

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2014] NZEmpC 173
CRC 12/14**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN LUND SOUTH LIMITED
 Plaintiff

AND DAVID MOWATT LOW
 Defendant

Hearing: 1-2 September 2014
 (heard at Dunedin)

Appearances: R Tomkinson, counsel for the plaintiff
 J Farrow and M Hayes, counsel for the defendant

Judgment: 18 September 2014

JUDGMENT OF JUDGE B A CORKILL

Background

[1] On 7 May 2014 the plaintiff lodged a de novo challenge to a determination of the Employment Relations Authority (the Authority) on a preliminary issue.¹ The context is a claim by the defendant that he was entitled to a bonus, subject to relevant conditions being satisfied, for the period 1 August 2003 until 7 September 2010. The plaintiff claimed that the defendant's bonus entitlement ceased on 30 September 2008. The preliminary issue therefore related to whether that entitlement continued for the period 1 October 2008 to 7 September 2010.

¹ *Low v Lund South Ltd* [2014] NZERA Christchurch 57.

[2] The Authority determined that the defendant ceased to be in the employment of the plaintiff with effect from 7 September 2010 and that his bonus entitlements continued until that date.²

Factual background

[3] Mr Low commenced working for Lund South Limited (LSL) on 1 August 2003 as Dunedin Manager. LSL is a commercial and industrial building company, providing construction, property development and project management services in Otago. Mr Low's superior was Mr R Lund, Managing Director of the company.

[4] According to a fax sent by Mr Lund to Mr Low prior to his employment, as Manager he would be responsible for:

- Overall performance of the company in Dunedin.
- Obtaining forward work in Dunedin.
- Overall supervision of Dunedin site staff.
- Supervision of Dunedin office staff.
- Hiring staff and apprentices.
- Administration, which was approving and signing subcontract payments; and reviewing and approving weekly wages.
- Administering plant and equipment requirements, including the undertaking of major plant purchases jointly with Mr Lund.

[5] The foregoing description was not specifically incorporated in the employment agreement subsequently signed by the parties on 10 July 2003. The agreement, did however, include the following special conditions:

- a) To manage the company so that opportunities are maximised, market share enhanced and relationships nurtured, all undertaken thoroughly in

² At [34].

accordance with good practice, and in the long-term interests of the company.

- b) The employee shall have full autonomy to pay creditors and sign cheques and payments as they fall due.

[6] Also included in the agreement were provisions as to remuneration. In addition to an annual salary, there was a bonus provision as follows:

Bonus of 8% of any profit on the Company's Dunedin contracts after recouping prior losses (excluding contracts current the Commencement Date)

Bonus of 15% as above on contracts handled from inception.

[7] The parties appear to have regarded the letter sent to Mr Low prior to the signing of the employment agreement as constituting the job description; I find it is an accurate reflection of the role he in fact undertook from the outset of his employment.

[8] Between 2003 and early 2009, Mr Lund focused on establishing and managing projects in Central Otago, particularly in Queenstown; he was also engaged in other business activities. He estimated that up to 10 per cent of his time was spent on work relating to the Dunedin operation.

[9] Mr Lund stated that by early 2007 he was concerned as to apparent shortcomings on the part of Mr Low; one particular reservation related to concerns about a significant redevelopment project which was undertaken in 2004 to 2005, where there were issues over certain remedial costs. Mr Lund says that as a result of these issues he became more involved in Dunedin contracts.

[10] In March 2008, the directors of LSL discussed Mr Low's role. Following the discussion, the Business Manager, Ms M Bryant (who was also a Director at the time), amended Mr Low's details in the LSL payroll system from "estimator/manager" to "estimator/tender manager". However, this was not undertaken with either the knowledge or agreement of Mr Low, and is of no assistance with regard to the issues which the Court must resolve.

[11] In May 2008, Mr S McLauchlan, a Dunedin Chartered Accountant, was appointed a Director of LSL; soon thereafter Ms Bryant ceased to be a Director. At about this time a meeting was held between the directors and Mr Low, the purpose of which was to introduce Mr Low to Mr McLauchlan. On the basis of an entry in Mr McLauchlan's diary, I find it is probable that this meeting took place on 30 May 2008.

[12] An important meeting took place between the parties in September 2008. The meeting was held at a café at the Southern Cross Hotel. Mr Lund and Mr McLauchlan called the meeting, because they considered there were performance issues relating to Mr Low which needed to be discussed away from company premises.

[13] It is common ground that there was a discussion as to the possibility that Mr Low would step down from his Dunedin Manager role and become a Senior Estimator/Quantity Surveyor, and that aspects of his remuneration package would be changed. The parties did not have a common recollection, however, as to the specifics of these details, since no record was made of the meeting. It will be necessary to discuss the details as to what was discussed later in this decision.

[14] In late 2009 and early 2010, Mr Lund became concerned about issues relating to Mr Low's behaviour, attitude and statements he had made to staff and others which he considered disloyal. These were discussed with Mr Low in late 2009, and during the first half of 2010. Mr Low accepts that he was suffering from personal issues through this period, which affected him. It is unnecessary to discuss those matters further, except to record that they are in part an explanation as to why neither party appeared to have taken any steps during 2010 to advance the discussions which had occurred regarding Mr Low's role in September 2008.

[15] On 18 March 2010, Mr Lund sent Mr Low a document entitled "Management". It commenced by stating that he and Mr McLauchlan wanted Mr Low to take responsibility for a number of tasks. They included:

- a) A strategy and plan for 2010 and 2011. This included managing specific and targeted projects, staff development, and technical staff training.
- b) Job costs, monthly meetings and reporting. Mr Lund emphasised that Mr Low needed to “lead by example” on the criteria which he outlined.
- c) Active supervision of project managers and foreman, particularly with regard to work on site.
- d) Licensed building practitioner requirements needed to be outlined for project managers and foremen; Mr Low was also asked to take on responsibilities for the company website.
- e) Mr Lund then stated:

Remuneration:

We acknowledge that since our last meeting with [Mr McLaughlan] some 18 months ago, that I have been remiss in acting on providing a restructured package, and that you did discuss this with me at Christmas. I confirm that the agreed restructured package will be backdated to the original meeting as we originally discussed. [Mr McLaughlan] and I undertake to have this done and on the table for discussion by April 15.

[16] It will be necessary to comment on this document later in this decision.

[17] In late May 2010, Mr Low was enrolled by the company in a Performance Edge course with a significant leadership management provider, LMA, which was scheduled to commence in July 2010. He did not in fact attend that course, although a colleague did. He eventually did so in 2011. The significance of this is that Mr Lund stated that the purpose of sending Mr Low on the course was on the basis that if he displayed an improved attitude and management skills, he could be returned to the position of Dunedin Manager; Mr Low said that at the time he was enrolled in the course he was still the Dunedin Manger. He also stated that he was initially enthusiastic about attending the course when booked in to do so, but that Mr Lund decided to send the colleague to avoid a potential conflict of interest issue. The main point is that Mr Low did not attend the Performance Edge course until 2011.

[18] Mr Lund said that following these events he realised there was a need to formalise what had been agreed in September 2008. Because of Mr Low's personal issues, he felt that he needed to conduct this in a sensitive way and that the fairest approach was to change Mr Low's role by way of "a restructure". He adopted the format of a letter which he had used in a previous redundancy situation. It was dated 7 September 2010. The letter covered a range of matters.

[19] It referred to:

- A possible redundancy, and the fact that LSL had held off making changes for as long as possible.
- Organisation charts that showed both a current structure (including Mr Low's current position of "Manager") and a proposed structure (with this position removed and replaced by "Senior Estimator & Project Manager").
- An explanation to the effect that the proposed restructure arose because Mr Lund wished to take a more active role, and would resolve a gap left by another employee who wished to reduce his working hours.
- An indication that Mr Lund wished to meet with Mr Low and hear any thoughts or suggestions he had as to the proposed restructure; it was emphasised that no decision had been made. To that end there was to be a further meeting a few days later.

