

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

THE PARTIES Snorkel Elevating Work Platforms Limited (Applicant)
AND Harold Stewart Thompson (Respondent)
REPRESENTATIVES Lewis Turner for Snorkel
Michael Gould for Mr Thompson, and Sue Thompson in attendance
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING Wellington, 1 and 2 December 2005
TELEPHONE CONFERENCE 16 January 2006
AFFIDAVITS AND SUBMISSIONS 26 & 27 January 2006 and 13, 16, 17 & 23 February 2006
DATE OF DETERMINATION 10 May 2006

DETERMINATION OF THE AUTHORITY

Preliminary

1. Employment relationship problems have been lodged by Snorkel Elevating Work Platforms Limited (“Snorkel”) and Stewart Thompson. Both applications have been consolidated and heard together.

Employment relationship problem

2. Snorkel is seeking the repayment of bonuses that it says Mr Thompson paid himself that he was not entitled to. Snorkel says the unauthorised bonus payments totalled \$139,690.46 that Mr Thompson paid himself between December 2003 and April 2005.
3. Mr Thompson says that he has been unjustifiably dismissed from his employment with Snorkel.
4. Snorkel carries on business as a manufacturer, importer and distributor of elevating work platforms. It is a wholly owned subsidiary of Snorkel International Inc (“Snorkel Inc”),

which is a company incorporated in the United States of America. Snorkel Inc also has an Australian subsidiary, Snorkel Elevating Work Platforms Pty Limited (“Snorkel Australia”).

Mr Thompson’s employment background

5. Mr Thompson commenced his employment with Snorkel in 1984 as an engineering coordinator. From 1985 to 1990 he was Snorkel’s Manufacturing Operations Manager. He was appointed General Manager of Snorkel in 1990.
6. Mr Thompson reported to Ross Hogan, Managing Director of Snorkel and Snorkel Australia until approximately September 2003. From September 2003 until 15 June 2005, he reported to Frank Scarborough, Executive Vice President and Chief Operating Officer of Snorkel Inc. He also had dealings that will be explained shortly with Snorkel Inc’s President and Chief Executive officer, Allen (Al) Havlin

Mr Thompson’s terms and conditions of employment

7. Mr Thompson and Snorkel were unable to reach agreement on signing off an employment agreement. Mr Thompson’s salary was \$123,000 per annum. He had a subsidised superannuation scheme at the rate of 15% of his salary per month. He also had the full use of a private motor vehicle at no cost. As part of his employment remuneration, he was paid a monthly bonus put in place in 1995 by Mr Hogan who says that he never intended it to be a discretionary bonus (Hogan 10). The monthly bonuses were calculated and paid to Mr Thompson throughout the eight year period from 1995 until January 2003.
8. Mr Thompson and Messrs Scarborough and Havlin exchanged employment agreements for signing on the terms. However, Snorkel could not agree with Mr Thompson’s proposals that included a bonus payment which he claimed was an “entitlement” and a redundancy provision, the subject of a trade off for payment (document 1).
9. In January 2003, Mr Havlin met with Mr Hogan at a trade fair, which Mr Thompson also attended. Mr Havlin declined to approve proposed employment agreements for Messrs Hogan and Thompson. Mr Havlin decided to freeze all bonuses and salary reviews throughout Snorkel with a review in six months because Snorkel was experiencing financial difficulties and he had to find ways of decreasing costs. He also wanted to assess the financial position of each of the businesses. He expected Mr Hogan to raise it with Mr Thompson but apparently this did not happen. Mr Havlin visited Mr Thompson at the company’s Levin premises and advised him that the payment of his bonus would be

suspended for six months, which he says, Mr Thompson accepted. Mr Thompson says that he accepted the suspension of the bonus but on the clear basis that he would be paid it later. He says there was never any mention that the bonus scheme would not be guaranteed. No terms were entered in writing.

10. At their meeting, Mr Thompson reminded Mr Havlin that he had not received a payment that had been promised by Omniquip/Textron, the previous owners of Snorkel Inc, for the completion of the Omniquip/Textron/Snorkel sale. Mr Thompson agreed to waive any claim and to enter into a new employment agreement with Snorkel under the new ownership (document 2) for \$205,313. Mr Thompson asked Mr Havlin to help speed up the payment owed to him by Omniquip/Textron. Mr Havlin agreed. Mr Thompson was paid \$205,313 upon these conditions purportedly being met. Even so no employment agreement was signed off.
11. Mr Thompson says that the payment was for him to remain in employment with Snorkel on his present terms and conditions, except for redundancy. He refers to an email from Dianne Toman supporting his claim that the settlement with Textron was only in reference to redundancy or severance pay and that his other terms and conditions of employment, including bonuses, would remain in place (document 1; Mr Thompson's statement).

