IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 386
5355048

	BETWEEN	GRANT THOMPSON Applicant
	A N D	88 C-FORCE TEXTILE INDUSTRIES LIMITED Respondent

Member of Authority:	Rachel Larmer
Representatives:	Eska Hartdegen, Counsel for Applicant Susan Hornsby-Geluk, Counsel for Respondent
Investigation Meeting:	31 January 2012 and 01 February 2012 at Auckland
Submissions Received:	30 May 2012 from Applicant 14 June 2012 from Respondent 21 June 2012 from Applicant 26 June 2012 from Respondent
Date of Determination:	26 October 2012

DETERMINATION OF THE AUTHORITY

A. Clause 7(a) of Mr Thompson's employment agreement requires his bonus entitlement to be calculated based on total company sales.

B. 88 C-Force Textile Industries Limited (C-Force) has underpaid Mr Thompson his bonus entitlement because since 01 July 2008 it calculated his bonus based on his personal sales only.

C. Mr Thompson is not estopped from recovering his bonus arrears.

D. C Force is ordered to pay Mr Thompson:

(a) $185,144.72 in bonus arrears; and

(b) Holiday pay on his bonus arrears.

E. C-Force has not overpaid Mr Thompson so its counterclaim is dismissed.

Employment relationship problem

[1] Mr Thompson claims C-Force breached his written individual employment agreement because it failed to pay him any bonus payments from 01 July 2008 until his employment ended on 26 October 2011. Mr Thompson claims he is owed $201,751.38 bonus arrears for this period. He seeks bonus arrears, holiday pay on the bonus arrears, and interest.

[2] Mr Thompson alternatively relies on s.129 of the Employment Relations Act 2000 (the Act) to say that a dispute exists regarding the interpretation, application, or operation of clause 7(a) of his employment agreement which sets out his bonus entitlement. C-Force submits Mr Thompson's claim as a dispute, and I agree with that.

[3] Mr Thompson withdrew breach of good faith and penalty claims on the first day of the Authority's investigation meeting.

[4] Mr Thompson's employment agreement and in particular clause 7(a) which contains the bonus provision is silent as to whether Mr Thompson's bonus entitlement is to be based on his own personal sales or on total company sales.

[5] The parties agree that if Mr Thompson's bonus entitlement is based on total company sales then he is owed $172,411.82 for the period 01 July 2008 to 31 March 2011.

[6] There remains a dispute between the parties regarding the amount Mr Thompson is owed for the period 01 April to 26 October 2011. If Mr Thompson's interpretation of clause 7(a) is correct C-Force says his bonus entitlement would be $12,732.90, whilst Mr Thompson claims he is owed $29,339.57 for that period.

[7] The parties agree that if Mr Thompson's bonus entitlement is based on his personal sales only, then he is not entitled to any bonus payments from when his bonus payments stopped on 01 July 2008 until his employment ended on 26 October 2011.

[8] C-Force denies Mr Thompson is entitled to any bonus arrears but also says that even if he is owed unpaid bonuses he is estopped from recovering any bonus arrears that may be due to him.

[9] C-Force counterclaims against Mr Thompson for $266,001.51 being the total bonuses it paid him from 01 July 2005 to 30 July 2008. It claims this amount was incorrectly paid to Mr Thompson because it wrongly calculated his bonus entitlement based on total company sales instead of his personal sales only.

[10] C-Force says Mr Thompson never achieved personal sales over $2 million in any year of his employment so no bonus entitlement arose after 01 July 2005, the date it claims his bonus entitlement changed from total company sales to his personal sales only.

Issues

[11] The following issues require determination:

(a) Is Mr Thompson's bonus entitlement based on his own personal sales or on total company sales? This involves:

(i) Examination of the words used in clause 7(a);

(ii) Consideration of extrinsic evidence;

(iii) Assessment of credibility issues;

(iv) Factual findings.

(b) Has Mr Thompson been paid his full bonus entitlements?

(c) If not, is Mr Thompson estopped from recovering any bonus arrears? In particular:

1. Does Mr Thompson's failure to query the non payment of any bonuses from 01 July 2008 prevent him from recovering any bonus arrears?

2. Did Mr Thompson accept a variation to his bonus structure from 01 July 2008 so that his bonus entitlement applied to his personal sales only?

3. Did Mr Thompson waive his right to recover any bonus arrears?

(d) If not, what is Mr Thompson owed?

(e) Should interest be awarded?

(f) Does C-Force's counterclaim succeed? In particular:

(i) Has Mr Thompson been overpaid bonuses?

(ii) If so, was that by mistake?

(iii) Is C-Force estopped from recovering any bonus overpayments from Mr Thompson?

(iv) If not, what does Mr Thompson owe C-Force?

Is Mr Thompson's bonus entitlement based on his own personal sales or on total company sales?

Examination of the words used in clause 7(a)

[12] The Authority must adopt a principled approach to the interpretation of clause 7(a) in the employment agreement and the dispute as to its meaning must be objectively determined. The starting point involves an examination of the words used by the parties in the employment agreement to ascertain if the meaning of clause 7(a) is clear and unambiguous.

[13] The relevant clauses in the agreement are:

(a) Clause 3 – states: *the effective date of the commencement of this employment will be 1 July 2005*.

(b) Clause 7 (a) – the bonus clause which states[1]:

> *In addition to the salary and entitlements, the employee shall be paid an annual bonus calculated at the rate of 2% of*

[1] This extract is from the fourth paragraph of clause 7(a) in Mr Thompson's IEA.

> *annual gross sales in excess of $2 million, such bonus to be paid monthly in arrears on the 5th day of the month following*

(c) Clause 2 – states that Mr Thompson had been appointed to *the position of Sales and Marketing Manager*.

(d) Clause 24 – states:

> *This agreement and the document specified later in this clause*[2] *constitute the entire agreement between the employer and the employee and supersede all previous representations, negotiations, commitments and communications, both written and oral between the parties.*

[14] I find the words used in clause 7(a) are not clear or unambiguous because they may be read in two different ways. Clause 7(a) fails to expressly state whether Mr Thompson's bonus entitlement is based on his own personal sales or on total company sales.

[15] In order to objectively determine the meaning of clause 7(a) the Authority must ascertain the meaning it would convey to a reasonable person who has the background knowledge which would reasonably have been available to the parties at the time they entered into the agreement. The context of the parties' contractual arrangements therefore becomes a necessary ingredient to be considered.

Consideration of extrinsic evidence

[16] The factual matrix for the Authority to consider when interpreting clause 7(a) includes information which would have affected the way in which the language used would have been understood by a reasonable person. Previous negotiations between the parties and the parties' subjective intentions regarding meaning must be excluded from consideration of the background matrix of the facts[3]. Reasonableness of result is also a relevant consideration[4].

[17] Extrinsic evidence is not relevant if it merely tends to prove the parties' subjective intentions or what they subjectively understood their words to mean. Extrinsic evidence is admissible if it tends to establish a fact or circumstance capable

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2 This refers to the job description, staff handbook and policy documents.

3 They are admissible only in an action for rectification – *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1997] UKHL 28: 1WLR 896 at 912-913; adopted in New Zealand by *Boat Park Ltd v. Hutchinson* [199] 2 NZLR 74 and affirmed by the Supreme Court in *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [2012] NZSC 5.

4 *Dwyer v Air New Zealand Ltd No 2* [1996] 2 ERNZ 435.

of demonstrating objectively what meaning the words used in the bonus clause were intended to bear by the parties.

[18] In accordance with the leading Supreme Court decision in *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [5] in order to objectively determine the meaning the parties intended their words to bear, the Authority may consider extrinsic evidence relevant to that question to ascertain what a reasonable and properly informed third party would consider the parties intended their words to mean[6].

[19] Mr Thompson commenced employment with C-Force as a Sales Manager around the beginning of 1999[7]. C-Force prepared a *to whom it may concern* letter dated 02 March 1999 which purported to be an employment contract between C-Force and Mr Thompson. Mr Thompson signed this letter on 08 March 1999.