[20] At a meeting – held on or about 7 September 2010 – Mr Low was presented with the letter by Mr Lund and Mr McLauchlan. Mr Low understood that he could either accept the Senior Estimator and Project Manager position which was being offered or he would become redundant. He understood that he would be on the same remuneration package as had been the case when he was Manager, but that he would not be entitled to any bonus payment. He felt it was a "take it or leave it proposition". He accordingly advised that he would accept the role being offered. He understood the effect of doing so was to bring his former position and the bonus arrangement to an end.

[21] On 17 September 2010, the Office Manager forwarded to Mr McLauchlan a draft individual employment agreement for Mr Low. It referred to Mr Low's role as now being "Senior Estimator"; it contained no description of responsibilities, remuneration details or start date although the document itself bore the date 17 September 2010. I find that it is probable this was the date on which the Office Manager was provided with instructions to prepare the document since the reference to the position of Senior Estimator was consistent with the role offered to Mr Low a few days previously. Eventually the document was provided to Mr Low on 11 July 2011, shortly before he was to attend the LMA course. By then the job description had been developed, but the document was still incomplete in that it did not set out the proposed remuneration, or indicate when it was intended to take effect. Mr Low did not sign it, as it referred to an entity other than LSL, and because it was not complete in other respects.

[22] In late 2010, LSL assisted Mr Low in making arrangements to attend counselling. Mr Lund said this was desirable because of the conduct and other personal issues which had troubled Mr Low earlier in the year; Mr Low stated that he also required counselling because of the alteration to the terms of his employment in September. The Office Manager arranged a first appointment with a counselling provider some four weeks in advance of the first appointment which took place on 26 November. Mr Low stated that he was informed of the arrangement approximately a fortnight before that appointment. Counselling sessions occurred fortnightly thereafter. It is more likely than not that Mr Low is correct in his recollection that he was encouraged to, and did, attend counselling following the restructuring meeting since the counselling was for him personally, and I am satisfied he had an accurate recall of the issues which would be discussed at counselling.

[23] In June 2011, the Office Manager ordered new business cards for Mr Low, bearing the description Senior Estimator/Quantity Surveyor.

[24] On 13 May 2012, Mr Low wrote to Mr Lund tendering his resignation with effect from 15 June 2012. In that letter he stated:

Also, in accordance with my Employment Agreement, I require Lund South to pay remuneration of all outstanding remuneration bonuses as set out in that Agreement for all Dunedin contracts started and completed from the date of my commencement with Lund South, 1 August 2003, until my position as Dunedin Manager was disestablished by you on 7 September 2010.

[25] On 28 May 2012, Mr Low sent an email to Mr Lund advising that he would now cease work on 25 June 2012. He went on to state that on 16 May 2012:

[Y]ou told me that we would meet last week and reach an agreement on outstanding bonus payments. This did not happen and we need to get this sorted and agreed before I finish up.

[26] Mr Lund responded to this request indicating that they would meet “on Friday”. He did not contest the acknowledgment referred to by Mr Low that an agreement would be reached on outstanding bonus payments; and he agreed to meet to discuss the issue.

Issues

[27] The essence of the case for LSL is:

- a) An agreement was reached at the meeting held in September 2008. In particular it was agreed that bonus entitlements would cease as of that date, and that Mr Low would step down into a Senior Estimator/Quantity Surveyor role. It remained only for a job description to be agreed upon (which was a formality), and a final decision to be made as to Mr Low’s salary.
- b) In all the circumstances a salary increase was not justified, so there was in reality nothing left to agree. Although this was not formally communicated to Mr Low at the time, there was sufficient certainty on the essential terms and thus there was a binding agreement between the parties.
- c) That this was so is evidenced by Mr Low in fact altering his role, and ceasing to be Dunedin Manager as from late 2008.

