IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 209
5436691

	BETWEEN	DARREN TOBIN Applicant
	A N D	RAPID LABELS LIMITED Respondent
Member of Authority:	Eleanor Robinson	
Representatives:	Blair Edwards, Counsel for the Applicant Dean Organ, Advocate for the Respondent	
Investigation Meeting:	27-29 May 2015 and 19 – 21 April 2016 at Auckland	
Submissions Received:	27 April and 6 May 2016 from the Applicant 4 May 2016 from the Respondent	
Date of Determination:	24 June 2016	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Applicant, Mr Darren Tobin, claims that he was unjustifiably dismissed by the Respondent, Rapid Labels Limited (RLL), on 12 September 2013 when his position was made redundant.

[2] Mr Tobin also claims that RLL failed to pay him the correct commission payments for the previous six years prior to the termination date of his employment, being 13 October 2013 pursuant to the individual employment agreement (the IEA) between the parties and subsequent letters of variation.

[3] Mr Tobin further claims that RLL failed to act in good faith by failing to consult with him appropriately before terminating his employment, and by failing to provide him with all relevant information pertaining to the restructure as well as alternative employment opportunities.

[4] RLL denies that Mr Tobin was unjustifiably dismissed by reason of redundancy and denies that there was any unpaid commission. RLL claims that it dealt with Mr Tobin at all

times in good faith and that there was extensive consultation prior to the decision being made to terminate Mr Tobin's employment on the grounds of redundancy.

Issues

[5] The issues for determination are whether or not:

(a) Mr Tobin was unjustifiably dismissed by RLL by reason of redundancy

(b) Mr Tobin is owed unpaid commission payments for the six year period prior to 13 October 2013

(c) RLL breached the duty of good faith it owed to Mr Tobin

Note

[6] At the Authority's investigation on 27-29 May 2015 and 19 – 21 April 2016 the witnesses answered questions on the witness statements they had provided and – under oath or affirmation – answered questions from me and the parties' representatives. The representatives have also submitted closing submissions on the facts and law.

[7] I have considered those submissions and the evidence, including relevant documents provided by the parties, but, as permitted by s.174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on the issue necessary to dispose of the matter, and specified orders made as a result.

Background Facts

[8] RLL is a labels manufacturer with the objective of providing businesses with labels within a speedy time frame, and operates in markets including wine labels, food and beverage labels, thermal printers/labels, laser labels, pharmacy labels and client customised labels.

[9] Prior to 2012, the business of Rapid Labels was owned by Blue Star Group (New Zealand) Limited, and in July 2012 was purchased by Tiri Group Limited. Rapid Labels Limited was incorporated in June 2012 and is now owned by Hexagon Holdings Limited, a New Zealand packaging and labelling group, which was formed by Blue Star Group (New Zealand) Limited. Following the acquisition of the Rapid Labels business, Mr Tobin's employment was continuous and therefore the use of RLL in this determination, unless stated otherwise, refers to the business operation of Rapid Labels

[10] Mr Tobin was employed by RLL for approximately nine years, and specialised in selling and marketing labels to the wine industry in New Zealand and Australia.

[11] Mr Tobin was initially employed by Rapid Labels, a division of Blue Star Print Group (New Zealand) Limited in July 2004. Although no individual employment agreement for that period has been provided to the Authority, there was a contract Variation document dated as effective 1 November 2004, which states Mr Tobin's job title as Business Development Manager – Auckland Labels.

[12] In 2005 Mr Tobin was issued with an individual employment agreement (the IEA) which stated in clause 2.1 that his position was Sales Director for Rapid Labels, a division of Blue Star Print Group (New Zealand) Ltd. The title of Sales Director was for cosmetic purposes and Mr Tobin was not appointed a Company Director.

[13] In clause 4, headed Remuneration, it stated:

> *4.1 The company will pay the employee an annual salary as per Schedule 3 paid in 12 equal monthly instalments on the 20th of each month by direct credit into a bank account nominated by the employee. Commission payments are paid by the 20th of following month.*
>
> *4.2 The company will review the salary and other benefits annually provided that*
>
> *(a) The company is under no obligation to increase the employee's remuneration in any way or at any time; and*
>
> *(b) The company may not reduce the employee's remuneration (excluding performance incentive if applicable) and other benefits without the consent of the employee.*

[14] Schedule 3, later becoming Schedule 1, sets out the incentive scheme details.

[15] The IEA stated at clause 13, entitled Restraint:

> *13.1 The employee shall not for a period specified in 13.1(a) and 13.1(b) after the termination of his/her employment, either on the employee's own account or as a consultant to, or as a partner, agent, trustee, employee, shareholder, member or director of any other person:*
>
> *(a) Induce any employee of the company to terminate his or her employment for a period of three months;*
>
> *(b) Approach or solicit any client or customer of the company for a period of six months.*

13.2 The employee shall not for the period specified in 13.1(a) and 13.1(b) after the termination of his/her employment either on the employee's own account or as a consultant to, or as a partner, agent, trustee, employee, shareholder, member or director of any other person, carry on or be engaged within the territory defined in 13.3 with any trade or business in competition with any business carried on by or activity contemplated by the company.

13.3 The territory in 13.2 is defined as Auckland.

13.4 The employee acknowledges that:

(a) The value of the remuneration and benefits referred to in this agreement have been assessed and are dependent upon the employee giving the undertakings contained in this agreement; and

(b) These undertakings are fair and reasonable for the proper preservation of the goodwill of the business of the company and Blue Start Print Group (New Zealand) Limited.

[16] Mr Tobin signed the IEA on 17 May 2005 below clause 19, **DECLARATION** which stated**:**

19.1 In executing this agreement, the Employee agrees that

(a) They have read and understood the terms and conditions of this individual employment agreement.

(b) They have been given an opportunity to seek independent advise (sec) *on the terms and conditions of these documents and have had a reasonable opportunity to take that advice.*

(c) …

[17] The incentive data performance parameters expressed in percentage terms and the basic salary were reviewed annually and amended as a variation to the IEA signed by Mr Greg Howell, then General Manager of Rapid Labels, and Mr Tobin.

[18] In 2012 Mr Rob Astley, Director of RLL, wrote to Mr Tobin in a letter dated 2 July 2012, prior to the impending sale of Rapid Labels business, offering Mr Tobin employment with RLL. The letter stated at clause 1:

> 1. *As you may be aware, Blue Star Group (New Zealand) Limited ("BSG") has agreed to sell its Rapid Labels business and assets (including the Wet Glue Line Operation) to Rapid Labels Limited ("**Rapid Labels**"), a wholly owned subsidiary of Tiri Group Limited (the "**Sale**"). It is anticipated that completion of the Sale will occur on or about 6 July 2012.*

[19] The letter stated at clause 2 that Mr Tobin was offered: "*employment with Rapid Labels in the same role as you are currently performing and on the same terms and conditions of employment*." The letter also stated at clause 3 that Mr Tobin was entitled to seek independent advice about the offer of employment.

[20] Mr Tobin signed in acceptance of the offer of employment on 2 July 2012 acknowledging that he had been advised, and had the opportunity, to seek independent advice about the effect of the offer.

[21] Mr Tobin said that he had become concerned about his position in RLL during 2013. He stated that he had experienced some difficulties in his relationship with Ms Anne-Marie Sutton, who had succeeded Mr Howell as General Manager. In addition he confirmed that he had other business interests, including running a farm and property renovation.

[22] Ms Sutton said that during 2013 Mr Tobin was finding it more difficult to acquire new wine clients and he was becoming frustrated at that. In addition he did not like having to adhere to the guidelines set in place to ensure that RLL did not erode shareholder value by prospecting clients outside the set parameters and entering a price war with sister companies operated by the Tiri Group. Mr Tobin confirmed in response to questioning at the Investigation Meeting held on 27 May 2015 that he and Ms Sutton had mainly disagreed about the fact that he could not pursue label business held by other sister companies.

[23] Ms Sutton also said that in September 2012 she and Mr Tobin had agreed to gradually reduce his role at his request to that of an Account Manager position from July 2013 in order that he could have a better lifestyle and potentially manage his workload whilst residing at his Bach on the Coromandel.

Alternative employment with Jenkins Group Limited

[24] Mr Tobin said he had considered alternative employment seriously on or about this time, explaining that he had been approached by other organisations throughout the period of his employment at RLL. These considerations included alternative employment at a competitor labels company, Jenkins Group Limited (JGL).

[25] An unsigned letter dated 8 August 2013 to Mr Tobin from Mr Tony Sayle, Managing Director, JGL, and provided to the Authority, contained an offer of employment with JGL. The letter states: "*Dear Darren, Thank you for your interest in a role at Jenkins and for participating in the numerous meetings and discussions that we have had together. We are now pleased to present a formal offer to you, in the role of Sales Director …"*

[26] On 16 August 2013 Mr Sayle emailed Mr Tobin stating

> *Hi Darren*
>
> *Please see Employment "revised offer confirmation" and Employment agreement for your acceptance. Happy to execute by E Mail and then you can post original prior to heading away if all OK.*
>
> *Looking forward to having you with us.*

[27] Attached to the email from Mr Sayle was an unsigned individual employment agreement between Mr Tobin and JGL.

[28] Mr Tobin signed an individual employment agreement with JGL on 22 August 2013, (JGL IEA) the same date it was signed by Mr Sayle. Schedule 1 to the JGL IEA set out that Mr Tobin's title was Sales Director for Jenkins Labels Limited, with a commencement date of 14 October 2013.

Disestablishment of Sales Director position

[29] Mr Tobin received an invitation from Ms Sutton on 21 August 2013 to a meeting to be held on 23 August 2013. The purpose of the meeting was to discuss some changes in RLL's structure which had the potential to affect the Sales Director position held by Mr Tobin. In the letter dated 21 August 2013, Ms Sutton stated:

> *Darren,*
> *I would like to meet with you later this week to present some changes being considered within the structure of Rapid Labels. The nature of the discussions is sensitive as the changes, if implemented, would affect your current role. Given this possible impact upon your employment I intend to have Dean Organ, our employment adviser, present at the meeting to provide advice to the company if required. You may also bring a representative or support person to this meeting should you wish to do so.*

Meeting held on 23 August 2013

[30] Mr Tobin attended the meeting held on 23 August 2013 with Ms Sutton and Mr Organ accompanied by his then legal representative, Mr Nicholas Eketone-Tekanawa.

[31] At the commencement of the meeting, Ms Sutton handed Mr Tobin an undated letter which set out RLL's proposal to disestablish the Sales Director position. Ms Sutton then proceeded to read aloud the letter which stated:

> *I am considering some changes within the structure of Rapid Labels. I am tasked with forming the structure that equips the business to grow significantly, a structure that will see us through to $30m sales from our current position of $23m. There is obviously a process for me to follow to propose and make changes to our structure and I have asked Dean to help me with this process. This meeting is intended to tell you about the changes I am considering and how they may affect you. Currently the role of sales manager is done by myself, with the account director part of that role being shared by the two of us with you Darren, directing the wine accounts.*
>
> *Moving forward, as the business grows, the sales manager role will become larger and already I am not doing it justice by doing the dual sales and general management role. So I am considering a dedicated position, a new position that is separate from my role. This new position should account direct all accounts. A key part of this new role would also be managing the "corporate self" by that I mean a sales process that is heavy on documentation, presentations, pitching corporate professionals. And of course, this role would include management of our sales team. …*
>
> *With the proposition of a sales manager role in the consideration that we have capacity in the existing team, I now look at your current role.*
>
> *Your role is taking care of a base that is primarily Central Otago wide, a few Auckland wine accounts and a small group of Auckland prime clients. About $1.3m in total. If, as I am proposing, the wine director part of your role instead lies within the new sales manager, the remaining client base to manage is small. I am considering widening Steven's area to cover all of the South Island now that we are not targeting Christchurch. This would mean Central Otago wine falls under Steven's care. The group of Auckland clients left could be allocated to Deborah and Catherine.*
>
> *Therefore the proposal at present is to proceed with the above. Before making any decision I wish to discuss the matter with you and provide you with the opportunity to provide your point of view.*

[32] Mr Tobin said that he had the impression during the meeting that RLL would be implementing the restructure regardless of his feedback and that he would not be considered for the newly created role of Sales Manager. As a result, addressing Ms Sutton, he allegedly asked *"you're not going to ask me to be the new Sales Manager are you?"* and in reply he alleged that Ms Sutton stated *"no"*.

[33] In his evidence Mr Eketone-Tekanawa confirmed that he had heard something to that effect and that Ms Sutton had replied "No".

[34] Ms Sutton said that she did not recall having been asked the question about Mr Tobin not being appointed to the new Sales Manager position, and stated that if it had been asked, she would not have responded as alleged. Further, at no time during the meeting had she said that Mr Tobin would not be considered for the newly created role of Sales Manager.

[35] Mr Eketone-Tekanawa said that he had been concerned at what appeared to be a lack of consultation during the meeting and he had queried *"so you're not going to go through a consultation process?"* He said that in reply Mr Organ had remarked *"That's it. That's all there is"*. He (Mr Eketone-Tekanawa) then suggested, and said that all parties present agreed, to engage in 'without prejudice' discussions.

[36] Mr Eketone-Tekanawa said that he had believed Ms Sutton wanted to implement the restructure without delay, which was why he had suggested that the 'without prejudice' discussions take place. However during cross-examination Mr Eketone-Tekanawa confirmed that at the date of the meeting he had been aware of Mr Tobin's involvement in regards to an employment relationship with JGL.

[37] Ms Sutton said that there had been an impetus for a quick process on the part of Mr Tobin who had immediately started discussions about swiftly ending the employment relationship. She said that Mr Tobin had stated:

(a) He would go quietly in return for a payment of $40,000 plus redundancy entitlements;

(b) He had other interests in his life he would attend to;

(c) The sooner he could leave the better.

[38] The meeting concluded with an agreement to meet on 4 September 2013.

Proposed meeting to be held on 4 September 2013

[39] On 30 August 2013, Mr Eketone-Tekanawa emailed Mr Organ stating:

> *Mediation is suggested so that the parties can address and resolve any issues in relation to the proposed redundancy of my client.*
>
> *To clarify, does your client require a formal letter raising a personal grievance before it will agree to mediation?*
>
> *… there is no agreement to your client's proposal therefore it would seem to me that if your client continues with the redundancy, certain matters will need to be addressed more fully.*

> *For the avoidance of doubt, if my client's position is made redundant then I would expect the usual full consultation procedure to be completed prior to any decision being made.*

[40] Mr Tony Sweetman took over the conduct of the case from Mr Eketone-Tekanawa and on 4 September 2013 he emailed Mr Organ stating that the meeting scheduled for that day would need to be cancelled and possibly rescheduled.

Meeting held 11 September 2013

[41] Mr Organ responded to the email from Mr Sweetman on 11 September 2013. In the email he proposed an agenda for the rescheduled meeting to be held that day:

> *I confirm our appointment today at 2pm at the employer's premises. Please note the company is happy to discuss the following:*
>
> 1. *Issues relating to the restraint.*
> 2. *Your client's feedback to the proposal.*
> 3. *All other matters relating to consultation.*
> 4. *Any other matters your client wishes to address.*

[42] Mr Tobin's said his understanding was that the meeting was being held to further the 'without prejudice' settlement negotiations and stated that he had not been in a position to provide feedback on the restructuring proposal at that time. He said that because he did not receive the meeting agenda until the morning of the meeting, he did not have sufficient time to prepare his feedback.

[43] In addition, because the restraint of trade clauses in the Employment Agreement were noted on the agenda for the first time, it reinforced his belief that the restructure was predetermined and that regardless of any feedback he provided, his position would be made redundant.

[44] The meeting held on 11 September 2013 commenced with a discussion about the restraint of trade clauses and the 'without prejudice' discussions that had been held to that date.

[45] Ms Sutton said that during the meeting Mr Organ asked on more than one occasion if Mr Tobin had any response to the proposal which had been discussed on 23 August 2013. She said that Mr Tobin's only comment was to say *"what, you mean why are they not making the two people redundant who are taking my portfolio?"*.

[46] Ms Sutton said that although Mr Tobin had been asked for his views at the first meeting and there had been more than two weeks for him to respond, no response had been

received and none had been made by Mr Tobin at the meeting apart from the one comment about his portfolio.

[47] Ms Sutton said she had confirmed to Mr Tobin at the meeting that she had asked the wider RLL group of companies if there were any roles available which would be suitable for Mr Tobin, however none had been identified.

[48] The meeting had been concluded by Mr Sweetman advising he would arrange for someone better qualified in employment law than himself to represent Mr Tobin and confirmed that he would like to *"keep the clock ticking"* in respect of Mr Tobin's opportunity to provide feedback.

[49] However, Mr Tobin had no opportunity to provide feedback on the restructuring proposal before he received the final decision of RLL to implement the restructuring which occurred the following day, 12 September 2013. This occurred before he had an opportunity to engage an employment law specialist.

Confirmation of Restructuring Decision

[50] In a letter dated 12 September 2013 confirming the decision reached by RLL Ms Sutton stated:

> *I refer to our recent discussions ….After considering the situation carefully I advise that the decision has been made to proceed with the restructuring as proposed.*
>
> *I confirm we have been considering changes to the structure of Rapid Labels presented to you on 23 August 2013 both verbally and in writing. You have been provided with the opportunity to provide your feedback and I have taken into account what you have had to contribute. As advised the structure of our sales team and the sales management were the parts of the proposal relevant to you. Although previously the role of Sales Manager was performed by myself I have now decided, for the reasons discussed, to create the new position of Sales Manager. This will be a dedicated position separate from my role and will Account Direct all accounts, managing the "corporate sell" and will include management of our sales team.*
>
> *As a consequence of the above your current position of Sales Director will be declared redundant. I confirm we have discussed the viability of ongoing employment and whether or not suitable alternative positions exist. I confirm that unfortunately there are no such positions available at this time. I have noted your view expressed in our meeting on 23 August that you understood what was being proposed and prepared the matter to be handled quickly as you had other interests and projects on the go. Given the above there is no reason for the process to be delayed any further.*
>
> …

> *Lastly I confirm the company's expectation that upon termination the company expects you to comply with the confidentiality and restraint provisions of your employment agreement, namely, clauses 10 and 13.*

[51] Mr Tobin replied to the letter on 13 September 2013 in which he stated:

> *2. I acknowledge receiving your letter in which you advise Rapid Labels is considering making my position as Sales Director redundant. I also understand from our without prejudice discussions at the meeting held on 23 August that the company would like to move quickly to terminate my role with the company.*
>
> *3. However, other than a brief discussion regarding the company's intention to disestablish my role there has not been any effort made to explore other possibilities or roles for me within the organisation. It is disappointing for me to realise after nine years with the company there seems to be little interest by Rapid Labels to explore other employment options. From my perspective I would like to have been given the opportunity to discuss with you my suitability for the new role that you are creating which will (as I understand it) replace my position.*
>
> *4. During the meeting on 23 August I was told that my position was going to be made redundant and there was no suggestion of other possible roles. Therefore I disagree with your statement that "… we have discussed the viability of ongoing employment and whether or not suitable alternative roles exist …". We have had no such discussion.*

[52] Ms Sutton replied to this letter the same day. In her letter dated 13 September 2013 Ms Sutton set out details concerning the termination including those of Mr Tobin's final payment, and stated that she would respond to the points raised in his letter dated 13 September 2013.

[53] Ms Sutton wrote again to Mr Tobin on 10 October 2013 confirming that his employment would end by way of redundancy on 13 October 2013 and that his final pay would be transacted at the end of October 2013. In the letter Ms Sutton referred to rumours she had heard to the effect that Mr Tobin intended to work for Jenkins Labels Limited. She noted that Jenkins Labels Limited was a competitor company to RLL and advised:

> *Lastly I confirm the company's expectation that upon termination the company expects you to comply with the confidentiality and restraint provisions of your employment agreement, namely, clauses 10 and 13.*

[54] The letter dated 10 October 2013 set out that Mr Tobin's final pay would be in the sum of $29,662.92, which amount included holiday pay entitlement and redundancy

entitlement, but excluded a commission payment of $1,458.77 which would be paid separately.

[55] On 15 October 2013, Mr Tobin raised a personal grievance against RLL for unjustifiable dismissal, specifically on the basis that there was no demonstrable need to restructure, and the lack of consultation. In the letter he requested the financial information on which RLL relied to justify the restructure.

[56] Mr Tobin also raised with RLL his concern that he had not been paid correctly under his IEA. A letter from Ms Sutton dated 17 October 2013 recalculated the amount due to Mr Tobin confirmed that the amounts due to him had been recalculated and confirmed that the adjustment amount of $86.58 would be paid into his account.

[57] The parties attended mediation conducted through Ministry of Business, Innovation and Employment on 7 November 2013 but it was not successful in resolving the issues.

[58] Subsequent to mediation, Mr Tobin engaged the services of a forensic accountant, Ms Tina Payne, to analyse whether or not he had been paid correctly in relation to the commission payments to which he claimed he had been entitled.

Commission payments

[59] Mr Tobin was, in accordance with clause 4 of the Employment Agreement and subsequently the terms of the letter dated 2 July 2012, entitled to commission payments based on the achievement of performance parameters. The parameters from which the commission were to be calculated were set out in Schedules 1 and 3 of the IEA and were agreed annually between the General Manager and Mr Tobin, with the agreed parameters for the next 12 months set out in Variation Letters.

[60] Variation Letters which had been provided to Mr Tobin covering the period from 1 November 2004 to the date of the termination of his employment on 13 October 2013 were all signed as agreed with Mr Tobin.

[61] During the period 2004 to 2009, there were seven Variation Letters, signed by Mr Tobin and Mr Greg Howell, at that time General Manager of RLL. The first Variation Letter was signed on 7 December 2004, and the last on 27 May 2009.

[62] From 2009 onwards until his employment ended, there were four Variation Letters signed by Mr Tobin and Ms Sutton, Mr Howell's successor as General Manager. The first was signed on 7 September 2010 and the last on 26 September 2012.

[63] The Variation Letters set out Mr Tobin's base salary at each date, and the parameters of the commission scheme incentives. The Variation Letters contain a number of acronyms, abbreviations and references, including GM, *Monthly Gross Margin; Monthly companywide gross margin; gross; Monthly company material gross margin; MGM; Monthly MGM.* There are no definitions or consistency of use relating to these terms, they are applied in one form or another to different incentive levels. Each incentive scheme target parameter to be achieved is defined in percentage terms.

[64] Mr Tobin received a salary payment advice each month during his employment with RLL which itemised the incentive scheme payment. He also was provided with monthly sales reports.

Basis of Mr Tobin's claim for unpaid commission

[65] Mr Tobin said that his understanding was that by definition, Gross Margin (GM) includes all costs of each job and that it is not set out in the RLL incentive scheme documentation that any sales or costs would be excluded from the RLL GM calculation, which he claimed is inconsistent with his definition of GM, which takes into account the "*total"* net sales and "*total"* cost of goods sold.

[66] Mr Tobin said that during his employment, RLL never disclosed the precise way in which it calculated GM for use in the incentive scheme, and that in particular, he was never advised that RLL were excluding origination from its calculations of his commission, or that the calculation was based on quoted GM, rather than actual GM.

[67] He agreed that over the course of his employment he had participated in multiple incentive schemes and had negotiated and signed a Variation Letter in agreement to parameters in each new scheme. However he claimed that what he thought he had agreed to were the express terms of the scheme and subsequent parameter variations. His belief had been that he would be paid on the GM percentage which included all of the sales and costs passed to the customer.

[68] Mr Tobin said that whilst he had received a monthly sales report during his employment, this had made no reference to the: "*quoted"* GM or "*excluding origination and freight"*, nor was there anything in the monthly report that suggested that the figures were calculated on the sales labels only.

[69] As a consequence he claimed that his understanding was that he would be paid commissions based on the GM on total sales as opposed to label only sales as the total sales is the only sales figure on the monthly report.

Raising of concerns regarding calculation basis 2009

[70] Mr Tobin said he suspected he had not been paid correctly and first raised his concerns with Mr Howell who referred him to Ms Michelle Allen, Finance Manager, in 2009, some 5 years after he commenced participation in the incentive scheme. He claimed however that he had not been provided with adequate information with which to investigate the calculations himself.

[71] Mr Howell said that he and Mr Tobin had agreed, in writing, to a revised Variation Letter pertinent to Schedule 1 of the IEA annually during the period 2004 to 2009, and Mr Tobin had not questioned the methodology of the incentive scheme until 2009 when he had raised questions on the calculation with Ms Allen.

[72] Ms Allen said that Mr Tobin had questioned her about the GM percentages displayed in the GM% column recorded in the monthly reports, saying that he believed they looked too low. She had explained that origination was included in the invoiced sales column on the report, but it was not included in the Quoted GM dollars only, which did not change.

[73] It had been her belief that Mr Tobin had understood how his incentive commissions were calculated; she also confirmed that the incentive scheme details and or definitions in the schedules were not defined in the IEA.

[74] As a result of Mr Tobin's queries, she had changed the monthly report format, with Mr Howell's agreement, to show the Quoted GM as a percentage of Invoiced Sales excluding Origination.

[75] Ms Allen said this change to the Monthly Report format had no impact on the incentive payments made to Mr Tobin.

[76] Mr Tobin confirmed during the Investigation Meeting that Ms Allen had explained the basis of the commission payment calculations.

[77] Mr Tobin did not raise the issue after 2009 until after his employment had terminated in 2013 although there had been 4 further Variation Letters negotiated and agreed in writing during that period.

Commission Payment investigation post-employment

[78] After the termination of his employment with RLL on 13 October 2013, Mr Tobin engaged Ms Tine Payne, a self-employed Forensic Accountant and Electronic Forensic

Investigator, to investigate whether or not he was owed commission payments by RLL. The exact terms of the engagement were not disclosed to the Authority.

[79] As a consequence of Ms Payne's review of the information provided to her by Mr Tobin of company sales and account information, she questioned how Mr Tobin's commission entitlements had been calculated and the fact that Mr Tobin may have been underpaid for the previous six years.

Ms Payne's Analysis

[80] Ms Payne based her conclusion upon the term Gross Profit (GM) as referred to in Schedules in the Variation Letters as meeting her own definition of GM

[81] Ms Payne said it was her opinion that GM should be defined as the residual profit gained after selling a product and deducting the costs associated with its production and sale. The profit is before deducting overhead, payroll, interest and taxation expenses. Ms Payne stated that this was the generally accepted accounting definition in New Zealand.

[82] Having analysed the monthly reports provided by RLL to Mr Tobin, Ms Payne said that the reports, which did not have formal headings, but had 5 columns headed

- Job
- Customer
- Sales
- Gross Margin
- GM%

[83] The figures in the Sales column are the actual total dollar sale amounts charged to the clients, including origination and freight.

[84] The figures in the GM column are the quoted dollar GM on the production of labels only, excluding origination and freight. Ms Payne said that the figures of Sales and GM recorded in the monthly reports shared no commonality other than the fact that they both relate to a particular job. The GM% column is a calculation resulting in recording the GM figure as a percentage of the Sales figure.

[85] Ms Payne said her view was that the inclusion of the GM% column could be considered misleading to the reader, and that in her opinion the monthly reports provided by RLL to Mr Tobin did not reflect the actual method of calculation of GM used in the calculation of his commissions, but rather could lead the reader, in this case Mr Tobin, to

interpret that he was receiving commission on the GM generated from the total Sales to clients.

[86] Ms Payne said she accepted that it would be difficult for RLL to calculate an actual cost per individual job, however in her opinion, the difficulty of calculating a monthly GM per job did not explain why RLL did not clarify to Mr Tobin that it intended to pay his commissions based on the quoted rather than actual sales and why it excluded origination, freight and other charges from the calculations.

[87] In conclusion Ms Payne said it was her view that the way in which RLL calculated Mr Tobin's incentive, based on quoted GM excluding origination and freight, was inconsistent with her use of the standard definition of GM and the wording of the clause 'incentive 1' relating to 'Monthly GM' contained in Mr Tobin's incentive scheme.

RLL evidence on the incentive scheme rationale and application

(a) Mr Howell

[88] Mr Howell said Mr Tobin had reported directly to him throughout the time he was the General Manager of RLL. During that period he said he had verbally explained the incentive scheme to Mr Tobin.

[89] He had devised the incentive scheme prior to Mr Tobin joining RLL which applied to the company Account Managers, including Mr Tobin, to provide commission payments to the sales personnel with the objective of changing sales behaviour in regard to quoted label pricing.

[90] He explained that there are three parts to the make-up of RLL's sales: origination, labels and freight. Because the origination (before production) and freight (after production) are both based on fixed price rate cards, and are completely outside the control of the Account Managers, they were specifically excluded from the incentive scheme as 'non-qualifying' sales.

[91] Any GM on origination or freight (positive or negative) had always been excluded from the incentive scheme throughout the period of Mr Tobin's employment. These GM aspects continue to be excluded from the commission scheme as 'non-qualifying' sales.

[92] The incentive programme paid a stepping proportion of monthly quoted label GM dollars in a particular month, excluding origination and freight. Each Account Manager received an itemised monthly report of the quoted GM dollar figure of each job invoiced to their clients, calculated on labels only, specifically excluding origination and freight.

[93] He said that since the inception of the incentive programme, in order to protect Account Managers from the actual production costs/losses, RLL had based the label GM incentive only on 'quoted' GM dollars, rather than the 'actual' GM of the job. The rationale for this was that the Account Manager could only influence the label price at the time of quoting, and the incentive programme's intention is to encourage Account Managers to lift the quoted price of labels.

[94] Mr Howell said that RLL did not want the Account Managers penalised for the many things which happen during the production of the actual label job. In addition, RLL did not want to be criticised by the Account Managers for lost commission on any jobs which incur higher costs than anticipated when quoting, therefore the incentive programme intentionally paid out only on the quoted label GM.

(b) Mr Astley

[95] Mr Robert Astley, a director and CFO of Blue Star Group (New Zealand) Limited, and director and CFO of Tiri Group Limited, said that having the quoted cost greater than the actual cost is a common practice especially in larger organisations which quote jobs. He explained that 'Hidden Margin' is the difference between the quoted cost and actual cost and is designed to protect a company's margin from cost overruns and sales representatives' behaviours.

[96] He agreed with Ms Payne's analysis that the generalised formula used to calculate GM is sales minus the cost of goods sold, however there is not a single set of numbers to be applied when determining GM in that there are numerous sets commonly used in a production/manufacturing environment to determine a GM, such as Quoted GM, Budgeted GM, Standard Cost GM, Actual GM and forecasted GM.

(*c) Ms Sutton*

[97] Ms Sutton said that RLL used an alternative method of calculating the Quoted GM calculation for the incentive scheme rather than the general definition referred to by Ms Payne which was used in financial documentation.

[98] Whilst the method used by RLL to calculate the GM was not stated in the IEA, the consistent method of calculation had been used since September 2004, both prior to and after Mr Tobin's employment with RLL by Mr Tobin and 16 other Account Managers. Ms Sutton explained that the GM percentage was not part of Mr Tobin's incentive calculation. Quoted GM dollars are used. GM percentage refers to the relationship between GM and Sales. Quoted GM dollars are profit dollars and Sales cannot be determined from that number in

isolation. The GM percentage is used by Account Managers for job comparison purposes only.

[99] Ms Sutton said that the calculation was fully transparent and was never hidden by RLL management. The Quoted GM dollars number was displayed in *Prism*, the estimating software system used by RLL for quoting, jobbing, invoicing etc., on one line, by job on the same screen that all Account Managers use to manipulate the mark-up percentage applied to get the final sales price.

[100] Ms Sutton said that it would be highly improbable to consider that Mr Tobin had not been aware of this occurring, and that in her opinion, he would have been remiss in his role if he had not considered carrying out the exercise for each customer quote he made, considering it was the only place that such information was available.. She said that Mr Tobin's access to *Prism* meant he had the ability to cross check the report he was given each month for accuracy.

(d) Mr Anthony Wheeler

[101] Mr Anthony Wheeler, previous Technical Manager of RLL, said that quotes were generated by inputting information into *Prism*, generally on a costs basis. Information such as the press used and the cost price of materials is loaded into *Prism* on a costs basis. *Prism* then adds margins onto these costs, which also takes into consideration labour, and overheads. For some materials the cost is inflated before the price is loaded into *Prism* in order to protect margins and increase company profit.

[102] When the cost of a particular item decreases, Mr Wheeler said it is common to remain inputting the cost into *Prism* at the original higher cost, to reap the benefits of the price reduction and increase the margin on that product. As a result, the margin generated in *Prism* is not always a true reflection of the actual GM on products.

[103] Mr Wheeler said it was relatively simple to retrieve the actual costs information by way of the *Prism* system, and that RLL looked at the actual label production costs against the quoted costs regularly in order to ensure the quotes were on track and in excess of actual costs.

(e) Account Managers

[104] During the resumed investigation meeting held on 19 – 21 April 2016, there were 5 RLL Account Managers interviewed, Mr Brent Craven, Mr David Millington, Mr Richard Royston, Mr Deborah Peters, and Ms Catherine Lyons.

[105] All the Account Managers said that they had understood the basis upon which the GM calculation in the incentive scheme was based as being selling price less quoted costs less origination and freight. This had been explained to them by Mr Howell or Ms Sutton, and they had been able to access the information about the actual costs via *Prism*.

[106] They all confirmed that they had no concerns with the incentive scheme or how it was calculated, nor were they aware of any other Account Manager who had any concerns.

Mr Tobin's awareness of the method of calculation

[107] Mr Howell said that Mr Tobin participated in the RLL incentive programme by mutual agreement as a term of the IEA, and that their agreement to each annual review was evidenced in the signed Variation Letters. He said Mr Tobin had never questioned the incentive scheme calculation methodology with him, although he was aware that Mr Tobin had spoken to Ms Allen about the incentive scheme in October 2009.

[108] Mr Tobin had stated that he worked closely with the other Account Managers, and participated in setting the RLL budgets. He was aware that over the years the incentive based commission scheme has been consistently applied. It is well understood by the other Account Managers who confirmed that they never queried the scheme with Mr Tobin.

[109] In addition, Mr Tobin had the opportunity annually to address his remuneration package and the incentive scheme parameters through discussion and negotiation, and did so.

[110] Ms Sutton said that whilst the method of calculating the GM used in the incentive scheme was not defined in the IEA, the calculation had been used since September 2004, both prior to and after Mr Tobin's employment with RLL by him and 16 other Account Managers. She said that Mr Tobin's access to *Prism* meant he had the ability to cross check the report he was given each month for make-up and accuracy.

[111] Ms Sutton said that every time a quote was prepared two reports are generated and provided to the relevant Account Manager: (i) the Quote letter intended for the client, and (ii) the Quote summary. As a consequence, Mr Tobin was made aware every day, and usually several times a day, of the basis of the calculation used by RLL.

[112] Further Mr Tobin was aware of the method of GM calculation both as a result of his discussion with Ms Allen in October 2009, and by his having full access to the sales and cost information requested via *Prism*.

[113] Ms Sutton said that Mr Tobin accepted the method of the GM calculation 6 times when re-negotiating the Schedule 1 Variation Letters during the period of his employment,

and referred to three discussions which she had with Mr Tobin in the period starting 1 October 2012 in which he made requests for changes to the arrangements she had suggested, twice rejecting the offers she had made. In her view Mr Tobin fully understood that basis of calculating his incentive payments.

[114] Mr Wheeler stated that he believed all the Account Managers, including Mr Tobin, were aware that they were paid on quoted GM.

Determination

Was Mr Tobin unjustifiably dismissed by RLL by reason of redundancy?

[115] Mr Tobin was dismissed from his employment with RLL by reason of redundancy. Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as being:

> ***S103A Test of Justification***
>
> *i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
>
> *ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[116] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[117] RLL did not provide financial information in support of its decision to restructure at the meeting held on 23 August 2013. However the rationale for the restructuring proposal was set out in some detail in the letter from Ms Sutton to Mr Tobin and delivered by her at the meeting held on 23 August 2013. No financial information was requested or provided subsequently which I find can be attributed mainly to the fact that the 'without prejudice' exit route was pursued by the parties.

[118] In *Michael Rittson-Thomas T/A Totara Hills Farm v Hamish Davidson*[1] *(Rittson)*, the Chief Judge considered that the Court cannot impose or substitute its business judgment for that of the employer taken at the time, however:

> *[54] … the Court (or the Authority) must determine whether what was done and how it was done, were what a fair and reasonable employer would (now could) have done in all the circumstances at the time. So the standard is not the Court's (or the Authority's) own assessment but rather, its assessment of what a fair and reasonable employer would/could have done and how. Those are separate and distinct standards.*

[119] I therefore examine whether or not the decision to dismiss Mr Tobin by reason of redundancy was one a fair and reasonable employer could have made. In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing pursuant to s.4 of the Act.

[120] The duty of good faith is set out in s.4 of the Act:

> ***s.4 Parties to employment relationship to deal with each other in good faith***
>
> *(1) The parties to an employment relationship specified in subsection (2) –*
>
> *(a) must deal with each other in good faith; and*
>
> *(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything-*
>
> *(i) to mislead or deceive each other, or*
>
> *(ii) that is likely to mislead or deceive each other*
>
> *(1A) The duty of good faith in subsection (1)-*
>
> *…*
>
> *(b) 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*

[1] Unrep [2013] NZEmpC 39 20 March 2013

[121] The Chief Judge in *Simpsons Farms Limited v Aberhart*[2] noted that this compliance with good faith dealing includes consultation "*as the fair and reasonable employer will comply with the law*"

Consultation

[122] The Employment Court in Vice Chancellor of *Massey University v Wrigley*[3] stated[4] that: "T*he purpose of s 4(1A)(c) is to be found in paragraph (ii) which requires the employer to give the employees an opportunity to comment before the decision is made. That opportunity must be real and not limited by the extent of the information made available by the employer".*

[123] The duty of good faith applies to both the employer and the employee in an employment relationship. The duty required RLL to consult meaningfully with Mr Tobin. The letter presented by Ms Sutton during the meeting on 23 August 2013 set out the reasons for the proposed restructuring, and concluded with the statement that: "*Before making any decision I wish to discuss the matter with you and provide you with the opportunity to provide your point of view".*

[124] The meeting held on 23 August 2013 did not discuss Mr Tobin's possible feedback, indeed it would have been unusual for it to have done so since at that stage Mr Tobin had not had an opportunity to consider the proposal.

[125] However I find it is relevant to the issue of good faith that at the time of first meeting on 23 August 2013 with RLL to discuss the restructuring proposal referred to in the letter from Ms Sutton dated 21 August 2013, Mr Tobin had accepted by signing an individual employment agreement an offer of employment with JGL, which employment was due to commence on 14 October 2013.

[126] Whilst there is no obligation, and it is not a breach of good faith, for an employee to explore possibilities for alternative employment whilst still employed, in this case Mr Tobin had actually accepted an offer of employment with JGL.

[127] By accepting an offer of employment with JGL on 22 August 2013 I find that on 23 August 2013, the day of the meeting with Ms Sutton, Mr Tobin was an employee of JGL in

[2] [2006] ERNZ 825
[3] [2010] NZEmpC 37
[4] Ibid at [55]

terms of s.6 (b)(ii) of the Act[5], materially *"a person intending to work",* which is defined in S5 as *"a person who has been offered, and accepted, work as an employee".*

[128] Mr Tobin did not share this information with Ms Sutton or Mr Organ during the meeting held on 23 August 2013.

[129] Moreover I note that Mr Tobin had not provided a signed copy of the individual employment agreement with JGL to the Authority either at the initial investigation meeting held on 27-29 May 2015, nor at the reconvened meeting held on 28 October 2015.

[130] Mr Tobin during the first investigation meeting held on 27 May 2015 said in answer to my questions that he had had discussions with another company about a month before he received the first RLL letter, but at that stage he: "*had not drawn a line".* During cross-examination he stated that he did not obtain a copy of the signed JGL IEA until after the first meeting, which was held on 23 August 2013.

[131] In fact Mr Tobin did not provide a copy of the signed JGL IEA until 17 November 2015. The explanation provided by Mr Tobin at the reconvened Investigation Meeting held on 19 April 2016 for not having done so earlier was that he had not kept a copy of it. The JGL IEA was signed and dated by Mr Tobin on 22 August 2013 and by the employer JGL also on 22 August 2013.

[132] Mr Tobin had signed the JGL IEA below the statement: "*I acknowledge that I have been given a reasonable opportunity to seek advice about this Agreement*"

[133] I find that Mr Tobin must have been aware before the meeting with RLL on 23 August 2013 that he had entered into an unconditional employment relationship with JGL, but he failed to disclose this fact to RLL at the meeting. I find that this was not acting in good faith.

[134] I find Mr Tobin's evidence on this issue to have been disingenuous and misleading.

[135] Moreover I find this circumstance to have influenced the fact that at the first meeting on 23 August 2013, the parties moved very quickly to 'without prejudice' discussions at the suggestion of Mr Tobin's then legal representative, Mr Eketone-Tekanawa.

[136] In particular I find that having entered into an unconditional individual employment agreement with JGL - which specified an agreed commencement date of 14 October 2013 - is significant in light of Mr Tobin via his legal representative initiating an exit strategy which

[5] S.6(b)(ii) ERA 2000: "(b) *includes- (ii) a person intending to work"*

would include a payment of $40,000.00 plus the redundancy entitlements which were in excess of $25,000.00.

[137] If an exit strategy had been accepted, this would have absolved Mr Tobin of the contractual requirement to provide a resignation, and would have ensured him a significant payment in addition to the retention of a redundancy entitlement.

[138] Whilst Mr Tobin said at the Investigation Meeting on 19 April 2016 that he would have preferred to continue in employment with RLL, and would have reneged on the signed contractual individual employment agreement with JGL had he been offered the newly created Sales Manager position, I note and take into consideration that the 'without prejudice' discussions also referenced the fact that Mr Tobin had "*other interests"* to pursue.

[139] The 'without prejudice' basis discussed during the meeting on 23 August 2013 did not result in agreement, and consequently I find that the duty of good faith remained on RLL to continue to consult in a meaningful manner with Mr Tobin. Also I note that it was not until after the restructuring was confirmed by RLL that RRL became aware of Mr Tobin's relationship with JGL.

[140] Mr Tobin had been requested to provide feedback in the letter presented at the meeting held on 23 August 2013. A subsequent meeting had been arranged for 4 September 2013 during the meeting held on 23 August 2013. This was postponed at Mr Sweetman's request, and subsequently took place on 11 September 2013.

[141] The email sent to Mr Sweetman by Mr Organ on 11 September 2013 set out an agenda for the meeting that included: "*Your client's feedback to the proposal",* and: "*all other matters relating to consultation".*

[142] Mr Tobin did not provide any feedback at that meeting, claiming that because he had not received the agenda until the day of the meeting, he had not had sufficient time to prepare his feedback. His evidence was that he also considered that the reference in the agenda items to the contractual restraint clauses indicated to him that RLL had predetermined the issue.

[143] I find there had been ample time provided for Mr Tobin to consider and provide feedback on the proposal: (i) he had been invited to provide feedback during the meeting on 23 August 2013 at which he had legal advice; and (ii) It had been a period in excess of two weeks since the meeting on 23 August 2013 and the meeting on 11 September 2013, during which period Mr Tobin had access to legal advice and could have formulated feedback, but he failed to do so.

[144] Moreover Mr Tobin did not request information in regards to the proposal to restructure, or a proposed job description, nor did he request more time to provide a response.

[145] I find persuasive Mr Tobin's evidence that he had believed the main purpose of meeting was to further the 'without prejudice' discussions. This impetus on his part towards a speedy resolution I find to have been the real reason he had not presented any meaningful feedback other than the one comment made during the meeting on 11 September 2013.

[146] Also, the fact that Mr Tobin had already entered into an unconditional individual employment agreement with JGL, would on the balance of probability indicate that he had no real interest in furthering the consultation process.

[147] During the meeting held on 11 September 2013 Ms Sutton's evidence was that Mr Tobin had been asked on more than one occasion by Mr Organ if he had any feedback to offer. He had made only one comment which she had taken to mean was in reference to the redistribution of his portfolio, but he had not requested more time to provide feedback despite having the opportunity to do so.

[148] I have considered Mr Sweetman's request to: "*keep the clock ticking"*. Whilst Mr Tobin stated in his letter dated 13 September 2013 that he would have: "*liked to have been given the opportunity to discuss with you my suitability for the new role"* I find that RLL had given Mr Tobin the opportunity to provide feedback during the restructuring process, but he had not responded in good faith, concealing the fact that he had, by signing an individual employment agreement on 22 August 2013, accepted alternative employment, and trying to use the opportunity presented by the restructuring proposal to negotiate a financially advantageous exit package.

[149] In response Ms Sutton confirmed in the letter dated 12 September 2013 that RLL had responded to Mr Tobin's expressed understanding of what was being proposed and preferred the matter to be handled quickly: "*as you had other interests and projects on the go".*

Pre-determination

[150] I have considered whether or not RLL had predetermined the outcome of the restructuring process, and I note that during the Investigation Meeting Ms Sutton confirmed under cross-examination that she had presumed Mr Tobin was not interested in the new role, and that it was the opinion both of her and Mr Howell that Mr Tobin was not suitable for the newly created Sales Manager role. With this fact in mind, I proceed to examine the stages of the restructuring process to determine if there was evidence of pre-determination.

[151] It was at the first meeting on 23 August 2013 that the restructuring proposal was first presented to Mr Tobin. I find no evidence of pre-determination in the written proposal.

[152] I accept that there was no job description attached to the proposal, but I note that neither Mr Tobin nor his legal representative requested one, or indeed appeared to evince any interest thereafter in seeing or discussing either a job description or the proposal during the period between 23 August and 11 September 2013 when the second meeting was held.

[153] Ms Sutton's evidence was that no job description had been finalised, or even prepared, at that stage as the proposal was merely a proposal and open for discussion and feedback from Mr Tobin.

[154] I have considered whether or not the inclusion of the reference to the restraint of trade as one of the items for discussion in the meeting on 11 September 2013 indicates pre-determination. I observe that Mr Tobin believed the purpose of the meeting on 11 September 2013 was to further the 'without prejudice' negotiations which would therefore lead to the termination of his employment.

[155] In this context, I do not find that wanting to discuss the: "*Issues relating to the restraint"* indicates pre-determination given the circumstances of (i) Mr Tobin having suggested an exit strategy which would terminate his employment and (ii) the fact that clause 10 of the IEA, Confidentiality, and clause 13 of the IEA, Restraint, required Mr Tobin to continue with those obligations post the termination of the employment agreement.

[156] I also note as relevant the fact that the next item on the agenda was Mr Tobin's feedback to the restructuring proposal.

[157] The opportunity existed for Mr Tobin to fully discuss the proposal, however the first time he raised the fact that he would like to be considered for the new role which was being created was not until after he received confirmation that RLL had decided to proceed with the restructuring and he had been reminded of his ongoing obligations in respect of the confidentiality and restraint provisions in the IEA which clearly had significance for the start date of his new employment at JGL.

[158] Notwithstanding that Mr Tobin had on 23 August 2013 already entered into an unconditional individual employment agreement with JGL, I find that the opportunity existed for Mr Tobin to make his interest in the newly created role clear and to have requested further and detailed information in order to make an informed decision; however he failed to do so.

[159] I find that the situation regarding the unconditional individual employment agreement with JGL influenced Mr Tobin's decision not to express any interest in the newly created role

until after the decision on the restructuring process had been completed and he had been reminded of his contractual obligations regarding the restraint period which had implications for his employment with a competitor company.

[160] I do not find that RLL pre-determined the decision to make Mr Tobin's position redundant.

Redeployment

[161] An employer must consider redeployment options and offer redeployment, if a suitable redeployment opportunity exists[6].

[162] Ms Sutton's evidence was that she had explored the possibility of suitable alternative roles for Mr Tobin within RLL, but there were none available at that time.

[163] The two Account Manager positions mentioned in the restructuring proposal tabled on 23 September 2013 and cited by Mr Tobin as being a viable alternative to his role being made redundant, were not being made redundant as a result of the restructuring proposal and therefore not available.

[164] Having considered all the circumstances regarding whether or not Mr Tobin was unjustifiably dismissed by RLL by reason of redundancy, I determine that the decision to make Mr Tobin's position with RLL redundant did not result in his being unjustifiably dismissed.

Did RLL breach the duty of good faith during the restructuring proposal process?

[165] I do not find that RLL breached the duty of good faith it owed to Mr Tobin during the restructuring process.

[166] I do however observe that the duty of good faith applies to both employers and employees and I find that Mr Tobin was in breach of that duty by not being' *communicative'*[7] during the meetings he had with RLL during the restructuring process, and pursuant to s4(1)(b) of the Act which states:

> *...without limiting paragraph (a), must not, whether directly or indirectly, do anything—*
>
> *(i) to mislead or deceive each other; or or*

[6] *Jinkinson v Oceania Gold* [2010] NZEmpC 102, *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142

[7] S.4 (IA)(b) of the Act

(ii) that is likely to mislead or deceive each other

namely by withholding the fact that he had already become an employee of JGL as a result of entering into an unconditional employment agreement with JGL and consequently pursuing an exit strategy which would ensure that he retained a redundancy payment plus the demanded sum of $40,000.

Is Mr Tobin owed unpaid commission payments for the six year period prior to 13 October 2013?

[167] Mr Tobin commenced employment with Rapid Labels in July 2004, and it is agreed between the parties that the written terms of the IEA which commenced on 17 May 2005 and ceased on 13 October 2013 contained the following clause:

> 5. *<u>Remuneration</u>: The Company will pay the employee an annual salary as per schedule 3.*

Schedule 3, later becoming Schedule 1, sets out the incentive scheme details, the incentive performance parameters are reviewed annually, and amended as a variation to the IEA signed by both RLL and Mr Tobin.

~~[168]~~ The schedules contain a number of acronyms, abbreviations and references, including GM, *Monthly Gross Margin; Monthly company wide gross margin; gross; Monthly company material gross margin; MGM; Monthly MGM.*

[169] There are no definitions or consistency of use relating to the various terms used in the Variation Letters, they are applied in one form or another to different incentive levels.

[170] I find that there is no dispute between the parties that the Schedules and Variation letters were created by Rapid Labels to be an integral part of an employment agreement relating to an incentive scheme for sales personnel**.** They are not financial papers either audited or for general use, but 'in house' documents for use in this case by Mr Tobin, and for other sales personnel and management.

[171] There is no requirement when designing incentive scheme parameters that an employer must follow some standard, or accounting definitions, the parameters will follow what the employer wants to measure in performance terms. However the scheme should be able to be understood by those to whom it applies.

[172] In this case, Mr Tobin alleges that he believed the RLL term GM referred to in the Schedules means the profit on actual material costs bought and sold to complete the jobs, an: " *accounting formulae which measures relationship between total net sales and total cost of goods sold being total net sales minus the total cost of goods."*

[173] RLL has a different view, namely that the term *'Gross Margin'* referred to in the Schedules and Variation Letters refers to a formulae devised by them, which is applied to a set of numbers, and has been used by them since 2004 in the calculation of the sales personnel incentive scheme

[174] This is a case concerning the interpretation and application of a term in an employment agreement.

[175] In *Terson Industries Limited v Loder*[8] (Terson) Judge Shaw stated:

> *[21] In a dispute about the interpretation and operation of an employment agreement, pursuant to s129 of the Act, the Court applies normal contractual principles of interpretation but will also take into account the special features of employment relationships and the statutory regime of the Act.*

[176] In *NZ Amalgamated Engineering, Printing and Manufacturing Union* v *Amcor Packaging (New Zealand) Limited*[9] Judge Ford introduced a summary of the law regarding contract interpretation as follows:[10]

> *The leading authority on contract interpretation in this country is the decision of the Supreme Court in Vector Gas Ltd v Bay of Plenty Energy Ltd That decision related to the construction of a commercial contract but the Court of Appeal in Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc made it clear that the principles of interpretation prescribed in Vector had equal application to employment agreement. The court is required to apply a principled approach to the interpretation of employment agreements and disputes as to meanings must be determined objectively. Vector highlighted the significance of the awareness of context as a necessary ingredient in ascertaining the meaning of contractual words emphasising commercial substance and purpose over semantics and the syntactical analysis of words.*

[177] In *New Zealand Professional Firefighters Union v New Zealand Fore Service Commission*[11] The Employment Court stated:[12]

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[8] [2009] NZEmpC 36
[9] [2011] NZEmpC 135
[10] At [12]

[11] [2011] NZEMPC 149

> *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 valid part of the interpretation exercise for the 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.*

[178] In the Supreme Court decision, *Firm PI 1 Ltd v Zurich Australian Insurance Limited*[13] *(Firm P1),* the Court stated in respect of contractual interpretation:[14]

> *… it is not necessary that we discuss the approach to contractual interpretation in any detail. It is sufficient to say that the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background" it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.*

[179] The starting point is the meaning of the disputed words written in the employment agreement, in this case gross *margin*, and if they are clear and can have only one possible meaning that will determine the dispute.

[180] Neither of the parties referred to a dictionary meaning of the words, and my own search of relevant dictionaries did not produce conclusive evidence that the words could have only one possible meaning, some simply stated *no definition found*, others referred to *gross profit margin*, *standard gross margin*, *budgeted gross margin*, and all appeared to include other variables which required their own definitions.

[181] I do not therefore find that the words *gross margin as* used in the schedules are as such clear and can have only one possible meaning, and therefore I take an objective approach to interpretation in order to ascertain the meaning which the Schedules and Variation Letters would convey to a reasonable person having all the background knowledge which would reasonably have been available to Mr Tobin and RLL at the date of the contract with '*This objective meaning is taken to be that which the parties intended.' (Firm Pl)*

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[12] At [17]
[13] [2014] NZSC 147
[14] at [60]

[182] Mr Tobin was employed subject to the IEA and the letter dated 2 July 2012 both of which provided that Mr Tobin's salary and other benefits would be reviewed annually. The letter dated 2 July 2012 stated that Mr Tobin's employment with RLL would be subject to the same terms and conditions of employment contained in the IEA.

[183] In both the IEA and the letter dated 2 July 2012 Mr Tobin agreed that he had read and understood the terms and conditions of contained in the IEA. Pursuant to clause 19 he confirmed that he had had the opportunity to seek independent advice on the terms and conditions and that RLL had considered and responded to any issues he had raised.

[184] There is no evidence that at the date of the signing of the IEA on 17 May 2005 or at the signing of any of the annually negotiated Variation Letters that Mr Tobin raised any issues relating to the terms and conditions of the incentive scheme. I note that during the period 2005 – 2009 he had received monthly pay slips setting out details of the commission payments.

[185] Mr Tobin raised an issue in relation to the calculation of the incentive scheme in October 2009. Ms Allen said that she had explained the basis of the incentive scheme to Mr Tobin at that time, and it was her belief that he had understood the basis of calculation both before and after her explanation.

[186] Mr Tobin did not raise the issue again until after his employment ended.

[187] However I find that he had at least two clear further opportunities to do so: at the signing of the offer of employment dated 2 July 2012 following the takeover by the Hexagon Group, and when accepting the 3 year variation agreement dated 26 September 2012. In this case Mr Tobin signed a declaration, as part of the July 2012 agreement that he had been advised of his right to seek independent advice, and that RLL had considered and responded to all issues he had raised. There is no evidence that at the date of the signing the letter dated 2 July 2012 that Mr Tobin raised any issues relating to the terms and conditions of the incentive scheme.

[188] In applying the normal contractual principles of interpretation I must also take into account the special features of employment relationships and the statutory regime of the Act. *(Terson)*

[189] Section.63 of the Act requires that employees must be given sufficient information and an adequate opportunity to seek advice before entering into an individual employment agreement, and for the employer to consider any issues raised by the employee.

[190] Mr Tobin confirmed in signing his agreement both to the IEA and the letter dated 2 July 2012 that he had read and understood the terms and conditions of employment, had had the opportunity to seek independent advice, and that RLL had considered and responded to any issues he had raised.

[191] In addition Mr Tobin had the opportunity annually to discuss and negotiate the terms of the Variation Letters, but had raised no issue with Mr Howell or Ms Sutton at the date of signing any of the Variation Letters.

[192] I find in this case that the requirement of complying with the statutory requirements provides an aid to interpretation, because it conveys the fact that RLL was led reasonably to believe that Mr Tobin accepted and understood the meaning that they had attached to clause 4 and the incentive schedules which lead to the basis of calculating his commission payments.

[193] I consider that Mr Tobin, an experienced sales manager and who had interests outside of his employment at RLL, including a farming operation and property development, possessed significant business acumen. Moreover he had had the opportunity to seek legal advice prior to signing the IEA and the letter dated 2 July 2012.

[194] Despite this however, during his 9 years of employment with RLL he accepted the incentive payments without raising an objection until October 2009 - a query relating to percentage figures in the monthly report in 2009, which was answered by Ms Allen – and continued to accept payment of the incentive scheme for a further 4 years without objection.

[195] In *Potter v Air New Zealand Limited*[15] Judge Colgan, as he then was stated:

> *If one party has known of the others performance of the clause and has accepted this or has at least allowed performance of it without challenge for more than a nominal length of time within which time challenge might be expected, this may confirm that this practice was the commonly agreed interpretation of the provision.*

[196] I consider that a 4 year period is more than a nominal length of time, therefore I find it is relevant that Mr Tobin and RLL acted consistently with RLL's interpretation of the incentive schedules, and highly improbable that had Mr Tobin held his alleged current view at

[15] [1999] AC79/99, AEC 130/99, Emp Court 12 October 1999 at pg 16

the time the contract was entered into in 2005, he would not have raised the issue before some 4 years had passed.

[197] In addition I find significant the absence of any queries for a further 4 years as an indication of Mr Tobin's understanding and acceptance of Rapid Labels interpretation of the incentive scheme as at the date of the contract.

[198] Despite this however, during his 9 years of employment with RLL he accepted the incentive payments without raising an objection until October 2009 a query relating to percentage figures in the monthly report in 2009, which was answered by Ms Allen – and continued to accept payment of the incentive scheme for a further 4 years without objection.

[199] The evidence presented by RLL is that during his employment with RLL Mr Tobin was its best sales manager. In that position it is reasonable to assume that he was a good negotiator, and Ms Sutton's evidence was that Mr Tobin was more than capable of expressing his view during the Variation Letter negotiations.

[200] I find that in terms of the approach set out in *Firm PI*, a reasonable person having the background knowledge which would reasonably have been available to the parties at the date of the contract and taking into account:

(i) the fact that the contract was an individual employment agreement subject to Section 63A 2(b)(c)(d) of the Act; and

(ii) as an aid to interpretation the performance of the parties during the term of the employment contract[16] favours RLL whose subsequent conduct from the date of signing the IEA on 17 May 2005 and the letter of 2 July 2012 until the employment agreement came to an end on 13 October 2013 was consistent with their interpretation of the incentive scheme; and

(iii) the fact that Mr Tobin accepted the incentive payments without raising an objection for over 4 years and following a query relating to percentage figures in the monthly report in 2009 – which was answered by Rapid

[16] *Wholesale Distributors v Gibbons Holdings ([2007] NZSC 37) ; Tipping J said (at 59): 'Evidence of subsequent conduct does not invite a subsequent meaning. It is directed to the original meaning; that is, the meaning of the contract when it was signed. It is a distraction to suggest that post-contract evidence is capable of changing the contract date meaning, when its sole purpose is to elucidate that meaning.'*

> Labels - continued to accept payment of the incentive scheme for a further 4 years without objection.

could have reached the view that RLL's interpretation and application of clause 4 and the incentive schedules is correct.

[201] I am supported in this finding by the evidence of the Account Managers to whom the incentive scheme also applied, and who clearly understood the basis of it.

[202] I have considered Ms Payne's evidence and do not consider it helpful in determining the meaning of the incentive clause because it purports to be evidence of Mr Tobin's subjective intention and focuses on Ms Payne's own view in financial terms of the meaning of the disputed words, notwithstanding that there is no claim by either party that the incentive scheme is a financial document – which I have already found it is not.

[203] I find that RLL has not failed to pay Mr Tobin the agreed commission payments from 2007 to 2013.

Costs

[204] A preliminary determination [2014] NZERA Auckland 82 was issued on an admissible issue and strike out application for this matter. In that determination, I have ordered costs were reserved pending a final resolution of this matter.

[205] Both costs are reserved. The parties are encouraged to agree all costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[206] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority