NOTE: This determination contains an order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 472
3155544

	BETWEEN	DEON HANEKOM Applicant
	AND	HCL (NEW ZEALAND) LIMITED Respondent

Member of Authority:	Peter Fuiava
Representatives:	Rhys Walters, counsel for the Applicant John Rooney and Matthew Austin, counsel for the Respondent
Investigation Meeting:	22-23 February 2023 in Auckland
Submissions received:	22 May 2023 from the Applicant 22-23 May 2023 from the Respondent
Determination:	23 August 2023

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Deon Hanekom, a former information specialist employed by HCL (New Zealand) Limited (HCL or the company) from 20 July 2020 to 20 August 2021, has asked the Authority to investigate his claims of constructive dismissal, unjustified disadvantage, a breach of the duty of good faith under s 4 of the Employment Relations Act 2000 (the Act), and estoppel. Underlying each cause of action are the assertions that:

(i) HCL failed to apply its performance bonus policy to Mr Hanekom in good faith, or in a way that was fair and reasonable; and

(ii) that the company failed to act in good faith as a fair and reasonable employer could in reimbursing Mr Hanekom's expense claims in a timely manner some of which were paid 99 to 257 days after the claims were initially lodged.

[2] HCL submits that it acted as a fair and reasonable employer and in accordance with the duty of good faith. It further submits that Mr Hanekom resigned from his employment and that he was neither constructively dismissed nor unjustifiably disadvantaged in his employment. As to Mr Hanekom's constructive dismissal claim, HCL says that it did not breach its duty to him and if it did (which is denied) there was no breach of duty of sufficient seriousness to make it reasonably foreseeable that Mr Hanekom would resign. In answer to the claim that the company should be estopped from departing from its representations to him, it was submitted that HCL has effectively complied with those representations and that this claim should also be dismissed.

How did the Authority investigate?

[3] As part of my investigation, I have requested under s 160 of the Act information and evidence from HCL relating to an "E4+ Bonus plan document". Reference to E4 is to Mr Hanekom's management level within the company and it was his contention that a performance-related bonus policy for E4 employees could be found if an information request was made. Although I have sought this information from HCL, it is Mr Rooney's instructions that no such document exists. Ultimately this matter was resolved by requiring the parties to address this issue in their witness statements. Now, having completed my investigation, I find that an E4 bonus policy does not exist.

[4] For the Authority's investigation, written witness statements were lodged from Mr Hanekom who called no other witnesses. For HCL, written statements from its Deputy General Manager of Human Resources, Pandurangan Ramaguru, Mr Hanekom's manager in New Zealand, Christopher Phillips, Associate General Manager of HCL's Global Claims Team, Angeline Dianahessing, and Administration and Human Resources Manager, Mary Castro, were provided.

[5] Leave was granted for Mr Ramaguru, Ms Dianahessing and Ms Castro to give their evidence by audio-visual link as they were based outside New Zealand. HCL is a multinational business. All witnesses answered questions under oath or affirmation from me and Mr Walters and Mr Rooney. Counsel have both lodged written closing submissions which have been considered.

[6] As permitted by s 174E of 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.

Non-publication order granted

[7] During the course of Mr Ramaguru's evidence, he referred to a Hiring Guidelines document which I subsequently requested a copy of as part of my investigation. Because this information contained highly commercially sensitive information, I took the approach of reviewing the material on my own before sharing the same with Mr Walters and Mr Hanekom. Most of what comprised the Hiring Guidelines was not relevant to my investigation as it related to other countries and not New Zealand. A case management conference was convened to discuss the documents I identified as relevant and a copy of this relevant material in redacted form was provided to Mr Walters for his and his client's information.

[8] By memorandum dated 23 May 2023, HCL applied for a non-publication order of the Hiring Guidelines information that was shared with Mr Hanekom. The application is not opposed by Mr Walters. The Authority's ability to order non-publication derives from cl 10 sch 2 of the Act. While the discretion to make such orders is wide, the discretion must be exercised on a principled basis. I adopt as my starting point the principle of open justice which is fundamental to our rule of law. I am satisfied that the portion of the Hiring Guidelines that was disclosed to Mr Hanekom contains commercially sensitive information which would disadvantage HCL if that material was shared with its competitors. I find that the potential commercial prejudice to the company is sufficient to rebut the principle of open justice on this occasion. A permanent non-publication order concerning this material is granted.

What are the issues?

[9] The issues requiring investigation and determination are as follows:

(i) Was Mr Hanekom unjustifiably and constructively dismissed as a result of HCL breaching its duties to apply a performance bonus policy and to reimburse his expense claims as a fair and reasonable employer could?

(ii) In the alternative, was Mr Hanekom unjustifiably disadvantaged for the same reasons above?

(iii) Should HCL be estopped from departing from representations made to Mr Hanekom that it would pay him a performance bonus?

(iv) If HCL's actions were not justified (in respect of unjustified dismissal/unjustified disadvantage) what remedies should be awarded considering:

    (a) Lost wages (subject to evidence of reasonable endeavours by Mr Hanekom to mitigate his loss); and

    (b) Compensation under s123(1)(c)(i) of the Act.

(v) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by the applicant that contributed to the situation giving rise to his own grievance?

(vi) Should either party contribute to the costs of representation of the other party.

What are the relevant facts?

[10] Mr Hanekom is a citizen of South Africa who moved to New Zealand in 2013. He obtained New Zealand residence in approximately 2016 to 2017 and is now a New Zealand citizen. His last immediate employer before joining HCL was Vista Entertainment Solutions and he was paid a salary of $190K by that employer. Unfortunately, due to the COVID-19 pandemic, Mr Hanekom was made redundant and had to look for new employment as a result.

[11] In early July 2020, Mr Hanekom was shortlisted by HCL for the role of IT Compliance and Risk Manager in Auckland. HCL is the New Zealand arm of a multinational IT services and consulting business that delivers IT services to a number of New Zealand's leading companies.

[12] The recruiter emailed Mr Hanekom to request, among other things, what his salary expectation was or Cost To the Company (CTC). Mr Hanekom replied that his

last CTC was $190K and while he would naturally prefer to have the same CTC, he was negotiable.

[13] On 15 July 2020, HCL offered Mr Hanekom employment in the role of E4 Group Technical Manager. In practice, he was integrated into the IT security team of a large corporate entity for whom HCL provided IT services (the client). The client was based outside Auckland where Mr Hanekom lived but it was understood that he would be working remotely from home. Mr Hanekom's employment agreement stipulated that he was to be paid a base salary of $160,000 plus KiwiSaver and other benefits as per 'company policy applicable to him'.

[14] The parties are in dispute as to whether Mr Hanekom was entitled to a performance bonus on top of his base salary. Mr Hanekom sees his base salary of $160K as a base and that by implication there would be a performance bonus on top of that amount. Mr Hanekom says that, if that were not the case, it would make more sense for his employer to just say 'salary' rather than 'base salary.'

[15] HCL's position is that Mr Hanekom is not entitled to a performance bonus because neither his employment agreement nor his letter of offer refer to a performance bonus as being part of his remuneration package. Reference to a 'company policy applicable to him' in [13] above is a reference to HCL's Global Bonus policy that only applied to employees who had a performance bonus as part of their compensation structure. However, that was not so for Mr Hanekom whose compensation structure, as set out in his letter of offer, consisted of a base salary of $160K only.

[16] Mr Hanekom accepted HCL's offer of employment and he commenced employment on 20 July 2020. During his first week of employment, Mr Hanekom stated that he took a few hours to read the company's Global Bonus Policy which sets out the eligibility criteria for its employees in India for Year-end performance bonus (YEPB) or a Performance Bonus (PB) as well as for employees in Europe and Asia (including New Zealand) for an On Goal Performance Bonus (OGPB).

[17] It is common ground that Mr Hanekom performed well in his duties and that HCL had no issues concerning his performance. In April 2021, Mr Hanekom received

a very positive performance evaluation for the period from 20 July 2020 to 31 March 2021 from his manager, Mr Phillips.

Performance bonus

[18] On 21 April 2021, Mr Hanekom enquired with HCL's HR team (all of whom are based outside New Zealand) as to why there did not appear to be any progress towards a performance bonus being calculated for him. There was considerable email correspondence (over 20 emails) between Mr Hanekom and HR about this issue. It was initially thought (incorrectly) by HR that the reason for this was because Mr Hanekom was subject to a 12-month probation period. However, that was a mistake because his employment agreement contained a six-month probation period and not a 12-month one.

[19] By email of 28 April 2021, Ms Castro, who is based in India, stepped in and advised Mr Hanekom (correctly) that his probation period was only six months and not one year as mistakenly advised by one of her colleagues. In a further email from Ms Castro to Mr Hanekom (5 May 2021) she attached a copy of HCL's "Guidelines for My Performance: The HCL Performance Review Process" (the Performance Review Guidelines) which sets out the formal appraisal process that includes a 5 Pointer Rating Scale that required the input of a second level manager and a delivery head of engagement, which had not been done at that time for Mr Hanekom.

[20] Ms Castro referred Mr Hanekom to the Performance Review Guidelines which ought to have answered his query but she had made the mistake in assuming that a performance-related bonus was part of Mr Hanekom's letter of offer/employment agreement when it was not. Be that as it may, at the investigation meeting, Mr Hanekom initially denied having seen the Performance Review Guidelines but when cross-examined by Mr Rooney about it, Mr Hanekom conceded that he had received the document because he had quoted from it in a subsequent email to Ms Castro on 7 May 2021.

[21] In response to Mr Hanekom's email of 7 May 2021, Ms Castro referred him to Nikhil Suman and Mr Ramaguru, senior HR representatives in HCL who both are based in India. Later that same evening, Mr Ramaguru emailed Mr Hanekom asking him

whether a PB (performance bonus) or OGPB (on goal performance bonus) was part of his CTC or letter offering employment.

[22] Mr Hanekom did not respond to Mr Ramaguru's question.

[23] Mr Hanekom was referred to Mr Suman who also made the same mistake of assuming that his letter of offer/employment agreement entitled Mr Hanekom to a performance-related bonus, which was not the case. On 1 June and 28 June 2021, Mr Suman emailed Mr Hanekom that the company was in the process of closing his rating and that it was targeting payment of his bonus in July 2021. However, as Mr Hanekom had been emailing HCL about his performance bonus since late April, he expressed his frustration at the further delay and he wished the matter to be resolved by 28 June 2021. Mr Suman advised that this could not be achieved within that timeframe because signoff by his leadership team was required.

Expense claims

[24] Mr Hanekom stated that, in addition to being frustrated about his delayed performance bonus, he had experienced similar difficulties in getting HCL to reimburse him for:

(i) an expense claim in the amount of $758 for the costs of professional certification and membership which was lodged in October 2020;

(ii) mileage and parking fees in the amount of $285.71 that was lodged in February 2021; and

(iii) Mobile phone and internet expenses in the amount of $263.90 that was lodged in March 2021.

[25] The above expense claims were paid by HCL to Mr Hanekom on 22 July 2021.

Resignation

[26] On 30 June 2021, Mr Hanekom gave HCL notice of his resignation which stated that it was his expectation his performance-based bonus would form a significant part of his total remuneration and that the company had repeatedly reneged on its assurances and its own policies about his bonus. Mr Hanekom further stated that HCL's business

was built on trust which he felt it had irreparably broken and that he no longer had confidence in his employer.

After the resignation

[27] On 7 July 2021, Mr Hanekom received a telephone call from his manager Mr Phillips who tried to dissuade him from resigning because he did not want to lose him. Mr Hanekom made a contemporaneous note of their conversation. There is a disagreement as to what was said and the tone of Mr Phillips's voice when he spoke to Mr Hanekom but even so, in the end, Mr Phillips was not able to persuade Mr Hanekom not to resign, confirming by email later that day that the company had accepted his resignation.

[28] On 19 July 2021, Mr Hanekom through his lawyer advised HCL that his resignation letter did amount to personal grievances that required a response.