- d) The letter of 7 October 2010 has to be understood in the context of difficult circumstances where the employer was attempting to act sensitively. The letter either was understood, or should have been understood, as being mistaken when it appeared to indicate that Mr Low still was the Dunedin Manager, and that it was only at that time that a change in role was being proposed. The letter should have been understood as formalising what had been agreed two years previously.

[28] The essence of the case for Mr Low is:

- a) Mr Low did not understand that there was an agreement with effect from 2008.
- b) Subsequent documents confirmed that there was not, especially:
- The memorandum of March 2010.
 - The continued use by Mr Low of the term “Dunedin Manager” in correspondence until September 2010.
 - The clear language used in the letter dated 7 September 2010.
 - The subsequent provision of a proposed employment agreement.
 - The fact that Mr Low’s business cards were not replaced until mid 2011.
 - The terms of his resignation letter of 13 May 2012; and email of 28 May 2012 relating to an agreement to meet and discuss outstanding bonus payments.

[29] The key legal issue is whether a consensus was reached between the parties. In *Manson v Wardell*, Judge Palmer stated:³

It is fundamental to the formation of a contract that the parties to it must be *ad idem*, that is to say of a common understanding and intent concerning

³ *Manson v Wardell* [1998] 3 ERNZ 285 (EmpC) at 292.

their contractual bargain. Mutual misunderstanding as to the meaning and intent of a contested contract and its application will usually, through orthodox contractual principles, cause a contended contractual arrangement to be held so inherently uncertain as to negate the formation of a contract.

He further stated that whether there was certainty would be “a matter of fact and degree in any particular case”.

Discussion

[30] Before considering the chronology against the submissions of counsel and the principles just identified, I deal with a preliminary matter which relates to Mr Low’s performance issues which Mr Lund said he was concerned about from 2007, and which precipitated the meeting which he and Mr McLauchlan held with Mr Low in 2008. The fact that there may have been such issues does not assist in the resolution of the central question which is whether an agreement was concluded when the parties met to discuss Mr Low’s employment in September 2008. Accordingly, it is unnecessary to analyse those performance concerns in any depth.

2008 meeting

[31] Mr Lund said that:

- a) At the September meeting, Mr Low agreed that he would step down as Dunedin Manager and instead work as a Senior Estimator/Quantity Surveyor, and that his bonus would cease.
- b) Mr Low asked that his profit-share agreement up to that point be finalised.
- c) He confirmed this would be done, although he said there would need to be a set-off for floor remedial costs relating to a particular project and that Mr Low accepted this.
- d) He agreed that following the meeting the parties had yet to formalise their agreement; even as at 2010, documentation needed to be provided to Mr Low which reflected the reality of the employment arrangement.

[32] Mr McLauchlan stated that Mr Low agreed to step down, asked that he be paid under the incentive scheme for projects to date, and that Mr Lund confirmed this. He also told the Court that:

- a) A step-down was not fully implemented, and was still being discussed at the subsequent meeting in September 2010.
- b) The step-down was subject to agreement of details.
- c) The incentive scheme was to be changed and presented to Mr Low in the future.
- d) The base salary had to be looked at as part of this review.
- e) He expected Mr Lund as the Managing Director to put these arrangements in place, and to document them.

[33] Mr Low's evidence was:

- a) The parties discussed recent projects which had not performed as well as expected. As an aspect of this discussion Mr Lund stated that he wished to review the way Mr Low's bonus incentive would be calculated and structured in the future.
- b) He understood that Mr Lund did not want to reduce his overall remuneration package, but just to structure it differently.
- c) He indicated he was happy to engage in a discussion about this, but that it would need to include a review of his total package, including base salary. If his bonus entitlement was to be varied, his base salary would need to be negotiated to compensate for any change as to the calculation of the profit-share entitlement.
- d) He expected that a formal proposal would be prepared by Mr Lund for his consideration. When this did not happen he assumed his existing employment terms continued.

[34] It is common ground that there were details that remained to be resolved. Mr Lund asserts that all the essentials were effectively agreed upon at the meeting; Mr McLauchlan believed that any step-down was subject to further details being negotiated. Mr Low did not believe an agreement had been reached, and that there would be further negotiations.

[35] No record was made of the meeting. If there had been agreement that the bonus entitlement would cease forthwith subject to any legitimate set-off, it is probable that it would have been recorded since the entitlement was potentially significant. Mr Lund did record meetings which involved significant matters, such as a meeting he held with Mr Low on 31 January 2012. He did not adopt that practice on this particular occasion.

[36] Mr McLauchlan, although a Director of LSL, was a relatively independent witness. He is an experienced director of multiple companies. His evidence was given from a professional perspective. I consider that it was reliable, particularly with regard to the concessions he gave when asked.

[37] It is significant that Mr McLauchlan did not refer to Mr Lund telling Mr Low there would be a set-off for the floor remedial costs of a particular project. Neither did Mr Low have such a recollection. Mr Lund said he would have raised such an issue. I find that he is mistaken in stating this occurred.

[38] Mr Lund has come to believe that his account is correct. Although his recollections were sincerely given, I prefer the evidence to the contrary of Mr McLauchlan and Mr Low.

[39] The effect of their evidence is that a binding agreement with immediate effect was not concluded in September 2008.

[40] This conclusion is confirmed by subsequent events, which are now considered.

Mr Low's role, 2008-2010

[41] Counsel for LSL submitted that subsequent events confirmed that an agreement had in fact been reached.

[42] First it was submitted in essence that as Mr Low no longer performed the Dunedin Manager role in practice and that Mr Lund instead assumed that role, the Court should conclude that an agreement had been reached and was implemented. There is no doubt that Mr Lund did become more directly involved in a number of substantial projects in and around Dunedin; and that Mr Low was not as heavily involved in managing all Dunedin projects as he had been previously. Although this was driven in part by the fact that Mr Lund had for some time believed there were performance issues, the reality was that following his return from Queenstown he had the opportunity to be more directly involved in projects in the Dunedin area. It is unsurprising that Mr Lund as Managing Director and a significant shareholder of LSL would choose to be directly involved in major projects if he was available to do so. This does not mean, however, that Mr Low had agreed to step down and to relinquish his bonus arrangements as a consequence.

[43] Second it was submitted that it was significant that Mr Low sought a new employment agreement and job description. The Office Manager in her evidence thought this could possibly have been "as early as late 2008 to 2009". She told the Authority that she could not recall whether Mr Low ceased being the Dunedin Manager in 2008 or 2010; she said her memory had improved since giving evidence to the Authority, but I find that – understandably – she continued to be uncertain as to when this happened.

[44] More reliable on the question of when Mr Low requested documents is the evidence contained in Mr Lund's email to Mr Low of 18 March 2010, when he confirmed that he had been remiss in providing a "restructured package", and that Mr Low had raised this with him "at Christmas" (that is late 2009). I accept that he did make such a request then, and that it would have been entirely understandable for him to do so since he wished to know what was being proposed.

[45] The Office Manager also said that Mr Low stated he was “not the Manager anymore”. I accept Mr Low’s evidence – which has been shown to be generally reliable as to the chronology – that this related to a conversation that he would no longer process overhead invoices, and that the conversation occurred after the September 2010 negotiation.

[46] Next it was submitted that Mr Low developed a negative and disloyal attitude towards Mr Lund as a consequence of the loss of his bonus entitlements. Mr Low accepted that there was a deterioration in his relationship with Mr Lund. However, he said that this was because he had been criticised by Mr Lund and Mr McLauchlan at the meeting they held September 2008.

