ms Robertson did veto payment to Mr Forsyth. Was it proper of her to do so?

[56] Having seen and heard these witnesses, I understand Ms Robertson to have a very real sense of despair, disappointment and disbelief in relation to Mr Forsyth's actions in interviewing with the *New Zealand Herald* and *National Business Review*. Ms Robertson says she was "gobsmacked" when Dr Freeth told her of Mr Forsyth's interview. She says Mr Forsyth's actions were "colossal" and "duplicitous". I find Ms Robertson's evidence compelling and she persuades me that TelstraClear was

genuinely shocked and incredulous about Mr Forsyth's conduct. I appreciate the significance of his managerial seniority and his particular role. I accept absolutely that if anyone were to appreciate the sensitivities of his activities, it would be him and any person in his particular role.

[57] The sensitivities at play are somewhat esoteric but I shall attempt to restate them here as I understood them from what was relayed to me. I apologise in advance if I have misunderstood any issue.

[58] Telstra is a highly capitalised publicly listed company in both New Zealand and Australia. The regulatory issues in New Zealand are important to TelstraClear. Its public views on regulatory issues can affect the price of its shares. It is for these reasons that TelstraClear has very deliberate and constructed policies about media relations and communications. It has a specific media policy in recognition of these issues. That policy expresses regulatory issues and political issues as sensitive. I have no doubt whatsoever that Mr Forsyth was intimately aware of these issues. I further record he did not challenge either Ms Robertson or Mr Wong's evidence or views in relation to these issues.

[59] The *New Zealand Herald* article reports Mr Forsyth's views of regulatory issues, competition, bundling, share price and politicians. The layout of the article juxtaposes Mr Forsyth's views on the left side as "Ex-TelstraClear" against those of Telecom's Mr Bruce Parkes on the right side. I have no hesitation in finding that in giving his interview with the *New Zealand Herald*, a reasonable person would regard Mr Forsyth as having a clear association with TelstraClear.

[60] Mr Wong further articulates TelstraClear's objection to Mr Forsyth's actions. Mr Forsyth described Telecom New Zealand Limited as a "mosquito sucking blood" and was critical of its monopoly status. He further criticised the Telecommunications Commissioner. Both comments had the potential to damage TelstraClear's relationships with those parties. The criticism of Telecom was contrary to TelstraClear's Chief Executive Officer Dr Allan Freeth's ("Dr Freeth") desired focus on consumer choice rather than attacking Telecom and Mr Forsyth's comments were regarded as contrary to that focus and retrograde steps.

[61] When he criticised the monopoly power of incumbent Telecom New Zealand in the New Zealand market, those same criticisms apply equally to the incumbent in Australia - Telstra.

[62] Mr Forsyth did not satisfy me of any reasonable explanation why he could not have told TelstraClear of his interviews with the *New Zealand Herald* and *National Business Review* at the time of the interviews or prior to publication. He does say quite disparagingly however, that he had bore the brunt of Dr Freeth's "irrational response" where he had been open previously and that Dr Freeth had "shut down". He also says he thought Dr Freeth would "have a tantrum". He tells the Authority he deliberately did not consult Dr Freeth or the communications team prior to his media interviews and that he did not think he needed to. He says too that he thought Dr Freeth and Ms Robertson would choose to "personalise [his] views of TelstraClear" and misinterpret his intentions. Because he did not share his activities with his employer, he is at risk of being regarded as conducting himself covertly in a clandestine fashion.

[63] I do not consider TelstraClear's objections overstated and exaggerated. I am persuaded that the articulated concerns were very real and genuine and so when Ms Robertson says she was incredulous about Mr Forsyth's actions, I find it is because of his blatant and complete disregard for the media policy and its underlying objectives as well as TelstraClear's concern for its relationships with its stakeholders all of which Mr Forsyth as senior executive management was intimately acquainted with.

[64] Mr Forsyth's response is not to challenge the significance of Ms Robertson's and Mr Wong's statements on the issues. Rather, his counsel argues at the time of publication, Mr Forsyth was not an employee and that the *New Zealand Herald* article is written as though Mr Forsyth was not an employee. It is also pointed out that the media policy does not apply to non-employees. In my view, the answer is a serious oversimplification and a very naïve response. I do not accept it.

[65] I regard the issue quite simply this - at the time he gave the interviews to the publications Mr Forsyth was an employee. He owed duties of good faith to his

employer as well as a duty of fidelity to act in his employer's best interests. The date of publication of the article is irrelevant. It is actions contrary to subsisting employment that are relevant. He should not have given these interviews as he did in these circumstances.

[66] I am satisfied that TelstraClear did purport to exercise its discretion by proposing to pay to Mr Forsyth a bonus outside the terms of IEA, and further and most significantly that it proposed the same in good faith. It is the exercise of a discretion in good faith that Mr Forsyth is entitled to. I find too that there was a fair process by which specific entitlements were actually proposed (as outlined by Mr Wong to the Authority) and which Mr Forsyth takes no issue with.

[67] Expressly by s4(4)(bb) of the *Employment Relations Act 2000*, I consider the duty of good faith applied particularly to the negotiations and processes surrounding the ascertainment of Mr Forsyth's bonus. I find that Mr Forsyth did not act in good faith to TelstraClear because he deliberately concealed his interviews with the *New Zealand Herald* and the *National Business Review*, and I infer, he appreciated his statements were contrary to TelstraClear's interests. He chose to conduct negotiations with his employer appreciating his comments would be of relevance to his employer in deciding whether his performance was worthy of reward but which he chose not to disclose. In these circumstances, his conduct was contrary to his duty of good faith.

[68] TelstraClear's contractual entitlement to make a decision and the decision itself cannot be subjected to objectively determined requirements of reasonableness. I regard that statement as the relevant principle of law which I apply now. I do not now second-guess the reasonableness of TelstraClear's objections to Mr Forsyth's established actions. TelstraClear makes a decision not to pay and I have no place interfering with its exercise of discretion in that way. Mr Forsyth agreed by the IEA that TelstraClear should have this discretion. Accordingly Ms Robertson's veto of payment of bonus to Mr Forsyth does not fall to be scrutinised by way of challenge by Mr Forsyth as to its reasonableness.

The determination

[69] Mr Forsyth alleges that Mr Wong agreed to pay a bonus but refuses now to pay. I have found that Mr Wong submitted a proposal to Mr Forsyth but no agreement or consensus was actually reached between them. In any event, whatever was to be proposed by Mr Wong was always conditional upon higher approval. There was no approval once Mr Forsyth's undisclosed activities were made known to TelstraClear. As a matter of law, TelstraClear's exercise of its decision not to pay a bonus does not fall to be scrutinised as to reasonableness. **For these reasons, there will be no compliance order or orders for penalties as sought by Mr Forsyth.**

[70] Mr Forsyth alleges that the refusal not to honour an agreement he made with Mr Wong was an unjustified punishment for alleged misconduct for which no proper disciplinary process was followed. There was no "action" taken by TelstraClear but rather, a discretion was not exercised in his favour. There being no "action" there can be no assessment of justification. Mr Forsyth does not have a personal grievance for an unjustifiable action. **There will be no orders for compensation.**

Costs

[71] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Kiely is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Steele is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority