IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 123
5575619

	BETWEEN	LISA ROBINSON Applicant
	A N D	GILLON & MAHER PLUMBING LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Robert Thompson, Advocate for Applicant Tim Twomey, Counsel for Respondent
Investigation Meeting:	21 July 2016 at Christchurch
Submissions Received:	21 July 2016 from the Applicant 21 July 2016 from the Respondent
Date of Determination:	26 July 2016

DETERMINATION OF THE AUTHORITY

A. **Whilst the parties did agree that Ms Robinson was to be entitled to a bonus, the terms of the agreement are unenforceable by reason of uncertainty.**

B. **Ms Robinson suffered an unjustified disadvantage in her employment by the respondent failing to advise her of its concerns about the bonus during her notice period.**

C. **No penalties are to be imposed on the respondent.**

D. **The Authority has no jurisdiction to investigate the counter claim.**

E. **Costs are reserved.**

Employment relationship problem

[1] Ms Robinson seeks a compliance order in respect of the payment of bonus entitlements. She also seeks holiday pay and interest calculated by reference to the bonus entitlements sought. In addition, Ms Robinson seeks compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) in relation to alleged unjustified actions by the respondent, leading to an unjustified disadvantage in her employment. Finally, she seeks a penalty to be imposed upon the respondent for having breached the individual employment agreement by failing to pay the bonus and for an alleged breach of the duty of good faith.

[2] The respondent denies that Ms Robinson is entitled to a bonus payment or, if she is entitled to such a bonus, denies the amounts sought by Ms Robinson. It also denies that Ms Robinson suffered an unjustified disadvantage in her employment and that penalties are appropriate. The respondent also counterclaims against Ms Robinson in relation to the cost of drainage work that was carried out by the respondent on a property owned by a trust associated with Ms Robinson, payment for which has not been made.

Brief account of the facts leading to the dispute

[3] The respondent runs a plumbing and drainage business. Ms Robinson commenced work with the respondent on 18 October 2013 as its Services Manager. She was initially paid an hourly rate, and did not work full time at that point.

[4] On 29 October 2013, one of the directors, Darren Maher, provided a letter addressed *"*to whom it may concern*"* which included the following paragraph:

> Lisa's role is a permanent role. The role has a base salary of $62,500 per annum plus expected commission and bonuses.

[5] Around the end of 2013, there were discussions about Ms Robinson working full time, and as she had not received an employment agreement, in December 2013 she asked a firm of solicitors, Buddle Findlay, to provide a draft employment agreement for her. Ms Robinson produced to the Authority a copy of an employment agreement which she says had been drafted by her solicitor. This contained a Schedule B which provided for a salary of $85,000 per annum, commission at 10% of gross revenue and a bonus of 2% of "our earnings before interest and tax and other fixed and variable costs are deducted".

[6] On 20 December 2013, Ms Robinson met with three of the directors of the respondent and presented the draft individual employment agreement to them, although the version she presented did not have the salary figure, or the percentage figures for the commission and the bonus. Ms Robinson's evidence was that she was aware that she was entering into a negotiation. I understand her evidence to be that she took the figures out because she understood that the figures would be up for discussion.

[7] It is uncontested that it was agreed at the 20 December 2013 meeting that Ms Robinson's salary would be $80,000 per annum, that she would get her home internet and fuel paid for, and a mobile phone. It is also agreed that she would not get commission, and that she would only get 3 weeks' redundancy compensation instead of the three months' she had asked for. It was also agreed that she would pay for the cost of having had the agreement drafted by her solicitor. What is hotly contested, however, is the bonus clause.

[8] It is Ms Robinson's evidence that the negotiations with respect to the contents of the draft employment agreement were very thorough. Ms Robinson said that it was agreed at the meeting that she would not receive commission but that it might be possible that she would get it later. It is for this reason, she says, that she did not delete the commission wording altogether in the final version that was signed, but only used strike through, as she may have wanted to use the wording again.

[9] Regarding the bonus, Ms Robinson says she had drafted the wording herself into the draft agreement, after having spoken to a colleague who was an accountant, and that her intention was to ensure that shareholders' and directors' payments were not deducted before her bonus was calculated, as that could leave the profit very low, or at zero. Ms Robinson said that she did not have accountancy training but she did have a business degree.

[10] Ms Robinson agrees that, during the 20 December meeting, Mr Gillon, one of the directors, initially refused to accept that Ms Robinson should be entitled to a bonus, as no-one else got one, not even the directors. Ms Robinson says that she then argued that, just because no-one else got a bonus did not mean that she could not earn one. She says that, after some discussion, it was agreed that she would be entitled to a bonus. She said that they discussed the terms of the bonus wording she had drafted, and that it meant that she would get a bonus by reference to gross profits, after

operating costs had been deducted. She recalled that mention was made of the previous years' gross profit of $880,000, and that 2% would have given her around $16,000[1].

[11] Ms Robinson says that, after the agreement was reached between them, she was asked by one of the directors, Mr Darren Maher, to draw up a final version for signature.

[12] Mr Maher said that the whole section relating to commission and bonus was struck down by all three of the directors at the meeting of 20 December 2013. He denies that they discussed the meaning of the wording at all, and also denies that it was contemplated that Ms Robinson might become eligible for commission at a later date.

[13] The agreement that was signed was dated 20 December 2013 but was signed by Ms Robinson and Mr Maher (on behalf of the respondent) on 9 January 2014, in his office. The following are material clauses of the contract that was signed by Ms Robinson and Mr Maher:

> 7. **REMUNERATION**
>
> **7**.1 Your salary is set out in Schedule B and will be paid by direct credit weekly into your nominated bank account. We may make reasonable changes to the pay cycle following consultation with you.
>
> **7**.2 Your salary, and commission/bonus will be reviewed six monthly.
>
> **7**.3 Your other benefits are set out in Schedule B.
>
> **7**.4 No other remuneration is payable, unless we agree in advance.
>
> …
>
> 11. **Redundancy**
>
> 11.9 Subject to this agreement, if your employment is terminated for redundancy, we will pay you redundancy compensation of 3 ~~months~~ weeks salary.[2]
>
> **Schedule B**
>
> **REMUNERATION**
>
> **Salary:** $80,000.00 gross per annum. Your salary may be calculated on a pro rata basis if your work hours vary below 40 hours per week.

[1] 2% of $880,000 is $17,600.

[2] The word "months" was struck out in manuscript and the word "weeks" added in manuscript. The amendment was initialled by both Ms Robinson and Mr Maher.

~~**Commission**: _ of gross revenue generated from new or existing client contracts initiated by you and entered into while you are employed pursuant to this agreement. "Gross revenue" is the total amount invoiced to the client. "Initiated by you" means any contract where you are involved in the tender process, project management, or introduction of the client~~.[3]	
Bonus:	2% of our earnings before interest and tax and other fixed and variable costs are deducted.
KiwiSaver:	We will contribute 3% employer's contribution exclusive of employer contribution tax to your kiwisaver account in addition to your base salary.

[14] Ms Robinson's evidence is that she believed that she had made the change to the commission part of the schedule earlier than 9 January 2014 because it is deleted by way of a font change, whereas the change in the redundancy clause is made in manuscript. She said in her oral evidence that they each had a copy of the agreement and that she and Mr Maher went through the agreement together, page by page, and that it was him who noticed the error in the redundancy clause, which should have been amended by Ms Robinson from a reference to three months' salary to three weeks' salary. Each page of each copy of the contract has been initialled by both Mr Maher and Ms Robinson, including Schedule B.

[15] Mr Maher said in his evidence that he only checked the clauses that should have been changed and that, when he saw the commission clause crossed out, he assumed that the bonus clause had been deleted too, as had been agreed. It is uncontested that, after the signing of the agreement, the parties did not refer to the agreement again until Ms Robinson's resignation.

[16] Ms Robinson was in the habit of keeping notes in a large diary recording tasks she had to carry out and events. Ms Robinson says that her 2014 diary records that, on 17 September 2014, an impromptu meeting took place with Mr Maher and two of the other directors, and that she remembers the conversation well because Mr Maher was *"*yelling and it was completely inappropriate*"*.

[17] Ms Robinson said that Mr Maher was worried about the level of the company's debtors and yelled at her that he was going to make her bonus dependent on her getting the level of debtors down. The Authority saw a copy of this reference in the diary. Mr Maher does not deny the conversation took place, but says he does

[3] The text in the agreement is struck out as part of the typewritten text. One copy of the two counterpart contract has this section initialled by Ms Robinson only. The other counterpart has no initials.

not recall making mention of Ms Robinson's bonus. Mr Brendan Johnstone, another director of the respondent who was present during this conversation, similarly says that he cannot recall any such reference to a bonus being made.

[18] On 23 February 2015, Mr Johnstone wrote a *"*to whom it may concern*"* letter on behalf of Ms Robinson, who was applying for a mortgage or loan. It stated that Ms Robinson's annual salary package was $105,000 gross income. Ms Robinson's evidence is that she drafted the letter for Mr Johnstone to sign (and the copy seen by the Authority bears Mr Johnstone's signature), and that she arrived at the figure of $105,000 by adding to her base salary of $80,000 a bonus of $25,000 gross which she believed was indicative of her likely annual bonus. She says that this was an estimate only as she did not have access to the financial statements to enable her to calculate the actual figure.

[19] Mr Johnstone says that he knew Ms Robinson's salary was $80,000 plus other benefits, but that *"*with LOU hours/overtime*"*, he thought that *"*the figure that she had inserted in the letter at $105,000 gross was not far off what I thought she was getting paid*"*. I note, however, that there is no provision for the payment of overtime in Ms Robinson's employment agreement. Mr Johnstone said in his oral evidence that Ms Robinson still got time off in lieu.

[20] Ms Robinson states that, shortly after that, they booked some drainage work to be done on her house and that she had several conversations with Mr Johnstone about the work being done in lieu of paying part of the bonus owing. She said that the carrying out of the drainage work as part of her bonus was raised before Christmas 2014, and again in several informal conversations after Christmas 2014.

[21] Ms Robinson says that the work was completed but she was not invoiced for it and the job card sat around for quite a few weeks. She says that Mr Johnstone seemed very relaxed about the matter and never finished or closed off her queries, indicating to her that he also believed that the work was part of her bonus.

[22] In his written statement, Mr Johnstone denies that he had a conversation with Ms Robinson about carrying out drainage work on her property in lieu of paying a bonus. However, in his oral evidence, Mr Johnstone said that he does recall talking about discussing a "bonus" in respect of the drainage work at Ms Robinson's house,

but that this was a reference to the staff discount that Ms Robinson got, whereby labour costs were discounted.

[23] Ms Robinson resigned her employment on 14 May 2015. Ms Robinson's final day of employment with the respondent was Friday, 26 June 2015. Ms Robinson's letter of resignation dated 14 May 2015 included this sentence, referring to her proposed final date of employment of 26 June 2015:

> This date also provides time for planning final wash up of salary and bonus payments per my employment agreement.

[24] As part of her evidence, Ms Robinson adduced copies of a number of emails that she had sent to Annah Johnstone, Mr Johnstone's wife, who was handling the payroll. These emails contained the following text:

> From: Lisa Robinson
> Date: 1 June 2015
> To: Annah Johnstone
> Subject: Private & Confidential: Final pay details for Lisa Robinson
>
> Hi Brendan
> … a quick email re planning for my final pay and windup:
> Per my IEA I am entitled to a 2% bonus calculated on annual gross operating profit.
> I will have been on fulltime contract for 18 months come my June finish date – applying the bonus terms to 1.5 years.
> We need to take out a sum for drainage works recently completed at my place – we have briefly discussed this as the Jan-Mar 2014 end quarter bonus when we lined it up, but that needs clarifying and sorting as I recall our conversation was pretty informal.
> That would then leave the 2015 full financial year and the first quarter of 2016 to calculate – 15 months or 1.25 years.
> By my rough figuring fifteen months (using the 2014 books) would be roughly $27,500, to pay out on termination (2% of gross operating profit figure x 1.25 years).
> I have a few thoughts about how to pay this out for business and my benefit deduction and tax wise. Can we run through these when you have a moment please?
> Regards,
> Lisa Robinson

[25] Ms Robinson sent another email to Ms Johnstone on 15 June 2015, asking for confirmation that her email of 1 June had got to Mr Johnstone. On 22 June 2015, Ms Robinson sent another email to Ms Johnstone which indicated that Ms Robinson had spoken to Mr Johnstone that day who had confirmed that he had passed information to his other directors. The email contained the following text:

> Would you confirm for me please how final wash up will be paid this Friday?

> I assume normal pay on Thursday overnight with termination and bonus payments on Friday overnight?
> For processing of the bonus amount, accountant has requested to following account:
> [BNZ account number details omitted]
> Thanks Annah
> Much appreciated, your confirmation back regarding above account details and plan for Friday.

[26] On 24 June 2015, Ms Johnstone emailed Ms Robinson, saying:

> I will pay as usual on Thursday, and then your termination pay when you are finished.

[27] Ms Robinson says that no questions were raised about the reference to bonus payments or the entitlement to it during her notice period.

[28] Mr Johnstone's evidence is that, when he saw the emails from Ms Robinson after her resignation referring to payment of the bonus, he checked the employment agreement and saw that there was reference to it. However, he and the other directors knew that they had never agreed that Ms Robinson would get a bonus and so decided to get legal advice. Another reason they got legal advice, he says, was because they did not know the meaning of the bonus term which Ms Robinson had drafted into the agreement.

[29] Mr Johnstone says that the reason he did not talk to Ms Robinson during her notice period about the company not agreeing that she was eligible for a bonus was that he did not wish to cause upset in the work place.

[30] On Saturday 27 June 2015, the day after Ms Robinson's final day of employment, she received a letter from Purnell Creighton Lawyers, written on behalf of the respondent, in which it was denied that there was an agreement between the parties for Ms Robinson to receive a bonus. It was stated that a meeting took place on 31 December 2013[4] in which it was expressly agreed that Ms Robinson would not be paid either a commission or a bonus in addition to her salary.

[31] In the letter, it was stated that Mr Maher had failed to notice that the provision for a bonus had not been deleted by Ms Robinson in Schedule 2. The letter stated that Ms Robinson had not asked for a salary review, nor payment of the bonus during her employment, and concluded that Ms Robinson had acted in breach of her duty of good

[4] It has since been accepted by the respondent that this should have read 20 December 2013

faith by failing to delete the provision for payment of a bonus in the employment agreement and by purporting to rely on the agreement which she knew was erroneous.

The issues

[32] The following issues need to be determined by the Authority:

(a) Whether Ms Robinson is entitled to payment of a bonus in respect of her employment with the respondent;

(b) If she is, the amount of that bonus;

(c) Whether Ms Robinson is entitled to holiday pay and interest in relation to that bonus;

(d) Whether Ms Robinson suffered an unjustified disadvantage in her employment; and

(e) Whether the Authority has the jurisdiction to consider the counterclaim against Ms Robinson.

Is Ms Robinson entitled to payment of a bonus in respect of her employment with the respondent?

[33] This issue needs to be examined in two parts:

a. whether there was an agreement or not on 20 December 2013 that Ms Robinson would be eligible to receive a bonus; and

b. if there was, whether the terms are certain enough to be enforceable.

[34] In practice, the first and second questions are potentially linked.

Was there an agreement between the parties on 20 December 2013 that Ms Robinson would be eligible to receive a bonus?

[35] The Authority can only assess this matter by reviewing all the relevant evidence and deciding, on a balance of probabilities, what the most likely fact situation is. There are very strong reasons for coming to the conclusion that, on a balance of probabilities, Ms Robinson and the directors did agree that she would receive a bonus. I make this finding for the following reasons:

a. The presence of a signed and dated individual employment agreement which plainly states that Ms Robinson would receive a bonus as part of her remuneration. This creates a very strong presumption that there was an agreement, which the respondent needs to rebut.

b. Unusually for an employment agreement, it was executed in counterpart, with every page of both copies initialled by Mr Maher, including the schedule with the bonus clause. Initialling that schedule creates a presumption that Mr Maher, on behalf of the respondent, accepted the terms of the schedule.

c. Mr Maher spotted an error in the agreement, which was corrected in manuscript. This shows that he did go through the agreement, checking the clauses that he believed should have been changed. He is likely therefore to have also checked the bonus clause, if he had believed it should have been deleted.

d. Whilst Mr Maher did not initial the struck through commission clause, this is probably because the strike through was already present in the text.

e. The authenticity of Ms Robinson's diary note about Mr Maher's reference to her bonus was not challenged, even though the respondent was able to examine the original diary.

[36] There is other evidence, not so strong, which supports the concept that a bonus had been contemplated. Whilst, of course, it is difficult for the respondent to prove a negative, it did not produce any evidence to show the bad faith that it accused Ms Robinson of in the letter to her from Purnell Creighton Lawyers.

[37] My finding is that the respondent has not been able to overturn the strong presumption created by the signed and dated employment agreement. I therefore find that there was an agreement that Ms Robinson would receive "a bonus". That finding is not enough on its own, however, to enable the Authority to order the respondent to pay bonus payments to Ms Robinson in a particular sum, as the terms of the agreement must be certain to enable the Authority to ascertain how that bonus should be calculated.

Are the terms certain enough to be enforceable?

[38] To have contractual force, any agreement must be in terms which define with a sufficient degree of certainty the obligations which the parties are to undertake[5]. In *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd*[6] the Court of Appeal indicated that parties may be ad idem concerning all terms essential to the formation of a contract, but still may not have achieved formation of the contract if there are other unagreed matters which the parties themselves regard as a prerequisite to any agreement.

[39] Mr Twomey submits that the bonus term is uncertain as it omits a number of elements, such as:

a. The period of assessment of payment;

b. When it is to be paid;

c. Whether it should be paid by reference to Ms Robinson's possible absence;

d. The meaning of certain terms used in the clause.

[40] I will examine the meaning of the bonus clause below, but I do not agree that all of the elements identified by Mr Twomey make the clause unenforceable for uncertainty, as not all of these elements are essential terms. In *Fletcher Challenge* the Court of Appeal recognised that a contract is not legally incomplete merely because consequential matters have been omitted, particularly when they relate to questions of contingency and risk allocation.

[41] Any number of matters might arise in an employee's employment which could theoretically impinge upon the right to a bonus payment. For example, an employee entitled to a bonus may become subject to disciplinary proceedings, change roles, start job sharing, go on parental leave or be granted some unpaid leave. It would not be reasonable for every possible contingency to be catered for. The failure to refer to the

[5] Section 3.7 of *Burrows, Finn and Todd Law of Contract in New Zealand*, 4th edition.
[6] [2002] 2 NZLR 433 (CA) at 444

possibility of Ms Robinson taking medical leave, or being on ACC, for example[7], does not make the agreement void for uncertainty as they are not essential terms.

[42] There are two elements of the bonus clause which are essential terms and which are not expressly covered. The first is the period over which earnings are to be assessed, and the second is when payment is to be made. The law in New Zealand allows the courts, and the Authority, to imply into an agreement terms which make clear an otherwise apparently insufficiently defined obligation.[8] In this case, in order to give it business efficacy, it is perfectly possible to imply into the agreement a term that the period over which earnings are to be assessed is the company's financial year, as the company is obliged to prepare its financial accounts, including calculating its earnings, by reference to that period.

[43] Equally, it is perfectly possible to imply into the agreement a term that payment of the bonus will be made within a reasonable period after the completion of the financial accounts. These implied terms are perfectly standard, and there is no evidence to contradict them.

[44] The real problem with the clause, however, is the meaning.

[45] The principles of contractual interpretation to be applied by the Authority in determining the matter before it are well settled. Judge Ford set these principles out in the Employment Court case of *Progressive Meats Limited v. Pohio & Ors* [9] where, at [29], he cited the five principles of contractual interpretation articulated by Lord Hoffmann in the UK House of Lords case of *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1997] UKHL 28. His Honour stated as follows:

> There was no dispute between counsel as to the applicable legal principles in the interpretation of collective agreements. Mr Cleary referred to the well-known five principles of contractual interpretation articulated by Lord Hoffmann in Investors Compensation Scheme Limited v West Bromwich Building Society which were adopted in New Zealand in Boat Park Ltd v Hutchinson[10] and recently reaffirmed in Vector Gas Ltd v Bay of Plenty Energy Limited.[11] As both counsel relied on the stated principles, I set them out in full:
>
> > (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge

[7] Two examples given by Mr Twomey
[8] Section 3.7.6 of *Burrows, Finn and Todd Law of Contract in New Zealand*, 4th edition.
[9] [2012] NZEmpC 103
[10] [1999] 2 NZLR 74.
[11] [2012] NZSC 5

> which would reasonably have been available to the parties in the situation in which they were in at the time of the contract.
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as a meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (See Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 2 WLR 945)
> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera SA v Salen Rederierna AB [1985] 1 AC 191,201:
>
> > "... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.".

[46] Another helpful summary of the relevant principles applying to contractual interpretation was provided by Judge Ford in *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission*[12]:

> [17] In summary it would appear from *Vector* that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text. It is, nevertheless, a vital part of the interpretation exercise of a Court to "cross check" its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve. If the language is,

[12] [2011] NZEmpC 149 (footnotes omitted)

> on its face, ambiguous, or flouts business common sense or raises issues of estoppels then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to a reasonable person with all the background knowledge available to the parties. Extrinsic evidence is admissible in identifying contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

[47] Mr Thompson, in his submissions, accepted that subjective evidence given by the parties about what they intended is not relevant, and should not be taken into account. Whilst Ms Robinson did not give direct evidence of what she intended the words to mean, she did submit a calculation of the bonus that she says she is due. It is clear from that calculation how she intends the clause to be interpreted.

[48] The calculation was based on what is called the Gross Trading Profit of the company, as presented in the trading accounts. Taking the trading account for the year ended 31 March 2015 as an example, as Ms Robinson was present for the whole of that financial year, she has calculated that her bonus for that financial year is 2% of $1,174,113. This is the gross trading profit for that financial year.

[49] The gross trading profit has been calculated by taking the sales (or earnings) of that financial year and deducting "direct costs", otherwise known as the "cost of sales". These are identified in the trading accounts for the year ended 31 March 2015 as comprising the following items:

a. Opening stock;

b. Purchases;

c. Sub-contracting;

d. Permits and inspections;

e. Damages expense;

f. Employee wages; and

g. Closing stock.

[50] However, the ordinary and natural meaning of the words in the bonus clause, as Mr Thompson urges me to adopt, quite clearly contemplates these direct cost items being excluded from the calculation. Indeed, the natural, every day meaning of the clause is that Ms Robinson would receive 2% of earnings, without any deductions, as all costs are either fixed or variable.

[51] The Authority heard evidence on behalf of the respondent from an accountant, who gave her own interpretation of the clause. I agree with Mr Thompson, though, that that evidence is not relevant, as the accountant was not a party to the agreement, and was not able to give evidence about the likely practice of a company such as the respondent. In addition, her interpretation (that "fixed and variable costs" means "exceptional items") strained the meaning for the words used in the agreement.

[52] The Authority also heard evidence from the respondent's own accountant, who called the wording of the bonus clause" nonsensical". However, he was talking from an accountant's point of view, and neither the directors of the respondent nor Ms Robinson are accountants, and they probably did not address the question of the bonus from the point of view of an accountant.

[53] In *Burrows, Finn and Todd Law of Contract in New Zealand*[13] the authors state that, where there is no admissible extrinsic evidence, and no relevant trade or business practice from which implied terms can be drawn to clothe the skeleton of the agreement, the task of spelling out a clear and certain common intention may prove impossible. If the terms the parties have chosen with which to state essential elements of their intended legal relations are ambiguous or uncertain, the court may reluctantly have to conclude that no contract was ever recorded.

[54] The interpretation that Ms Robinson now seeks to argue was agreed strains the wording of the bonus clause beyond any acceptable level. Essentially, she seeks that the last six words ("and other fixed and variable costs") be ignored. This is presumably because she knows that she would be very hard pressed to persuade the Authority that the respondent had agreed to essentially pay her a bonus based upon revenue alone[14].

[13] Section 3.7.6
[14] Using the 2014/15 financial year figures, for example, 2% of earnings would have resulted in a bonus of $90,141 for that year alone.

[55] I do not accept either that the word "earnings" should be read as "profit" as suggested by Mr Thompson. Those two terms have quite different meanings, even to non-accountants. Even the most unsophisticated business person knows the difference between the two concepts and neither Ms Robinson, nor the respondents are unsophisticated.

[56] In other words, the Authority is faced with a situation where either a strained and unnatural meaning of the wording of the bonus clause must be adopted to give it a credible meaning, or its plain and ordinary meaning makes it highly unlikely that the respondent ever agreed to it.

Conclusion

[57] Standing back, on a balance of probabilities I infer that the following has occurred:

a. Ms Robinson initially drafted a bonus clause which she believed would be her starting point in the negotiations on 20 December 2013, expecting its scope to be reined back.

b. The respondent agreed she could have a 2% bonus, but the wording of the clause was not discussed, and nor were the details.

c. The respondents either expected Ms Robinson to go back to them with a revised agreement, including a revised bonus clause, or to do so with more details of the proposed bonus arrangement.

d. This never occurred, however, possibly because of the intervening Christmas and New Year holidays.

e. Ms Robinson either forgot to amend the bonus wording, or deliberately did not do so.

f. The agreement entered into by the parties contained a bonus clause which did not reflect terms that had been agreed, because no clear terms had ever been agreed.

[58] There is an arguable case that Ms Robinson's interpretation should be adopted, as she said in evidence that that is what was agreed on 20 December 2013. However, that is hotly disputed by the respondent. In addition, Ms Robinson was very

meticulous in keeping records and making amendments to the agreement. Whilst she forgot to change the wording of the redundancy clause, she did not forget to strike out the commission clause, which is just above the bonus clause. Given how important a bonus would have been in increasing her salary, it is less than likely that Ms Robinson would have failed to have amended the clause to reflect what she says was agreed. If she had been unclear how to do so, she could have used Buddle Findlay, who drafted the agreement for her in the first place.

[59] I believe that the basis of calculation that Ms Robinson now seeks to argue was agreed has been arrived at ex post facto, in order to seek to legitimise her claim.

[60] I must conclude, therefore, that details of the basis of the calculation of the bonus were never agreed between the parties, and that it is not possible to imply them into the agreement, as any number of bases could apply, and there is no machinery or other reference point by which the Authority can ascertain the scope of the binding agreement which the parties sought to impose on one another[15]. The literal meaning of the wording used was not what the respondent agreed to. As the basis of the calculation is an essential term, the clause is unenforceable by reason of uncertainty.

[61] As an alternative, the plain and ordinary meaning of the wording makes it less likely than not that the respondent agreed to the bonus clause. Either way, Ms Robinson cannot rely upon the clause. I therefore decline to order compliance. The issue of holiday pay and interest does not arise.

Did Ms Robinson suffer an unjustified disadvantage in her employment?

[62] Ms Robinson cannot have suffered an unjustified disadvantage in her employment by not being paid a bonus when the Authority has found that she was not entitled to that bonus because the contract on that point had not been properly formed.

[63] Was Ms Robinson subjected to an unjustified disadvantage in her employment by not being told that her employer had decided she was not entitled to the payment, while she worked her notice? Section 4(1A) of the Act requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative. By choosing to be silent on their disagreement that Ms Robinson was entitled to a bonus, the respondent was in breach of this duty.

[15] Section 3.7.1 of *Burrows, Finn and Todd Law of Contract in New Zealand*, 4th edition

[64] However, did that silence cause Ms Robinson a disadvantage in her employment? What occurred was that Ms Robinson was deprived for around 26 days of the opportunity to complain about the refusal to pay. It is certainly arguable that being so deprived was a disadvantage to Ms Robinson. Ms Robinson says that she paid for a farewell breakfast for everyone. She may not have done so had she known that the respondent was contemplating challenging her right to a bonus.

[65] Was the disadvantage unjustified? I believe it clearly was, as no fair and reasonable employer could have failed to have communicated with their employee about their decision to question the bonus, in all the circumstances.[16]

[66] I will deal briefly with an objection raised by Mr Twomey in his submissions. He said that the personal grievance "had not been put in evidence". I am not entirely certain of what he meant. The personal grievance for unjustified disadvantage was pleaded in the statement of problem, was referred to with sufficient specificity in the personal grievance letter, and was raised within the 90 day statutory time period. It was also dealt with in Ms Robinson's statement of evidence. Whilst the respondent failed to plead to the disadvantage claim in its statement in reply, that was its choice. If Mr Twomey means that the personal grievance letter was not put in evidence, this is true, but it was produced when I asked to see it after Mr Twomey had cross examined Ms Robinson on her evidence about the effect of the disadvantage actions she alleges. Finally, Mr Twomey addressed disadvantage in his pre-prepared written submissions, so he and the respondent cannot claim to have been prejudiced[17].

Should a penalty be imposed on the respondent?

[67] No penalty is appropriate in respect of the failure to pay bonus payments, as I have found that there was no binding obligation upon the respondent to do so.

[68] Clause 14.1 of the employment agreement stated as follows;

> We encourage you to raise any issue or concern that you may have regarding your employment with us directly. Similarly we will raise any issue or concern that we have directly with you. Both parties will try to resolve the issue or concern promptly, fairly and discreetly.

[16] S.103A(2) of the Act.
[17] I accept that Mr Twomey only dealt with one of the alleged disadvantageous actions, the failure to pay the bonus, rather than the failure to communicate during the notice period, but again, that was the respondent's choice.

[69] The respondent clearly failed in this duty by not raising with Ms Robinson its concerns about her entitlement to a bonus. Section 134 of the Act provides that every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.

[70] I do not believe that the respondent deliberately breached the agreement, although it did deliberately choose not to tell Ms Robinson of its concerns. I have already found that the respondent has subjected Ms Robinson to an unjustified disadvantage in her employment by that failure, and she will be awarded remedies as a result. I do not believe that it is necessary or appropriate to impose a penalty as well.

Remedies

[71] Ms Robinson is entitled to be considered for compensation for humiliation, loss of dignity, and injury to her feelings. Ms Robinson said in her evidence that she was upset upon receiving the letter from the respondent's lawyers the day after her last day of employment that the respondent had been so misleading during her notice, acting in a friendly way, wishing her well and attending the farewell breakfast.