[47] There were other frustrations as well. On any view, there were outstanding bonus payments (since the most recent assessment of those was carried out in July 2007, and even then only partially paid). Until Ms Bradley departed, he was responsible for paying creditors jointly with her; this ceased when she departed, and Mr Low was frustrated by having to explain to unpaid creditors that he could not authorise payment of invoices and claims because Mr Lund had assumed that responsibility. Furthermore, there were issues as to the terms of his employment which drifted on unresolved. He did make disloyal statements, but they have to be assessed in the context just described; and do not confirm that an agreement as to cessation of his bonus entitlements had been concluded.

[48] A further relevant factor is a conversation which Mr Low conducted with the Manager of Lund Central Ltd. That Manager said that during a visit to LSL’s offices in Dunedin, Mr Low rushed out of his office and unprompted referred to a lengthy list of alleged failings of both the company and Mr Lund. Amongst other topics he told the Manager that he should sort out his own bonus arrangement, otherwise he would never receive it. Mr Low accepted that this conversation occurred. It tends to suggest that there were unresolved bonus issues between Mr Low and the company at that time.

[49] There is other evidence which supports the conclusion that Mr Low genuinely believed he remained Dunedin Manager (and was therefore still entitled to

a bonus until September 2010). He continued to send correspondence to third parties which he signed as Dunedin Manager. He did so because he believed he continued to be the Dunedin Manager. He continued to have a business card which referred to him having this position; this again tends to suggest that he – and the Office Manager responsible for producing business cards – believed he was still the Dunedin Manager. In 2009, a website was established for the company on which he was listed as Dunedin Manager and contact for all building enquiries; this was updated in mid 2010, and his position description was not changed at that time, reflecting his belief that he continued to be the Dunedin Manager.

[50] All these factors confirm that there was no agreement that he agreed to stand down as Manager in late 2008.

Management document of 18 March 2010

[51] On its face, the management document appears to cover a range of management topics for which Mr Low was being asked to take responsibility. In addition there was the specific reference to remuneration, where it was acknowledged by Mr Lund that he had been remiss in providing “a restructured package”. Mr Lund told the Court that the content of the document was consistent with Mr Low no longer being Dunedin Manager, and that it was simply a request for him to provide advice and to lead by example because he had so much experience as the most senior person in the office, and because he was “running various minor jobs”. Although he acknowledged that the document indicated that remuneration information would be “on the table for discussion by April 15” this was supposed to be understood as meaning that there was a possibility of a salary increase, although in the event having regard to all the circumstances in which the company found itself, that could not be offered. Consequently the matter was taken no further. It was otherwise no longer in doubt that Mr Low would not be receiving a bonus.

[52] For his part, Mr Low continued to believe that he was still the Dunedin Manager, and that the management document confirmed this was the case. He acknowledged that Mr Lund had indicated he wanted to alter the existing arrangements which would require a negotiation on a specific proposal, but that had

yet to be advanced. He said that the confirmation that the “agreed restructured package will be backdated to the original meeting as we originally discussed” was a new proposal which he had not agreed.

[53] The memorandum is consistent with Mr Low’s understanding of the situation. It does not lend any weight to the LSL case that an agreement had in its essentials already been concluded in September 2008, with the intention that it would be implemented then.

September 2010 meeting

[54] It is common ground that there was a further meeting in 2010, and that at this meeting Mr Low agreed he would step down. The content of the letter which was given by Mr Lund to Mr Low, and Mr Low’s reaction to it have already been described. The documents that were provided to Mr Low are consistent only with a context where he was regarded under the existing company structure as a Manager; and that it was being proposed that he either would be made redundant, or he could accept a new role as a Senior Estimator.

[55] For the company it was submitted that the letter should be understood as obviously being mistaken with its reference to an existing structure; and that having regard to the history it should have been understood that the letter was simply formalising an agreement that had been concluded two years previously. I do not accept this submission because:

- a) The letter was clearly written with regard to events in September 2010.
- b) Mr Low was now being told that he had a choice; either he would be made redundant, or he could accept a role as “Senior Estimator”, a job description which had not been utilised previously.
- c) All the previous events were consistent only with there having been a preparatory discussion as to what could occur with no follow-up of essential details thereafter – particularly as to remuneration but also as to a job description.

- d) Mr Lund said that one of the drivers for the meeting was because Mr Low wanted a job description and contract so that he could attend an LMA course. The contemporaneous documentation, however, shows that the only LMA course Mr Low had attended prior to September 2010 was a Breakfast Seminar involving modest cost; and that the significant Performance Edge course which he did attend and for which he did need employment documentation did not take place until mid 2011.

- e) Mr Lund also stated that one of the factors which persuaded him to portray the situation as being a restructure, rather than approaching it on a disciplinary basis was because the company had spent a lot of money assisting Mr Low by paying for counselling, and it was necessary to “treat him with kid gloves”. However, as already described, the counselling was not arranged until after the September 2010 meeting; and one of the reasons for it was the alteration of Mr Low’s terms of employment.

[56] The Court is accordingly satisfied that Mr Low’s account as to what occurred is correct. In September 2010, Mr Low was presented with an option of either accepting redundancy in which case he would no longer have any employment with LSL; or he could accept that his existing contract ended at that point (including the bonus arrangement), but that he would have a new position as Senior Estimator.

[57] Within a fortnight, a draft employment agreement was prepared, although it still required a job description and remuneration details to be added to it. The draft suggested the new arrangement would take effect as from 17 September 2010. Once again Mr Lund did not advance this issue in a timely way, and it was not until Mr Low pressed for a copy of a new employment agreement so that he could attend the LML course in mid 2011 that he was actually given a copy of it.

[58] Finally, the events of May 2012 provide yet further confirmation of the above conclusion. Mr Low’s resignation letter of 13 May 2012 referred to remuneration bonuses being outstanding, until his position as Dunedin Manager was disestablished

on 7 September 2010. There is no evidence that Mr Lund challenged this statement at the time. In the email exchange which occurred on 28 May 2012, Mr Low referred to a conversation some days previously that they would need to meet and reach an agreement on outstanding bonus payments. Mr Lund did not say there was nothing to meet and discuss. The inference is that he accepted there were outstanding bonus issues to resolve.

[59] Mr Low prepared an Excel spreadsheet to facilitate the calculation of his bonus. It categorised contracts up to 30 August 2008, from September 2008 to 17 March 2010, and from 17 March 2010 to 7 September 2010. The evidence was unclear as to when the categories were first introduced into the document. Mr Low said he updated the document so that if there was a restructuring of his package he would know what the bonus position was. Then he worked on it again in 2012 for negotiation purposes. The fact that Mr Low prepared this document does not lead to a conclusion that he accepted there was a binding agreement as to the cessation of bonus entitlements in 2008.

Conclusion

[60] I find that when the parties met on or about 7 September 2010, they agreed that Mr Low's existing employment agreement which included his bonus entitlement would end with effect from that date. Although no new written employment agreement was concluded, one was offered.

[61] The Authority concluded that his entitlement to earn a bonus continued until 7 September 2010, which is the same conclusion that has been reached by the Court. Accordingly, the challenge is dismissed.

[62] Following the hearing, counsel jointly agreed to provide to the Court a copy of the statement of problem dated 3 September 2012, and the statement in reply and counter-claim of 19 September 2012. It will be for the Authority Member to determine the scope of all remaining issues which arise from the pleadings following determination of the preliminary issue.

[63] Mr Low is entitled to costs. If the parties are unable to reach agreement as to costs, Mr Low is to file a memorandum and evidence within 21 days, and LSL is to file a memorandum and evidence 21 days thereafter.

B A Corkill
Judge

Judgment signed at 9.45 am on 18 September 2014