[29] On 5 August 2021, Mr Hanekom received from HCL a one-time *ex gratia* payment of $4,667. The payment was described as a "project allowance" by HCL. It was Mr Ramaguru's evidence that the descriptor of 'performance bonus' or 'ex gratia payment' could not be used by its payroll system because Mr Hanekom's offer letter/employment agreement did not contain a performance bonus component and he had given notice of his resignation prior to his rating being closed.

[30] Mr Hanekom states that $4,667 represents of 4.2 percent of his base salary which is far too low and having regard to his previous jobs and his very positive review from Mr Philips, he expected a higher bonus in the order of 10-15 percent.

Was Mr Hanekom unjustifiably and constructively dismissed as a result of HCL breaching its duties to apply a performance bonus policy and to reimburse his expense claims as a fair and reasonable employer could?

[31] In examining whether a constructive dismissal has occurred two questions arise. First, has there been a breach of duty on the part of the employer which has caused the resignation? Second, if there was such as breach, was it sufficiently serious so as to

make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, was there a substantial risk of resignation?[1]

[32] In the seminal Court of Appeal decision of *Auckland Shop Employees Union v Woolworths (NZ) Limited*, constructive dismissal cases included situations where:[2]

(a) an employer gives an employee a choice of resigning or being dismissed;

(b) an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and

(c) a breach of duty by an employer leads an employee to resign.

[33] Mr Hanekom relies on the third category above and says that HCL breached its duty to apply its performance bonus policy to him in good faith or in a way that was fair and reasonable. Mr Hanekom says the same with respect to his expense claims which took HCL several months to pay.

No contractual obligation to pay performance bonus

[34] Mr Hanekom accepts that there was nothing expressly stated in his offer letter or employment agreement with HCL that contractually obliged the company to pay him a performance bonus. However, it was submitted that this was not particularly alarming given that bonuses tend to be discretionary in any event. Closely aligned to this submission was Mr Hanekom's written witness statement to the Authority in which he stated that, throughout his career, he has always received some sort of bonus as part of his remuneration package.[3] He further stated that there was nothing in his employment agreement that said he was not entitled to a bonus, which is something he would have definitely noticed.[4]

[35] However, the evidence and information before me establishes that HCL made it clear to Mr Hanekom that a performance related bonus was not part of his Cost to the Company or CTC. First, the company's letter offering Mr Hanekom employment and his employment agreement both make abundantly clear that his CTC was $160K.

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[1] *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 1 ERNZ 168 at 172.
[2] *Auckland, etc, Shop Employee, etc, IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372.
[3] Statement of Deon Christopher Hanekom (23 September 2022) at paragraph [6].
[4] n 3 at paragraph [19].

While Mr Hanekom has interpreted his base salary as precisely that - a base - such an interpretation ignores that his base salary was also his total salary as recorded in Annexure 2 to Mr Hanekom's employment agreement which states:

Annual Components (In NZD)	
Base Salary	160000
TOTAL	**160000**

[36] There can be no ambiguity with the meaning of the word "Total" which means all of it or the whole number or amount. During the investigation meeting, Mr Hanekom stated that at the time of his job interview he did not seek to renegotiate a higher base salary with HCL because having recently been made redundant he was not in a position of strength and "beggars can't be choosers." However, Mr Hanekom ought to have known that $160K was as high as HCL was prepared to offer him for his role especially as he had made known during the recruitment process that his last CTC was $190K. There was no attempt by HCL to match that figure or to improve on its initial offer of $160K, which Mr Hanekom accepted.

[37] Mr Hanekom stated in his own evidence that he had spent a few hours in his first week of employment familiarising himself with HCL's Global Bonus Policy which specifically spells out in three different places that a performance bonus was only for those employees who had this as part of their compensation structure:

> - This policy is applicable to all … employees of HCL Technologies and its various subsidiaries across the globe, having Bonus (PB/YEPB/OGBP/KPP Linked) as part of their compensation structure.
>
> - Employees having YEPB/PB/OGPB/KPP linked bonus component in salary structure will be eligible for bonus payout at the end of the year.
>
> - Performance bonus/YEPB is paid only to employees who have performance bonus/YEPB as part of their compensation structure and are on the rolls of HCL on the bonus pay day.

[38] HCL's letter of offer to Mr Hanekom contained an acknowledgment page which stated that he understood the offer made to him and that he had been afforded a reasonable opportunity to seek independent advice regarding the terms of his employment agreement.

[39] Mr Hanekom's expectation of a performance bonus was based on nothing more than him being hopeful of getting one. I note that Mr Hanekom had never previously worked for HCL or for the client for whom the company provided IT services for in New Zealand. As such Mr Hanekom's expectation of a performance bonus lacked reasonableness and ignored the clear wording of his offer letter/employment agreement and HCL's Global Bonus Policy. There was ample opportunity for Mr Hanekom to raise this as a concern but he did not do so at his job interview and nor did he raise this as an issue once he had secured the role. It is reasonable to expect an IT professional such as Mr Hanekom to have done so immediately after having read the Global Bonus Policy which would have put him on notice that he was not eligible for a performance bonus.

[40] Both Ms Castro and Mr Suman made the mistake of not considering Mr Hanekom's employment agreement and assumed that he was eligible for a performance bonus. This is somewhat of an own goal by HCL which has arisen because HR staff are based offshore and a copy of Mr Hanekom's employment agreement, which is in New Zealand, was not readily accessible to Ms Castro and Mr Suman. Had the pair obtained Mr Hanekom's employment agreement and seen for themselves that a performance bonus was not part of his CTC this ought to have been the end of the matter. However, I find that, despite the mistake being made which Mr Hanekom has benefited from, HCL has gone on to consider him for a bonus not because he was entitled to one but because an exception had been made for him.

[41] Mr Hanekom was fortunate to have been treated in this way especially as he had been asked by Mr Ramaguru by email of 7 May 2021 whether an OGPB or PB formed a part his CTC. Mr Hanekom never answered that question and nor did he disclose to Mr Suman that a performance bonus was not part of his compensation structure.

[42] In explanation for not answering Mr Ramaguru's question, Mr Hanekom stated that he believed Mr Ramaguru had referred him to Mr Suman. Even so, the matter could have ended there had there been greater continuity and follow up between Mr Ramaguru and Mr Suman in relation to their communications with Mr Hanekom. In addition to not responding to Mr Ramaguru's question, Mr Hanekom failed to properly consider the Performance Review Guidelines that Ms Castro had emailed him on 5 May 2021 which Mr Hanekom eventually conceded during cross-examination he

had received from Ms Castro. That document would have made it clear to Mr Hanekom that a formal appraisal process needed to be completed which his internal review meeting with Mr Phillips in April 2021, was not.

[43] The Performance Review Guidelines is relevant because it set the time frame as to when a performance bonus could expect to be paid which for Mr Hanekom was after he had completed 12 months' employment with HCL, i.e., after July 2021. According to Mr Ramaguru, an employee's 12-month anniversary with the company would automatically trigger the formal appraisal process which for Mr Hanekom would have commenced in July, August, September 2021 with payment of any performance bonus in approximately November 2021. Not only was Mr Hanekom incorrect about his eligibility for a bonus, the Performance Review Guidelines (which he initially denied ever receiving) shows that he was also incorrect about the timing of the payment of the bonus.

[44] Despite the errors made by HCL's HR staff, an exception was made in Mr Hanekom's case. Mr Ramaguru's evidence was that he attempted to expedite the payment of the bonus which I note Mr Hanekom received well before his general manager Mr Phillips received his bonus. Although Mr Hanekom takes issue with the timing of his performance bonus payment, I find that HCL had sped up the process for him as a fair and reasonable employer could have done in the circumstances.

Ex-gratia payment

[45] The bonus payment of $4,667 represents 4.2 percent of Mr Hanekom's base salary which he says is the lowest annual bonus he has ever seen. Having decided to award Mr Hanekom a bonus, HCL has the responsibility of showing that it applied its discretion fairly and reasonably and in good faith. The statutory test of s 103A of the Act is well understood and employment institutions cannot substitute its own view for that of an employer. Put differently, I am required to assess HCL's actions on an objective basis and so long as what it did (and how it did it) falls within the range of outcomes of what a fair and reasonable employer could have done in all the circumstances, the outcome will be justified.

[46] Mr Ramaguru calculated Mr Hanekom's bonus by adopting a starting point of $10,000 which represents approximately seven percent of his salary. Mr Ramaguru

then paid 70 percent of the starting point because of Mr Hanekom's performance rating of 4/5. The figure of 70 percent was the same used in respect of other E4 employees who received the same 4/5 performance rating. From there, Mr Ramaguru adjusted the payment on a pro-rata basis to reflect the eight-month period between Mr Hanekom's commencement (20 July 2020) and end of HCL's payout cycle (31 March 2021).

[47] I note that Mr Hanekom had not previously worked for HCL or the client company it provided IT services for. As such, there is no other comparator to assess Mr Ramaguru's calculus against and I do not consider Mr Hanekom's percentage bonuses from previous employers to be relevant. While Mr Hanekom considers the bonus he received from HCL as the lowest bonus he has ever received in his career, with respect, that is not the test. Mr Ramaguru's methodology is sound and fair and he has demonstrated that he has treated Mr Hanekom consistently with other E4 employees with the same performance rating. I find Mr Hanekom's bonus to fall within the range of acceptable outcomes of what a fair and reasonable employer could have done in all the circumstances.

Expense claims

[48] It was submitted that HCL's failure to pay Mr Hanekom's work-related expenses was the final straw for him which contributed to his constructive dismissal. In October 2020, he lodged a reimbursement claim in the amount of $758 for various certifications which took the company 257 days to pay. Similarly, a mileage and parking claim of $285.76 lodged in February 2021 was paid 138 days later. In addition, there was a reimbursement claim of $263.90 from 23 March 2021 for mobile and internet use which took the company 99 days to pay by which time Mr Hanekom had already tendered his resignation.

[49] On its face, the delays appear inordinate but I have had the benefit of hearing from Ms Dianahessing, the Associate General Manager of HCL's Global Claims Team. It was her evidence that her 40-person team are responsible for dealing with expense claims from employees across the wider HCL group of companies, of which there are approximately 220,000 employees. I accept Ms Dianahessing's evidence that there are a significant amount of employees who submit expense claims through the Global

Claims System (GCS) who do not read the relevant policies relating to the reimbursement of such expenses.

[50] I count Mr Hanekom in that number because he admitted to not checking whether he could claim mileage and parking when he travelled from Auckland to the client's premises in the Waikato for work. He also admitted to lodging his mobile phone and internet expenses outside the three-month time frame. During the investigation meeting, Mr Hanekom stated that HCL was a $10B company and that it should simply have paid his expense claims. While I accept that Mr Hanekom was being flippant with his response, it underscores a clear misunderstanding on his part of the need for the Global Claims Team to verify claims rather than accept them at face value. This is particularly so if a business wishes to remain profitable.

[51] The wrong category was used and insufficient information had been provided by Mr Hanekom in relation to his technical certification expenses. Nor did he respond to follow-up queries from a member of the Global Claims Team who I find was trying to be helpful and not "obtuse" as Mr Hanekom claimed at the investigation. I do not accept that the Global Claims Team has taken an overly officious approach to Mr Hanekom's expense claims especially when he has in the past made 14 other expense claims which were fairly and reasonably processed and reimbursed by the company.

[52] The fact that Mr Hanekom's manager, Mr Phillips, had approved his membership and certification and mobile and internet expense claims was not determinative. The final decision was one for the Global Claims Team to make. It was not a decision that could have been made at a local level although I accept that had Mr Phillips been made aware of Mr Hanekom's outstanding expense claims, which he was not, Mr Phillips may have been able advocate or intercede on his behalf to speed up matters.

[53] However, the first Mr Phillips heard of Mr Hanekom's outstanding expense claims was when he received his letter of resignation. Given the combined value of the expense claims in question, which is not significant, I find the outstanding expense claims an insufficient reason for Mr Hanekom to feel that he had no option but to resign.

Conclusion as to constructive dismissal

[54] There are two main threads to Mr Hanekom's constructive dismissal claim. The first thread relates to HCL's failure to apply its performance bonus policy fairly and reasonably and in good faith. The second thread relates to HCL's alleged failure to act in good faith as a fair and reasonable employer could in the reimbursement of Mr Hanekom's expense claims as described above. Even when these strands are cumulatively considered, it has not been established that HCL breached its duty to Mr Hanekom such that it can said that his resignation was reasonably foreseeable. The claim is dismissed.

In the alternative, was Mr Hanekom unjustifiably disadvantaged for the same reasons above?

[55] An unjustified disadvantage is a personal grievance whereby one or more conditions of an employee's employment is affected to the employee's disadvantage by some unjustifiable action by their employer.[5] Mr Hanekom must therefore establish that either one or more conditions of his employment has been affected to his disadvantage through an action or actions by HCL.

[56] Mr Hanekom's claim of unjustified disadvantage relies on the same set of facts. So as to avoid repeating myself here, and relying on the same reasoning set out above, I find that Mr Hanekom has not been unjustifiably disadvantaged. The claim is unsuccessful.

Should HCL be estopped from departing from representations made to Mr Hanekom that it would pay him a performance bonus?

[57] Estoppel is an equitable remedy and applies where it would be unconscionable to allow a party to succeed having acted in a manner to induce or cause another party to act or omit to act in a manner which is now compromised. In *Checkmate Precision Cutting Tools Ltd v Tomo* the Employment Court stated:[6]

> 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 party to whom the

[5] The Act, s103(1)(b).
[6] *Checkmate Precision Cutting Tools Ltd v Tomo* [2013] NZEmpC 54 at [20].

> 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.

[58] I do not consider that either pre-requisite is satisfied in Mr Hanekom's case. As stated already, neither his letter of offer nor his employment agreement contained a representation that he was eligible for a performance bonus. However, due to a series of unfortunate mistakes by HR staff which resulted in Mr Hanekom receiving a benefit for which he was not entitled, he was considered for a performance bonus as an exception to HCL's Global Bonus Policy. An ex-gratia payment under the descriptor of 'project allowance' of $4,667 was later paid out to him as well as the value of Mr Hanekom's three expense claims. Mr Hanekom has received his bonus albeit not the quantum he expected. Even so, no inequitable action has occurred to necessitate the equitable relief sought.

[59] In the alternative, it was submitted that it was unconscionable of HCL to have strung Mr Hanekom from May to July 2021 with promises that he would be rewarded with a fair bonus calculated in good faith. However, it remains that Mr Hanekom did receive his ex-gratia payment and while it was not as high as he expected it to be, it was nevertheless within the range of what he could have been eligible to receive if he was contractually eligible to be considered for a performance bonus.

No breach of s 4 of the Act

[60] Mr Hanekom seeks a penalty under s 4A of the Act for certain breaches of the duty of good faith. Under s 4A, a party who fails to comply with the duty of good faith is liable to a penalty if the failure was deliberate, serious and sustained or was intended to undermine the employment relationship. The test is high and requires clear evidence of intention.[7]

[61] I find that Mr Hanekom has not satisfied the requirements of s 4A which sets a high threshold. I do not consider HCL's actions to be deliberate, serious and sustained or intended to undermine the employment relationship. A penalty is not warranted.

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[7] *Prins v Tirohanga Group Limited* [2006] ERNZ 321 at [75]-[76].

Costs

[62] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[63] My preliminary view on costs is that HCL should take some responsibility for its HR staff who did not review Mr Hanekom's letter of offer/employment agreement. Had that happened, proceedings in the Authority may have been avoided altogether. If the parties are not able to resolve the issue of costs between them and an Authority determination on costs is needed HCL may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Hanekom would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[64] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[8]

Peter Fuiava
Member of the Employment Relations Authority

[8] See www.era.govt.nz/determinations/awarding-costs-remedies.