[72] I accept that that is likely to have caused Ms Robinson injury to her feelings. Mr Thompson submits that Ms Robinson should be awarded the sum of $10,000. However, first, Ms Robinson did not give a great deal of evidence about the effect on her. Secondly, there will inevitably have been bound up in her feelings hurt at being refused the bonus payment. Standing back, I feel that a sum exceeding $5,000 cannot be justified, and that is the sum I award.

[73] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s.124 of the Act).

[74] Ms Robinson plainly did not contribute in any way to the decision of the respondent not to have communicated with her. I therefore decline to reduce the remedies awarded.

Counterclaim

[75] The respondent claims that a total of $6,859.32 inclusive of GST is owed by Ms Robinson in respect of drainage works done to her property. Ms Robinson did not deny that the invoice (dated 30 July 2015 in respect of the works) had not been paid.

[76] However, there are two problems with the counterclaim. First, the invoice is addressed to Rock Solid Trustees Limited, not to Ms Robinson. Whilst that is apparently a trust which owns the house in which Ms Robinson lives or lived, the trust is a separate legal entity.

[77] Second, I do not accept that the Authority has the jurisdiction to consider the counter claim in any event. In *JP Morgan Chase Bank NA v Robert Lewis*[18], the Court of Appeal, at [94] to [97], stated the following, when considering the jurisdiction of the Authority by reference to the meaning of "employment relationship problem" as defined in s.5 of the Act[19]:

> [94] …Since the Authority had jurisdiction, the High Court did not. In a passage relied on by Mr O'Brien, the Judge said:
>
> > …a claim that one party to an employment relationship should pay a sum to another party to the relationship on account of a liability incurred in the context of that relationship comes comfortably within the meaning of employment relationship problem under s 5 and is therefore within the jurisdiction of the authority under s 161.
>
> [95] We do not agree with this reasoning. It effectively treats all issues that arise between employer and employee as exclusively within the Authority's jurisdiction because of the existence of that relationship. We do not think that can have been Parliament's intention when it passed the Act. In accordance with the definition in s 5 an "employee relationship problem", must relate to or arise out of an employment relationship. We consider this means that the problem must be one that directly and essentially concerns the employment relationship.
>
> [96] At [19], Associate Judge Bell quoted and purported to apply what was said by Panckhurst J in *Pain Management Systems (NZ) Ltd v McCallum*:
>
> > [22] To my mind the core concept which is determinative of the exclusive jurisdiction of the Authority is whether the determination which is required is indeed about an employment relationship problem. In the words of the definition of that concept is the underlying problem one relating to, or arising out of, an employment relationship. I think it is important to distinguish between a claim which

[18] CA587/2013, [2015] NZCA 255. Case citations omitted.

[19] "**Employment relationship problem** includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment".

> may have its origins in an employment relationship on the one hand, and a claim the essence of which is related to or arises from the employment relationship of the parties on the other. Is the issue in a particular claim an employment relationship one, or is the subject-matter of the claim some right or interest which is not directly employment related at all? …
>
> [97] We accept that statement of the law as sufficient for present purposes, but consider its application to the facts in *Hibernian Catholic Benefit Society* should have led to a different conclusion. While Ms Hagai was clearly in breach of her employment contract, the essence of the Society's claim was her dishonest theft of the money. This was not an employment-related problem, although it would undoubtedly have justified her dismissal. While the claim may have had its origins in the employment relationship in the sense that the relationship created the opportunity for her theft, Ms Hagai's conduct was such as would have made her liable to the plaintiff *without* any such relationship. In other words, the existence of the employment relationship was not a necessary component of many of the causes of action that could have been asserted against her. That indicates that the essence of the claim was not employment related, and should not have been regarded as within the Authority's jurisdiction.

[78] The employment relationship between Ms Robinson and the respondent was not a necessary component of the work that the respondent did for the trust which owns the house in which its employee lived, nor of the resultant debt. Accordingly, the Authority does not have the jurisdiction to consider this counter claim.

Orders

[79] I order the respondent to pay Ms Robinson the sum of $5,000 pursuant to s.123(1)(c)(i) of the Act.

Costs

[80] I reserve costs. The parties are to seek to agree costs between them. However, if they are unable to do so within 14 days of the date of this determination, any party seeking a contribution to their costs should serve and lodge a memorandum setting out what contribution they seek, and the basis for it, within a further 14 days. The other party will then have a further 14 days within which to serve and lodge a reply.

David Appleton
Member of the Employment Relations Authority