Ownership of Snorkel's Levin premises

12. Mr Thompson says that the purchase happened with the knowledge of the then vice President and general manager of Snorkel Inc and his assistant in July 2002. He says that he never spoke to Mr Havlin about the ownership in 2002 prior to him purchasing Snorkel but accepts it was raised later, consistent with Mr Havlin's visit to Levin and him asking for details of the purchase. Further, he says, that in February 2003 when Mr Havlin visited New Zealand, he told Mr Havlin "*quite openly and unprompted that Ross Hogan and I owned the building*". Mr Havlin says that the ownership of the building was not disclosed by Omniquip/Textron in any due diligence materials provided at the time he was exploring purchasing the company and nor from Mr Thompson either.
13. Mr Havlin says he first learnt at the Trade Fair from Mr Hogan that they had purchased the property and that it had an environmental issue. This was not challenged by Mr Thompson. Mr Havlin did not pursue it further at the time because he had other pressing issues to deal with. He says, however, later he never successfully obtained details from Messrs Hogan and Thompson about the property despite requesting details from them. On 22 April 2005, Mr

Scarborough wrote to Antrin wishing to exercise on behalf of Snorkel an option to purchase the Levin premises. Mr Thompson became aware of Mr Scarborough's letter in early May 2005, and Antrin responded stating that Snorkel no longer had an option to purchase the premises. This has become a matter of legal dispute between Snorkel, Mr Thompson and Antrin. Snorkel alleges that Mr Thompson's behaviour of not disclosing the ownership of the premises during the due diligence process highlights that he could not be relied upon and was involved in deception. It is one of the reasons now relied upon by Snorkel for Mr Thompson's dismissal and its lack of trust and confidence in his honesty.

Bonuses and management compensation plan

14. Mr Havlin and Mr Scarborough say that the company intended for its management compensation programme ("MCP") to replace any other bonus payments. Mr Thompson says that if that was the company's intention, it was not communicated to him. He had nothing given to him in writing confirming that it was a replacement scheme and he did not believe that he had in any way discontinued his existing entitlement of bonuses. The MCP document does not indicate that it replaced any other bonus arrangements but supports the MCP being a discretionary payment (documents 6).
15. Mr Thompson says that he dealt with Mr Scarborough at all times in regard to the reinstatement of his bonus payment. Mr Thompson says that it was Mr Scarborough who authorised the reinstatement of his bonus payment. Mr Thompson says that it was in December 2003 that he telephoned Mr Scarborough and asked for approval to pay his accumulated bonuses. Mr Scarborough denies this telephone call took place. There are no records of the telephone conversations taking place between Mr Thompson and Mr Scarborough. Mr Thompson says that the amount accumulated had been calculated by Sue Bartholomew, Snorkel's administration manager in Levin, who then sent her calculations to Marcel Aouad, Snorkel Australia's general manager. Ms Bartholomew worked in her position for 15 years with Mr Thompson.
16. Ms Bartholomew says that she had previously calculated Mr Thompson's bonus for him to ensure that it was paid correctly. Mr Thompson would check it and they were usually not checked by anyone else and she was never given any documentation which authorised the payments. She says that Mr Thompson informed her in December 2003 that Frank Scarborough had approved the payment of all of his 2003 bonuses. She says that Mr Thompson asked her to calculate the bonuses and arrange for them to be paid. She says that she completed the bonus calculation and forwarded it to Mr Aouad to check. Mr Aouad

reviewed the calculation and sent back a corrected figure and she arranged the payout to Mr Thompson. When the bonuses were paid as a lump sum they were taxed at a higher tax rate. Ms Bartholomew says that this annoyed Mr Thompson and he informed her shortly after the payment that Mr Scarborough had granted approval to recommence his bonuses on a monthly basis. Mr Thompson was paid his MCP bonuses in addition to his old bonuses.

17. Between December 2003 and April 2005, Mr Thompson received 14 payments. These payments were:

- (i) \$45,236.70 in December 2003;
- (ii) \$8,528.63 in March 2004;
- (iii) \$5,675.12 in April 2004;
- (iv) \$6,827.30 in June 2004;
- (v) \$4,433.07 in July 2004;
- (vi) \$6,896.48 in August 2004;
- (vii) \$4,142.16 in September 2004;
- (viii) \$12,277.68 in October 2004;
- (ix) \$5,043.68 in November 2004;
- (x) \$6,543.60 in December 2004;
- (xi) \$2,093.01 in January 2005;
- (xii) \$3,561.48 in February 2005;
- (xiii) \$3,932.76 in March 2005; and
- (xiv) \$5,114.79 in April 2005.

TOTAL \$NZ120,306.46

18. Snorkel says that Mr Thompson authorised these payments with full knowledge that the payment of all bonuses had been suspended. In January 2005, Mr Thompson started to receive discretionary bonuses under Snorkel's MCP that the company says but for the unauthorised payments would otherwise have been authorised. The sums comprised:

- (i) \$9,692 in January 2005; and
- (ii) \$9,692 in April 2005.

(MCP bonus payments totalling \$19,384)

19. The company says that Mr Thompson was advised of the MCP as it applied in Australia and New Zealand. It has produced a confidential memorandum outlining the programme and Mr Thompson's eligibility and criteria for the payment of MCP bonuses.

20. An Ernst & Young audit report for the financial year ended December 2004 was produced on 27 April 2005. It raised a concern regarding bonus payments and in particular that Mr

Thompson appeared to have been paid bonus payments for which there was no documentation confirming the authorisation.

Events leading to Mr Thompson's dismissal

21. On 6 May 2005, following the receipt of the Ernst and Young report, Mr Scarborough made a direction that all bonus programmes and payments were to be stopped pending a review by Snorkel's senior management (email document 9). .
22. On 13 May 2005, Mr Scarborough advised Mr Thompson that Snorkel was checking on some concerns it had regarding the bonus programme and the option to purchase the Levin premises. A number of questions were put to Mr Thompson in this letter. This was followed by a telephone conference on 19 May 2005, which included Frank Scarborough, Al Havlin, and another employee as a note taker, and the applicant. The purpose of the telephone conference was to discuss the matters raised in the letter of 13 May. In addition, Mr Thompson replied to Mr Scarborough's letter in an email dated 20 May 2005 in which he formally commented on each of the points raised (BOD 12).
23. On 3 June 2005, Mr Thompson received another letter from Mr Scarborough in regard to receiving unauthorised bonus payments after the bonuses had been suspended (BOD 13). The letter also stated that Mr Thompson's involvement with Antrin's purchase of the company's premises was a breach of duty owed by Mr Thompson to the company to disclose an interest. Mr Scarborough informed Mr Thompson that the people he had referred to as knowing about the property purchase had given him a different account of the events and that even if consent had been sought at the time it was not through Snorkel because the people concerned did not have any authority to waive any options for Snorkel.
24. Mr Thompson was requested to attend a meeting with Mr Scarborough on 15 June in Wellington.
25. The meeting took place in Wellington on 15 June. In attendance were Mr Scarborough, Mr Aouad, the company's lawyer, Simon Cogan, Mr Thompson and his lawyers, Michael Gould and Nigel Moody. It is agreed that the meeting was a disciplinary meeting to hear Mr Thompson's response to the concerns Mr Scarborough had set out in his letter of 3 June 2005. Mr Thompson in essence denied the allegations and provided explanations on the two key points of the payment of his bonuses or reinstatement of his bonus and the disclosure in regard to the purchase of the Levin property by a company in which he had a shareholding.

26. During the course of the meeting, there was a one hour break. When the meeting reconvened Snorkel's position was explained:
- Ross Hogan had conveyed to Mr Thompson that his bonus had been cancelled;
 - Mr Thompson should have known that the MCP replaced his existing bonus;
 - Mr Thompson had not obtained proper approval to purchase the building and did not disclose a conflict of interest.
27. Mr Thompson was told that the company had lost trust and confidence in him and he was summarily dismissed as of that day. This was confirmed in a letter dated 17 June 2005 from Mr Scarborough terminating Mr Thompson's employment effective from 15 June 2005 for serious misconduct.
28. For completeness, the letter reads as follows:

“TERMINATION OF YOUR EMPLOYMENT

- 1. I write to confirm my oral advice to you at our meeting yesterday that your employment as general manager of Snorkel Elevating Work Platforms Limited has been terminated effective 15 June 2005 for serious misconduct.*
 - 2. The reason your employment was terminated is that Snorkel EWP has lost the necessary trust and confidence in you as general manager. That loss of trust and confidence arose from the bonus payments made to you and the purchase of the Levin property by Antrin Holdings Limited. During the meeting adjournment yesterday I carefully considered the responses made by you (including your May 20 email) and your legal counsel. Those responses did not adequately address Snorkel's serious concerns, which were set out in my letters of May 13 and June 3.*
 - 3. Please liaise with Sue Bartholomew to make arrangements for the return of all company property and collection of your personal property. I confirm Snorkel EWP has paid on June 17 your final pay up to and including 15 June 2005, including your holiday and any other entitlements.”*
29. Mr Scarborough, in his evidence, stated that Mr Thompson should have known that the MCP scheme was to replace the existing bonus. Mr Thompson had not obtained proper approval to purchase the building, that he must have seen the option in the lease and that the company had lost trust and confidence in him and that he was summarily dismissed as from that date.

The bonus payments and damages claim

30. At best Mr Thompson's action could be the result of a misunderstanding about his entitlement to the bonus. I find no evidence that suggests Mr Thompson has deliberately set out to authorise the payment of his bonuses when he knew he was not eligible. It is a fact he instigated the payment of his bonuses and did not hide them from Ms Bartholomew and Mr Aouad. There is a dispute about how Mr Thompson reacted to Mr Aouad upon hearing about the Ernst and Young audit and recommendation. I am left in some doubt about what Mr Thompson said to Mr Aouad because the latter was at times confused and flustered in giving his evidence. In this case the vagueness of the arrangements and the absence of any written details about the terms of the reinstated bonuses support my conclusions. There is no documentation supporting Mr Thompson that the bonuses were an entitlement of right. I accept that they were discretionary bonuses for reasons I will elaborate on shortly.
31. The evidence does not support Mr Thompson getting approval to reinstate his bonus. I am supported by the following:
- The telephone accounts are not clear in regard to how the call was made by Mr Thompson, either by direct line or through reception or by a cell phone. Emails and telephone accounts for 15 December when the telephone calls were meant to have been made do not reconcile. Mr Thompson then said the calls were made on either 10 or 12 December. I have not recalled Mr Thompson because any further oral evidence from him I consider would not assist me when he had his chance to provide a full explanation at the investigation meeting.
 - Mr Thompson's version of events changed from his oral evidence and in his affidavit.
 - The lack of any detail in writing from both Mr Thompson and Mr Scarborough alongside other formal communications about remuneration. If the bonuses were an entitlement it could be reasonably expected for them to have been included in the documentation somewhere.
 - Mr Scarborough conceded that there was a telephone call but not for the approval of the reinstatement of the bonus and monthly payment. There is no evidence to suggest he is not telling the truth and is unreliable.

- I have balanced what Mr Thompson says with the fact that for such an important matter it was never put in writing and not able to be properly verified. It was not sufficient for Mr Thompson to rely upon Ms Bartholomew and Mr Aouad's involvement in solely administering the bonus, given they were acting on his word. I have considered any inconsistency in Ms Bartholomew's evidence but not given weight to it to say Mr Thompson is correct, given he was not able to verify the matter any other way.
- I have noted that Mr Hogan supported Mr Thompson but I have decided not to give his evidence much weight because he had an interest opposed to Snorkel. In any case his views conflicted with evidence produced from Mr Aouad that contradicted the entitlement of the bonus.
- The Ernst and Young audit report raised a problem that management was not aware of until then.
- Further it became apparent that while Mr Thompson and Mr Hogan looked after themselves with the change of Snorkel's ownership Ms Bartholomew's interest – in reliance of the two men - was not. This emerged, to her considerable upset during the Authority's investigation. This does raise further doubt about Mr Thompson's involvement in the matter and propensity to look after himself. On its own not a great deal can turn on this.
- David Theirens, general manager of Snorkel (who replaced Mr Thompson) gave evidence in support of Snorkel and this gave rise to another factual matter about Mr Thompson's involvement in the Levin premises. I found it was not directly relevant and has not assisted me any further. I have put it to one side.