[20] The material part of the letter states states:

> *This is to certify that Mr Grant Thompson commences work in C-Force Textiles Limited as a sales manager on 8 March 1999. His basic annual salary is $30,000 gross PLUS a sales commission of 1% which under our agreement will only be paid* ***when the annual sales is over $2m.*** (emphasis added)

[21] From March 1999 until 31 May 2001 Mr Thompson was paid his bonus entitlement based on total company sales. I therefore find the parties, and in particular C-Force as the author of the letter, used the words *annual sales* when they intended to refer to "total annual company sales".

[22] On 01 June 2001 Mr Thompson was appointed General Manager. His salary was increased to $60,000 per annum and he was given the use of a mobile phone and car. Mr Zhang, Managing Director of C-Force, agrees Mr Thompson's bonus entitlement of 1% continued to be based on total company sales.

[23] Mr Zhang told me the total company sales threshold figure was set at $2m to reflect that the company was already achieving $2m sales per annum via its two distributors, which had nothing to do with Mr Thompson or his efforts.

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5 [2010] NZSC 5, Tipping J at [19].

6 *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [2010] NZSC 5, Tipping J at [19]

7 Neither party was sure of the exact date but Mr Zhang believes Mr Thompson was employed 6-8 weeks before the letter dated 02 March 1999 (the purported employment contract) between C-Force and Mr Thompson was provided.

[24] Over the period 2001 to 2005 four or five sales representatives came and went from the company.[8] Mr Thompson's bonus entitlement continued to be calculated based on total company sales, despite the fact that at various times from 2001 until 2005 C-Force employed other sales representatives whose personal sales contributed to the total company sales.

[25] Mr Zhang acknowledged Mr Thompson received the benefit of the sales generated by other sales staff without being required to do anything to contribute to these sales.

[26] This history shows that C-Force was happy to financially reward Mr Thompson via his bonus structure for sales he had nothing to do with. I consider that a reasonable person with this background knowledge would expect any change to this practice, which had been in place since March 1999, to be expressly recorded.

[27] Mr Zhang told me that in 2005 C-Force's total company sales were approximately $2.5m per annum which was made up of $2m sales by two external distributors who between them covered the area south of Taupo and $0.5m of sales generated by Mr Thompson in the region north of Taupo.

[28] Mr Zhang's evidence was that he expected the sales from the two distributors to increase and he acknowledged to me his understanding that Mr Thompson would obtain the financial benefit of the increase in sales the two distributors achieved because his bonus entitlement was calculated on total company sales.

[29] In 2005 Mr Thompson's remuneration was renegotiated. The circumstances of that are in dispute but I consider the following matters are not disputed: the parties agreed to enter into a written employment agreement; Mr Thompson's base salary increased to $130,000; his title changed from General Manager to Sales and Marketing Manager; and his bonus entitlement was increased from 1% to 2% of sales.

[30] There is obviously a dispute about whether the 2% bonus entitlement continued to apply to total company sales or whether it was to be restricted to Mr Thompson's personal sales only.

Assessment of credibility issues

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[8] The parties were unable to provide specific names and dates of employment for these employees.

[31] The written employment agreement entered into by the parties was prepared by Mr Thompson's solicitor, and he paid for the cost of that. Mr Thompson signed the agreement on 10 May 2005 and Mr Zhang signed it on 10 August 2005. Mr Thompson says Mr Zhang had the agreement for three months before he signed it. Mr Zhang denies that and says he signed it the same day Mr Thompson presented it to him.

[32] I prefer Mr Thompson's evidence that he gave the agreement to Mr Zhang immediately after he signed it because he was so anxious to get a written agreement in place that he paid for it himself. I consider it unlikely having demonstrated such a sense of urgency regarding the preparation of the agreement that he would have held on to it for three months. I therefore consider it more likely Mr Zhang held on to the agreement for three months before he signed it.

[33] Mr Zhang says he did not read the employment agreement before signing it, he did not take advice on the provisions of the agreement, nor did not check it against the previous bonus provision[9] because he trusted it properly covered the matters the parties had agreed. I find that surprising in light of Mr Zhang's evidence he believed it recorded a significant change in the company's favour to Mr Thompson's bonus entitlement, especially when Mr Zhang had not been involved in any way with the drafting of the agreement.

[34] Mr Thompson was paid his bonus entitlement for the period 01 July 2005 to 30 June 2008 based on total company sales. Mr Zhang says he did not know that was occurring because he was not involved in processing or checking Mr Thompson's bonus payments because Mr Thompson calculated his bonus entitlement then passed the figures on to Ms Norma McKeown, the Office Manager to check and pay.[10]

[35] I do not accept Mr Zhang's evidence that he did not know Mr Thompson was being paid his bonus entitlement based on total company sales from 01 July 2005 until 01 July 2008 because that was contradicted by Mr Stuart Reeves, whose evidence I have preferred on the balance of probabilities.

[36] Mr Reeves, is a qualified accountant who worked with C-Force for eight or nine years, initially on a consultancy basis then from April 2008 in a full time position

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9 Contained in the 02 March 1999 letter.

10 Ms McKeown worked for C-Force from 2000 to 2008.

as General Manager.[11] Mr Reeves told me part of his role was to maximise the company's profits and cut costs so he identified to Mr Zhang that Mr Thompson's bonus payment based on total company sales was a substantial ongoing cost to the company.

[37] There is a substantial conflict in the evidence of Mr Reeves and Mr Zhang. Mr Reeves says Mr Zhang authorised him to design a new bonus structure with a view to reducing the cost of Mr Thompson's bonus entitlements and with the aim of bringing the other sales representatives on to a commission based remuneration package.

[38] Mr Reeves produced a document which he says he prepared in June 2008 which proposed a new bonus structure for the year ending 31 March 2009. This document clearly records that Mr Thompson was already receiving 2% of total company sales and that the company wanted to change that.

[39] Mr Reeves says he discussed the proposed new bonus structure with Mr Zhang who told him to discuss it with Mr Thompson. Mr Reeves raised it with Mr Thompson who responded that Mr Zhang had to discuss any changes with him directly. Mr Reeves says he conveyed that to Mr Zhang.

[40] Mr Zhang denies everything Mr Reeves told me. Mr Zhang says Mr Reeves told him Mr Thompson had been overpaid because his bonus payments did not match what he and Mr Zhang had discussed. Mr Zhang says he told Mr Reeves to *remedy the mistake in the current* [bonus] *structure* and that when he did not hear anything further he *assumed the problem had been rectified.*

[41] This conflict is to be resolved on the balance of probabilities. On that basis I prefer Mr Reeves' evidence because:

(a) Mr Reeves' evidence had a ring of credibility that was missing from Mr Zhang's evidence. It also corroborated Mr Thompson's evidence. Mr Zhang's evidence contradicted all material aspects of Mr Thompson's and Mr Reeves' evidence;

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[11] Mr Zhang denied Mr Reeves was employed as the General Manager. I have preferred on the balance of probabilities Mr Reeves' evidence he was because Mr Zhang was aware that Mr Reeves had business cards which identified him as the General Manager and did not take any steps to address that.

(b) I consider it likely Mr Reeves did prepare a proposed new bonus structure. It was something Mr Zhang was concerned about because he told me he believed other sales staff had left C-Force because Mr Thompson was receiving commission on their sales;

(c) It is unlikely Mr Reeves would prepare something as controversial as a proposed new bonus structure which reduced Mr Thompson's bonus entitlement without Mr Zhang's prior authorisation;

(d) It is likely Mr Reeves showed Mr Zhang the proposed new bonus structure and discussed it with him because the matter could not have proceeded without his express prior approval;

(e) It is unlikely Mr Reeves would have embarked on a discussion with Mr Thompson about such a sensitive issue as changing his longstanding bonus structure without Mr Zhang's express approval given the close relationship at that time between Mr Thompson and Mr Zhang;

(f) It is unlikely Mr Reeves would have told Mr Zhang that Mr Thompson's bonus payments were a mistake when he identified in the proposed new bonus structure the very arrangement Mr Zhang claims he said was a mistake;

(g) It is unlikely a very experienced businessman like Mr Zhang would not have investigated the amount of alleged bonus overpayments if Mr Reeves had told him Mr Thompson had been overpaid, particularly in circumstances where C-Force was wanting to reduce its costs;

(h) I consider it unlikely Mr Zhang, if he believed Mr Thompson had been overpaid three years of bonus payments by mistake, would not have personally raised that concern with Mr Thompson, particularly in light of their long work history and close relationship;

(i) It is unlikely an employer would not take any steps to, address the issue of repayment with an employee who had been overpaid in excess of $266,000. If Mr Zhang's evidence that he did not intend to recover

that amount from Mr Thompson is correct then it was surprising he did discuss that with Mr Thompson;

(j) If Mr Zhang believed it was up to Mr Reeves to *fix* the issue then it was surprising he did not take even cursory steps to find out how and when Mr Reeves had apparently *fixed the mistake*;

(k) It is unlikely an experienced business owner like Mr Zhang would not have identified from the financial statements and accounts over the relevant three year period that Mr Thompson had been paid in excess $266,000 in bonuses, particularly when the bonus payments were separately identified expense items and Mr Thompson was the only employee who received bonus payments;

(l) If Mr Zhang genuinely believed Mr Thompson was only entitled to bonuses on his personal sales then he should have easily identified that the amount of bonus being paid to Mr Thompson was substantially higher than expected had it been based on personal sales only.

[42] Mr Thompson admits he knew his bonus payments stopped in July 2008 but says he did not take action because he was concerned if he raised it with Mr Zhang he would lose his job. He says he viewed his unpaid bonuses as a nest egg which was accruing to him throughout his employment. Mr Thompson said it was not until he was made redundant that he decided to pursue his alleged unpaid bonus entitlements.

Factual findings

[43] I consider that clause 7(a) of Mr Thompson's employment agreement requires his bonus entitlement to be calculated based on total company sales. The decisive factor is that clause 7(a) in the 2005 employment agreement did not specifically restrict the bonus entitlement to Mr Thompson's personal sales only.

[44] I consider that a reasonable person with the background knowledge of the parties would have expressly recorded such a fundamental change to the manner in which Mr Thompson's bonus entitlement was to be calculated.

[45] I consider the parties' failure to make this express change when amending the bonus structure would lead a reasonable and properly informed third party to conclude

the parties intended the only change to be an increase in the bonus percentage from 1% to 2% and that no changes were intended to be made to their usual practice of calculating Mr Thompson's bonus entitlement based on total company sales.

[46] If Mr Zhang's evidence was correct, and the remuneration changes were intended to restrict Mr Thompson's bonus entitlement to his own personal sales, then it was surprising he failed to check that the new contractual terms entered into by the parties reflected that. However, if the sole change was to the bonus percentage that would make his failure more readily understandable on the basis that he did not consider the change significant enough to review the agreement before he signed it.

[47] Another key factor in my interpretation of clause 7(a) is that the 02 March 1999 bonus structure stated that bonus was payable *when the annual sales is over 2 million.* Mr Zhang agreed those words were used by him to refer to total company sales. I therefore consider that a reasonable and properly informed third party would consider that the parties would have used different words from those in the March 1999 letter if they mutually intended the words *annual gross sales* (the words used in clause 7(a)) to mean something other than "total company sales".

[48] I do not accept C-Force's submission that it would not make sense for it to base Mr Thompson's bonus payments on a percentage of total company sales, over which he had no involvement, rather than his personal sales because that is in fact exactly what it had been doing since it first entered into a bonus structure with Mr Thompson.

[49] I find that:

(a) C-Force entered into a bonus structure with Mr Thompson in the full knowledge that the first $2 million of sales were attributed solely to two distributors and that he got the benefit of the distributors' sales without having any input towards their sales;

(b) From at least 2005, Mr Zhang knew sales from these two distributors would be increasing and that Mr Thompson would obtain financial benefits from those increased sales but he did not take steps to address that;

(c) From 2001 to 2005 Mr Thompson received the financial benefit of sales generated, without any input from him, by other sales representatives. Mr Zhang was aware of and had accepted that was the case;

(d) From 2005 to 2008 C-Force paid Mr Thompson substantial bonuses in excess of $266,000 which it must have known were based on total company sales because if it was based on his personal sales only he would not have received any bonus payments.

[50] This factual background indicates C-Force was happy for Mr Thompson to receive the financial benefit of sales he had not personally generated.

[51] I therefore do not accept C-Force's submission that interpreting the bonus clause in this particular case to apply to total company sales *flouts business commonsense*, because it is exactly the arrangement that C-Force elected to operate from March 1999 to July 2008.

Has Mr Thompson been paid his full bonus entitlements?

[52] The parties agree if Mr Thompson's bonus is based on total company sales:

(a) He received his full bonus entitlements from 01 June 2005 to 30 June 2008, so there is no bonus arrears for this period;

(b) He was not paid any bonuses from 01 July 2008 to 31 March 2011, so is entitled to bonus arrears of $172,411.82 for this period.

[53] Mr Thompson claims he is entitled to a pro rata bonus so he believes his bonus entitlement for the period 01 April to 26 October 2011 is $29,339.56. C-Force says he is not entitled to a pro rata bonus which means his bonus entitlement for that period is $12,732.90.

[54] Mr Thompson bases his pro rata bonus entitlement calculation on the amount of total company sales each month and he has treated each month as a separate entitlement. Under that approach Mr Thompson calculates his bonus entitlement based on monthly sales in excess of $166,666.67 (being the annual $2m target divided by 12 months) for each separate month from April to October 2011.

[55] C-Force says Mr Thompson's interpretation requires the Authority to read the following words into clause 7(a) that are not already there, namely: *should a full year not be completed by the employee then the bonus entitlement will be calculated based on sales in excess of $166,666.67 in each month*. C-Force says that would ignore the specific wording of the agreement which provides for an annual and not monthly bonus entitlement.

[56] C-Force says Mr Thompson is not due a part-year bonus because his bonus is only payable on sales in excess of $2m calculated over the entire 12 month period. Its position is that Mr Thompson's interpretation regarding a pro rata bonus entitlement for a part year is inconsistent with the plain wording of his employment agreement which expressly states the bonus is to be calculated based on annual sales. It refers to the use of what it says are the key terms *annual bonus* and *annual gross sales* in support of this submission.

[57] C-Force acknowledges the bonus was paid out on a monthly basis, but says that was solely a matter of convenience and such arrangement did not create a further contractual obligation to pay a bonus based on monthly results.

[58] C-Force submits Mr Thompson's interpretation fails to take into account that the company sales may not reach $2m in any one year. It says Mr Thompson's pro rata interpretation of his bonus entitlement means he would receive bonus payments for any months in which company sales exceeded $166,666.67 even though the total company sales over the relevant 12 month period may not reach the $2m threshold which clause 7(a) specified.

[59] C-Force submits that in order to calculate Mr Thompson's bonus entitlement for the period 01 April to 26 October 2011 the amount of $2m must be deducted from the total company sales figure over the period April-October 2011 before the bonus is calculated. It says that would leave $636,645.11 on which the 2% bonus is to be calculated, giving a bonus entitlement for that period of $12,732.90.

[60] I do not accept Mr Thompson's submission that he was entitled to 2% bonus to be paid on a monthly pro rata basis. This is not in accordance with the words used in the bonus clause.

[61] Clause 7(a) does not provide for his bonus to be paid on a pro rata basis. It clearly states that it is an *annual bonus* which must be calculated based on the *annual*

gross sales in excess of $2m. This means that if the company did not exceed $2m of sales for the 2011 financial year then Mr Thompson is not entitled to any bonus payment in that year.

[62] Although C-Force's practice was to pay Mr Thompson monthly based on the sales achieved for the preceding month, as per the arrangement recorded in the bonus clause, I do not find that changed his overall bonus entitlement by lowering the total sales that needed to be achieved before he became entitled to a bonus.

[63] I prefer C-Force's approach, whereby the company has to first achieve total sales of $2m then Mr Thompson becomes entitled to 2% of excess sales over that threshold amount. I therefore find that Mr Thompson's bonus arrears for the period 01 April 2011 to 26 October 2011 is $12,732.90.

Is Mr Thompson estopped from recovering any bonus arrears?

Does Mr Thompson's failure to query the non payment of any bonuses from 01 July 2008 prevent him from recovering any bonus arrears?

[64] C-Force submits Mr Thompson is estopped from claiming bonus payments from July 2008 until his employment ended on 26 October 2011 because he failed to raise a query about the non-payment of his bonus at the time that occurred. C-Force says it would be inequitable to allow him to obtain bonus arrears given the period of silence which it claims led it to believe Mr Thompson knew he was not entitled to any bonus payments.

[65] For such an estoppel to occur, there must generally be a clear promise or representation, although it does not need to be express[12]. C-Force says that Mr Thompson's failure to raise an issue regarding the non-payment of bonus entitlements from July 2008 raised an implied promise on his behalf not to pursue the amount sought.

[66] I do not accept that submission. Acquiescence may be a form of estoppel provided that the conduct which is said to amount to acquiescence has involved a

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12 Chitty on Contracts, Vol 1, Sweet & Maxwell, London 2004, 3-088.

detriment producing alteration of position in reliance on it, which would usually take the form of expenditure of money or effort or both[13].

[67] I find that there was no evidence produced by C-Force to establish that it had acted to its detriment in reliance upon assurances given by Mr Thompson, quite simply because he did not give any actual or implied assurances.

[68] For there to be an estoppel that would cause the Authority to restrain or prevent Mr Thompson from pursuing his contractual entitlements, C-Force would need to produce evidence to show it acted to its detriment by relying on some assurance or undertaking given by Mr Thompson[14]. That did not occur.

[69] Passive acquiescence or silence in the face of C-Force's failure to pay Mr Thompson the bonus he considered he was entitled to under his employment agreement is insufficient to establish the evidence required to support a proprietary estoppel claim.

[70] C-Force submits that Mr Thompson was subject to the statutory duty pursuant to s.4 of the Act to act in good faith towards it, which included an obligation for him to be *responsive and communicative.* C-Force submits that imposed a *duty to speak* on Mr Thompson of the type referred to in Chitty.

[71] C-Force argues that by failing to exercise his legal duty to speak, Mr Thompson is estopped from pursuing a claim for bonus arrears on the basis his silence since July 2008 amounts to acceptance of the change to his bonus entitlements.

[72] I do not accept that Mr Thompson's failure to pursue his bonus arrears claim until after his employment ended estoppes him from pursuing it now his employment has ended. Mr Thompson has six years within which to pursue his claim. I consider it was within his rights to decide at what point he wished to do so.

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13 *New Zealand Building Trades Union v. Ebert Bros Construction Ltd* [1991] 3 ERNZ 1004 which refers to the Court of Appeal decision in *Wellington City Corporation v. Rodd* [1919] NZLR 595 and a text by Spencer Bower & Turner on Estoppel by Representation (3rd ed) pp.284-5.

14 *Graham v. Crestline Pty Ltd* (unreported) AC53/06, Colgan CJ, 15 September 2006.

Did Mr Thompson accept a variation to his bonus structure from 01 July 2008 so that his bonus entitlement applied to his personal sales only?

[73] As an alternative to the estoppel claim, C-Force argues that it varied the terms of the employment agreement as it related to bonus entitlements in July 2008 when it ceased to pay any bonuses to Mr Thompson. C-Force acknowledges that according to Chitty on Contract[15] *mere inactivity is generally not sufficient* to amount to an acceptance of an offer unless there are:

> *[…] special circumstances that give rise to a "duty to speak", and in which it would be unconscionable for the party under that duty to deny that a contract had come into existence.*

[74] I do not accept C-Force's submission that Mr Thompson's silence in response to its failure to pay him any bonuses from July 2008 gives rise to an estoppel because I do not deem him to have accepted the alleged significant variation by inaction.

Did Mr Thompson waive his right to recover any bonus arrears?

[75] C-Force submits that by failing to raise an issue regarding the cessation of his bonus payments in July 2008 Mr Thompson has waived his right to do so. I do not accept that. A contractual entitlement should be specifically or expressly waived and there was no evidence that Mr Thompson did that. The failure to assert a legal right which has not yet expired does not, in my view, give rise to such a waiver.

What is Mr Thompson owed?

[76] I find that C-Force owes Mr Thompson unpaid bonus entitlements of $185,144.72[16]. Mr Thompson is also entitled to receive holiday pay, to be calculated in accordance with the applicable rates in the Holidays Act 2003, on his unpaid bonus entitlements.

[77] The parties have not provided the Authority with any information about Mr Thompson's holiday entitlements, so no order can be made in respect of that aspect of his claim. It is up to the parties to calculate his holiday pay entitlement, with leave being reserved to revert to the Authority to fix that amount if agreement

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15 Chitty on Contract Vol 1, Sweet & Maxwell, London, 2004, 3-088

16 $172,411.82 for the period 1 July 2008-31 March 2011 plus $12,732.90 for the period 01 April-26 October 2011.

has not been reached on the quantum of holiday pay within 28 days of this determination.

[78] C-Force is ordered to pay Mr Thompson bonus arrears of $185,144.72 together with holiday pay on that amount.

Should interest be awarded?

[79] The Authority has the discretion to award interest pursuant to clause 11 of Schedule 2 of the Act if it thinks fit to do so pursuant to the rate prescribed in s.87(3) of the Judicature Act 1908.

[80] I decline to award Mr Thompson any interest on the amounts he is owed because I do not consider it would be equitable to do so. Mr Thompson was aware, at least from July 2008, he had an entitlement to unpaid bonus but he did not raise that until after his employment ended in October 2011.

[81] Mr Thompson said he viewed his unpaid bonus entitlement as an accruing nest egg. I consider it would be unconscionable for C-Force to be required to pay interest on the amount due when its view at the time was that it had no liability to pay it. If Mr Thompson had wanted the benefit of this money, then it was open to him to have brought his claim earlier. He should also have put C-Force on notice that he considered that he had an accruing entitlement which he intended to recover in due course.

[82] I do not consider it just to award interest in respect of the bonus or holiday pay entitlements which Mr Thompson is owed. If Mr Thompson had elected to raise his concern about unpaid bonus payments with C-Force promptly in 2008, then the issue of interest may not have even been relevant.

[83] Instead Mr Thompson elected to keep quiet about the issue, which I consider was contrary to his s.4 obligation of good faith and in particular the requirement to be responsive and communicative. To award interest in these circumstances would be to reward Mr Thompson for his bad faith behaviour, which I decline to do.

Does C-Force's counterclaim succeed?

[84] Clause 7(a) of the employment agreement requires Mr Thompson's bonus entitlements to be calculated on total company sales. That means he was not overpaid

bonuses over the period 01 June 2005 to 30 June 2008, so C Force's counterclaim can not succeed.

Costs

[85] The parties are encouraged to resolve costs by agreement. If that is not possible, then Mr Thompson has 14 days within which to file costs memorandum, C-Force had 14 days within which to file its costs memorandum, with Mr Thompson having 7 days to respond.

[86] In order to assist the parties to resolve costs by agreement, the Authority can indicate it is likely to adopt its usual notional daily tariff based approach to awarding costs. The current notional daily tariff is $3,500, which will then be adjusted to reflect the particular circumstances of this case. The Authority would therefore be assisted if the parties address in their costs memoranda (should that become necessary) factors which they say should result in an adjustment to the notional daily tariff.

Rachel Larmer
Member of the Employment Relations Authority