32. Furthermore, since Mr Scarborough has denied receiving telephone calls in which he gave permission to Mr Thompson to pay himself the bonus, Mr Thompson has not satisfied me that he had the authority to reinstate his bonus. It is common ground that the bonus was suspended at the time. It is probable that it was replaced by the MCP, in which case Mr Thompson could not expect payment of both bonuses, especially given the negotiations on the employment agreement. This is supported by Snorkel's reaction upon finding out that Mr Thompson had been paid both bonuses. Mr Thompson received a payment purportedly in return for reaching an agreement on a change of Snorkel's ownership that hinged on excluding redundancy and waiving any claims. Mr Thompson did not raise the contractual

bonus entitlement at the time of the Ernst and Young audit as an explanation. Mr Thompson did not claim he had an entitlement at the time of the disciplinary process. Instead, this appears to be a recent view reached with his lawyer. There was no supporting employment agreement with terms to support anything other than a discretionary bonus, whereas there was no dispute on his salary, the car and superannuation.

33. Mr Thompson sent to himself Snorkel's general terms and conditions in an individual agreement of employment in a letter dated June 2004. Mr Thompson signed and declared that he had read and understood the employment conditions detailed in the letter and accepted them. He confirmed that he had reasonable opportunity to seek independent advice on the content of the agreement before signing it. However he did not include any entitlement to a bonus or make any qualification on any terms personal to him.
34. Mr Thompson's decision to send himself the general terms and conditions in his role as general manager instead of taking the matter up with Messrs Scarborough and Havlin has not assisted him.
35. Mr Thompson prepared draft agreements in his negotiations with Messrs Scarborough and Havlin. The document referring to Ms Toman is not an independent verification of the situation.
36. The MCP is discretionary considering the evidence of the criteria and terms. The email dated 6 May 2005 suspending further payments sent by Mr Scarborough more than likely related to his knowledge at the time of the MCP and the Ernst and Young report because I am satisfied he was not aware that Mr Thompson's other bonus payments had resumed. The earlier bonus suspension was more consistent with a discretionary arrangement too, and the payment of the MCP supports the position that Messrs Scarborough and Havlin would not have approved both bonus arrangements to be paid at the same time. Mr Thompson relies upon the administration of the payments to support his position. I find this explanation does not assist Mr Thompson given his senior role as general manager. Since Mr Thompson authorised the payment of his own bonuses and the company continued to consider it had been suspended, and as there is no evidence of Mr Havlin, who made the decision, rescinding it, Mr Thompson must pay the sums back. The actual details of the reinstated bonus have not been challenged as incorrect. Mr Thompson must pay back a total sum of \$NZ120,306.46. He is not required to repay the MCP, which was authorised and paid by the company in good faith to him at the time since he was entitled under set criteria.

The personal grievance claims

37. A fair and reasonable employer would not have come to an honestly held belief on the information available to it at the time that Mr Thompson was deliberately and wilfully dishonest or deceptive. My reasons are as follows. First Snorkel relied upon Mr Thompson paying himself unauthorised bonuses. It was alerted to a problem by the Ernst and Young audit report. However the seriousness of the situation was based on Mr Scarborough concluding that Mr Thompson had acted deliberately, and to support it is alleged Mr Thompson deliberately hid the bonuses in a document proposing salary increases for New Zealand staff. In the document Mr Thompson did not refer to bonuses and the rates. It is plausible that Mr Thompson did not include the bonus information in such a document because the document related to remuneration for New Zealand staff and was a proposal for salary increases separate from bonus payments. Mr Thompson and Snorkel were also in negotiations on a new employment agreement that involved a claim for the entitlement to bonuses. If there was any dispute on the entitlement it could have been resolved as a dispute.
38. During the investigation meeting I raised the difficulty that appeared with Mr Scarborough and Mr Thompson having a dispute over a significant matter of fact on whether the telephone calls for approval to reinstate the bonus were made. Mr Scarborough was directly involved and the decision maker. I have accepted the submission made by Snorkel's representative that this should not be fatal and indeed such a situation can quite often arise. I agree that of the two directors both were involved with Mr Thompson and one of them had to make a decision and it is a question of which one was better placed to make that decision.
39. This is a situation involving an allegation of serious misconduct; therefore the more serious the allegation is the greater the responsibility to establish a higher level of proof. On this matter Snorkel has not done that and especially did not meet the requirement at the very least to provide reasoning how Mr Scarborough came to reach his decision (Scarborough paragraphs 31, 32 and 33). Indeed Snorkel has relied upon information after the event. As such although it can not be considered in the scrutiny of the dismissal it will be relevant for assessing Mr Thompson's contribution.
40. The telephone issue was not raised by Mr Thompson until Mr Scarborough got to New Zealand and had convened the disciplinary meeting. The very purpose of the meeting was to enable Mr Thompson to explain and a fair and reasonable employer should have expected that to happen and listened with an open mind. Mr Scarborough discounted the telephone calls from having occurred because of his own involvement. The fact is that the payments were

not hidden from Ms Bartholomew and Mr Aouad. Furthermore a fair and reasonable employer would have searched the telephone records and enquired with the reception for verification, which was not done at the time. If it had been done, since the telephone records have now been provided, it would have been open to a fair and reasonable employer to come to an honestly held belief that misconduct had possibly occurred. Its failure means that Mr Thompson has a personal grievance.

41. Secondly, the next issue was the purchase of the building by a company involving Mr Thompson. Snorkel has not made out its case that the issue relates to serious misconduct due to a linkage to, in turn, a matter of due diligence raised by Mr Thompson in his evidence before the Authority. Snorkel could have been expected to undertake due diligence on the matter for itself especially since the purchase occurred prior to Snorkel Inc purchasing shares in the ownership of Snorkel. The seriousness of this allegation has not been proved, ie that it involved deliberate and wilful misconduct, as opposed to Mr Thompson being naïve not to ensure some written verification existed and was properly disclosed when Mr Havlin raised the matter firstly at the trade fair, and then later in Levin, as it does seem that he never did get a proper response from Messrs Hogan and Thompson. Also there is a lack of clarity about who knew what in the matter, which remains unresolved on the basis of the evidence placed before me. Both parties had the opportunity to produce further such evidence. The real responsibility rested on Snorkel to refute Mr Thompson's assertions. The assumptions put to me in Snorkel's submissions about Mr Thompson's alleged dishonesty have not been established to a sufficiently high enough degree to meet the seriousness of the alleged offence.
42. Mr Thompson's dismissal was unjustified.
43. The next step involves an assessment of any contribution by Mr Thompson. He has directly contributed to the situation, I hold. He could have at the very least obtained much better clarification and certainty of his entitlement to the bonuses and disclosed the ownership of the property that Snorkel also had an interest in. He could and should have raised the matter of the payment of his bonus with Messrs Scarborough and Havlin properly for certainty, given he reported to the former and the earlier bonuses were suspended by Mr Havlin. He failed to disclose this and he has had the benefit of bonuses that he instigated the reinstatement of without sufficiently clear enough authority, which he now has to repay. To resolve this employment relationship problem in equity and good conscious I find that Mr Thompson's actions account for 40% of the remedies available to him. I assess his loss of wages at three

months under the Act using the base salary. Mr Thompson's salary was \$123,000 per annum. I award him a reduced sum of \$18,449 to take account of his contribution (60% of 13 weeks salary). Leave is granted to return to the Authority or make submissions on the superannuation claim if the parties are unable to reach some agreement on superannuation and its calculation in terms of the sum awarded above and dependant on any of the terms of the deed not placed before me. Mr Thompson is entitled to a proportion of the sum of \$1,500 for the loss of the car that I calculate at \$900. He would be due compensation for humiliation, loss of dignity and injury to feelings of \$12,000 but reduced to \$7,200 for contribution.

44. My decision is that Mr Thompson is to repay the bonuses of \$NZ120,306.46 to Snorkel Elevating Work Platforms Limited. Mr Thompson is able to retain the MCP bonuses of \$19,384. Snorkel Elevating Work Platforms Limited is to pay Mr Thompson lost wages of \$18,449 under s 123 (1) (b) and s 128 (applying s 124) and compensation of \$900 for the loss of the car under s 123 (1) (c) (ii) and compensation of \$7,200 for humiliation, loss of dignity and injury to feelings under section 123 (1) (c) (i) of the Act.
45. Snorkel has claimed a penalty against Mr Thompson for breach of his employment agreement. I have decided not to apply any penalty because there has been no proven deliberate and wilful breach of any such terms and conditions of employment. I have given the benefit of the doubt to Mr Thompson that there has been some misunderstanding but that since he was paid bonuses that were not approved he has to repay them. A penalty is punitive and I hold that the grounds relied upon have not been established when the employer's choice of action involved its decision to dismiss the applicant as opposed to pursuing a course of action for a penalty in their relationship.
46. Leave is granted to return to the Authority or make submissions on the superannuation claim if the parties are unable to reach some agreement on the calculation of superannuation in regard to the sum of \$18,449 awarded here, and of course, dependant on any of the terms of the deed not placed before me.

47. Costs are reserved as requested.

P R Stapp
Member of Employment Relations Authority