

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 186
5341239

BETWEEN DEAN MICHAEL COOK
Applicant

A N D MAGNUMMAC LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Mark Henderson, Counsel for Applicant
Elizabeth Coats, Counsel for Respondent

Investigation Meeting: 29 and 30 November 2011 at Christchurch

Submissions Received: On day two of the investigation

Date of Determination: 30 August 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] MagnumMac Limited (Magnum) was purchased by Renaissance Corporation Limited (Renaissance) in 2008 and is a company within the Renaissance Group of companies. The companies within the Renaissance Group distribute, sell and manufacture products and services in the information technology sector.

[2] Dean Cook was employed in 2003 by Renaissance as an engineer. After a few years of employment he moved to the Renaissance education department and became a K13 education account manager in which role he sold Apple hardware to primary and secondary clients in the education sector.

[3] Mr Cook then transferred to Magnum in 2008 but kept the same duties as an education account manager. He signed an individual employment agreement with MagnumMac on 24 December 2008 with a commencement date of 1 March 2008. His remuneration package was described in the employment agreement as \$45,000

per annum gross base salary, a car allowance of \$10,000 per annum and commission of \$20,000.

[4] In April 2010 Mr Cook was transferred back to work for Renaissance. Magnum says it remained his employer at this time but that Mr Cook was one of the account managers within the various business units in the Renaissance Group who were pulled back under the management of Renaissance as part of a broader division known as enterprise sales. Mr Henderson wished to reserve the right if necessary to return to the Authority and apply to amend the name of the employer. In the event that Magnum was not Mr Cook's employer from 1 April 2010 and there are orders in Mr Cook's favour then I reserve leave for Mr Henderson to apply to the Authority to amend the name of the employer to Renaissance Corporation Limited.

[5] Mr Cook says that in or about September 2010 following the departure of some Renaissance tertiary account managers to work for a competitor, he was asked by his manager, Ross Fodie to change roles from his K13 position to a tertiary role working with universities and polytechnics. At or about that time he says that he was offered and accepted a new remuneration package of \$80,000 base salary, \$10,000 car allowance and \$30,000 base commission together with a three month restraint of trade commencing from 1 October 2010. No written variation of his employment agreement was entered into.

[6] Mr Cook claims he was then disadvantaged in his employment from 1 October 2010 when he started working in the tertiary role because Magnum did not pay the remuneration agreed to and he says he was further disadvantaged by the way he was treated when he raised issues about his remuneration.

[7] Mr Cook resigned on 24 March 2011 with one month's notice. He was on sick leave from 24 March 2011 and paid in lieu of notice from 1 April 2011. He says that his resignation was in the nature of a constructive dismissal following contractual breaches to pay him the agreed remuneration and breaches of the obligations of trust and confidence. Further he says there were breaches of the good faith statutory obligations because the conduct by Magnum was misleading and deceptive and likely to mislead and deceive him.

[8] Magnum says that there was no breach of Mr Cook's employment agreement because it continued to pay him what was provided for in his individual employment

agreement. It says there was never any agreement between Mr Cook and Magnum to vary his role and increase his remuneration package. Firstly it says that neither Mr Fodie nor Mr Fodie's manager Mr Stephens, had actual or apparent authority to bind Magnum to any variation to Mr Cook's employment agreement. Secondly, even if they did, there is no evidence of any such offer having been made and any conversation with Mr Cook was preliminary in nature and did not amount to an offer from Magnum. Thirdly, even if there was authority to bind Magnum to a variation of Mr Cook's employment agreement, and such an offer was made Magnum says that offer was insufficiently certain to result in a binding agreement. Finally Magnum rely on clause 24.1 of Mr Cook's employment agreement that is headed modification or variation:

This Agreement represents a full record of the agreement entered into between the Employee and the Employer and any change or additions to this Agreement will need to be agreed in writing.

[9] Magnum does not accept that Mr Cook's resignation arose from any breach of duty on its part. It does not accept there was any such breach and therefore denies that Mr Cook was disadvantaged, constructively dismissed and/or that it behaved in a misleading and/or deceptive manner and says that the applicant is not entitled to any of the remedies he seeks.

[10] The remedies Mr Cook seeks are:

- Difference in base salary from 1 October 2010 to 24 April 2011 in the sum of \$19,753.34.
- Loss of wages from 24 April 2011 to the date Mr Cook obtained other employment on 25 July 2011 less an amount he received during that period from ACC in the sum of \$16,136.25 gross.
- Commission for 1 October 2010 through to 1 April 2011 at \$7,500 for three quarters less commission received in the sum of \$15,001.
- Annual leave on the commission and unpaid wages in the sum of \$2,780.34.
- Compensation for hurt and humiliation in the sum of \$15,000.

- A penalty for a breach of good faith.
- Interest and costs.

Issues

[11] The following issues require resolution by the Authority:

- i. What was said to Mr Cook in September 2010 about any new role, any corresponding increase to remuneration and a restraint of trade?
- ii. Did either Mr Fodie or his manager Ms Stephens have actual or apparent authority to bind Magnum to a variation to Mr Cook's employment agreement?
- iii. Was there an offer made to Mr Cook of a base salary of \$80,000, commission of \$30,000 and car allowance of \$10,000 with a restraint of trade and a new role that he accepted and, if so, by whom and when?
- iv. If there was an offer, then were the essential terms of the offer certain?
- v. Did Mr Cook actually commence in the new role and, if so, from when?
- vi. What is the effect of clause 24.1 in the employment agreement that any variation to it was required in writing?
- vii. If the Authority finds that there was authority, either actual or apparent, and an offer was made and accepted by Mr Cook and that there was a binding variation notwithstanding clause 24.1, does Mr Cook have a personal grievance that he was unjustifiably disadvantaged in his employment when the terms agreed to were not complied with?
- viii. Was Mr Cook's resignation caused by a breach of duty on the part of Magnum?
- ix. If the answer to that is yes, then was the breach of duty of sufficient seriousness that a substantial risk of resignation was reasonably foreseeable?
- x. If the Authority finds one or both of Mr Cook's personal grievances are made out, then what remedies is he entitled to? Are there issues of contribution or

mitigation? Is the commission claimed fair and reasonable, should annual leave be calculated on the commission and unpaid wages and should there be an award of a penalty, interest and costs?

What was said to Mr Cook in September 2010 about his role, an increase to remuneration and a restraint of trade clause?

[12] Ross Fodie was the general manager of the education sales division for Renaissance Corporation until in or about mid November 2010. Mr Cook reported directly to Mr Fodie. Mr Fodie reported directly to Lynne Stephens who was employed by Renaissance as director of sales. Ms Stephens was responsible for driving and managing education, enterprise and SMB sales across the Renaissance Group businesses. She was based in Auckland but had responsibility for all of New Zealand. Ms Stephens was on the executive management team and reported directly to Richard Webb, the Chief Executive Officer.

[13] In or about mid 2010 several Renaissance account managers, including tertiary account managers, resigned and went to work for Cyclone, a competitor to Renaissance. This occurred over a relatively short timeframe. It is clear from emails provided to the Authority at or about that time that Mr Fodie was concerned he could lose even more staff.

[14] Mr Cook at or about this time telephoned Mr Fodie and advised that he was happy to help with any cover in the tertiary area. Mr Cook was asked by Mr Fodie to attend a tertiary education conference in September 2010. At this conference Mr Fodie talked to Mr Cook about taking on a tertiary role fulltime, working with the universities and polytechnics and giving up his primary and secondary clients. Mr Cook considered that such a role would have been a change and increase in responsibility as the clients were generally higher value clients. He advised Mr Fodie he would think about whether that was what he wanted to do.

[15] Following on from that conference on 9 September 2010 Mr Cook emailed Mr Fodie and advised him that he was thinking about the tertiary job but had some questions for Mr Fodie about what part of the South Island he would be covering. Mr Cook said amongst other matters in his email:

I presume that I would be covering the top half of the South Island but who would you see being included in that, would that be any or all of

the private tertiary campuses, or mainly focused on the Unis and Polytechs? ...

It would be good to keep some K13 clients but depending on how many Tertiary clients I am looking after it would depend how many and who as I don't want to find I am that busy in tertiary that they get neglected. Is there anything you see me needing to up skill on for the tertiary space?

A big question is, if for some reason Renaissance doesn't get the Gov deal or did lose Apple, what would then happen? I have a good client base in K13 so could deal with competition easier than in tertiary were [sic] I don't have those relationships would it be a matter of sink or swim with the move to tertiary?

I'm pretty much 99% on the Tertiary job now as I know it is a good move but obviously a little nervous about stepping into a new space I don't have a lot of experience in but also know CHCH will work way better if I do at the moment Paul isn't doing that great, no fault of his own so having more of my client base should make CHCH more profitable.

I have some ideas on the package that I want but can you give me a bit of an idea of what you're thinking about on that?

[16] On 13 September 2009 Mr Fodie emailed Mr Cook back and advised that the top half of the South Island was the correct territory. He set out in his email that as discussed with Mr Cook he would like the second education person in Christchurch to focus predominantly on K13 but hold at least one tertiary account to provide some cross knowledge. He advised that up-skilling was Mr Cook's call and that in relation to all of Government, he wouldn't expect Mr Cook or anyone that he is currently interviewing for the other tertiary roles to sign up to anything until that is finalised and said he was expecting good news in this space later this week or early next week at the latest. He described the package as *circa 120k OTE* with Mr Cook to think about the split and said that a guaranteed bonus for a quarter could also be part of the package. The various emails sent support, at least from Mr Fodie's perspective; the rationale behind such a package was that it was the market rate for the sales roles undertaken at Renaissance and that account managers at Renaissance were paid below the market rate.

[17] Mr Cook said that upon receipt of the email he telephoned Mr Fodie and said that he would agree to a package split of 80/30/10. Mr Cook said that Mr Fodie thought that would be fine. Whilst I accept that it is inherently more likely than not that Mr Cook made that telephone call and communicated the package split he wanted I am not satisfied that there was offer and acceptance at that point in time.

[18] Steve McLean who was at that time the group human resource manager but at the time of the investigation meeting the general manager – operations, emailed Mr Fodie on 22 September 2010 to ask him for information on discussions he was having with another employee.

[19] The Authority was provided with a copy of that email and also the response from Mr Fodie, also dated 22 September 2010 that he sent and copied to Ms Stephens. The reply refers to a number of employees including Mr Cook. In relation to Mr Cook it provides:

Dean Cook – stepping up to tertiary role in CHCH. package 120k, base 80k, car 10k, commission 30k, gtee for first quarter. Some technical training to get up to level required to talk to tertiary customer base, and interested in Renaissance Direct's approach to WWDC Macworld – if our customers are going we should be there.

Later in the email Mr Fodie noted that none of the employees referred to were interested further in signing a 3 month restraint or a 3 month notice period. Specifically in relation to Mr Cook he noted – *Dean Cook is dead keen to move but holds a similar position re restraint of trade and notice period.*

[20] Mr McLean then spoke to Mr Fodie on 27 September 2010 about matters in the 22 September 2010 email. He emphasised that Mr Fodie needed Ms Stephens' support before any of the proposed changes to employees' roles and remuneration could be taken to the Chief Financial Officer Shaun Rendell for his approval.

[21] Following on from that conversation with Mr McLean, Mr Fodie emailed Ms Stephens on 27 September 2010. He said amongst other matters in his email:

I had a long chat with Steve today re the situation we are currently faced with in the education team. Short answer from our conversation is I need you to make a call on how to proceed ...

Specifically in relation to Mr Cook he said:

Dean C – happy to step up to Tertiary but seeking a remuneration package reflective of the increased responsibilities of the role.

More generally in relation to whether Ms Stephens wanted him to continue discussions with these employees:

If you're happy to proceed, I need (a) you to determine what you can get Rick or Shaun to sign off and move forward with achieving this

and (b) let me know what offer I can take back to the affected team members?

(For the record – I don't believe we will be able to negotiate much on the splits, however I would expect a three month restraint of trade to be signed by all staff...

Mr Fodie ended the email by stating that he believed there is a certain amount of urgency around these issues and that he did not think the company should be losing any of these particular staff members.

[22] In response Ms Stephens emailed Mr Fodie on 28 September 2010 and copied the email to Mr McLean. She said:

Hi Ross,

Understand where you were coming from and this has been going on for far too long. Given what has happened with Apple/Ingram today – they have announced the 2nd distribution. Give them a smaller base increase and a large OTE – give them the value they want but load it into the OTE. Please don't make them to offer verbally. contact Steve and he will make the offer – inclusive of the new Terms re restraints etc.

Lynne

[23] Mr Cook was unaware of these email exchanges between the managers.

[24] The next time Mr Cook was involved in a discussion about his remuneration and the tertiary role was at a training conference at Auckland Rose Garden in Parnell. The dates of the training conference were confirmed as 29 and 30 September 2010. It is at this conference that Mr Cook says the offer was made to him of the new role with the increased remuneration package and he accepted the offer.

[25] Mr Cook said that on the first day of the conference Mr Fodie advised him that he had spoken to Shaun Rendell the chief financial officer of Renaissance and Mr McLean and they said they could only offer Mr Cook a 70/40/10 split plus a three month restraint of trade. Mr Rendell and Mr McLean did not accept/recall that such a conversation took place although Mr McLean was aware that Ms Stephens had said employees should be given smaller base increases and a large OTE – email 28 September 2010. For completeness Mr Fodie said that this conversation took place on the second day of the conference. That there was such a discussion was not disputed by Mr Fodie.

[26] Mr Cook advised Mr Fodie that he wanted the original split that he said in his evidence he thought had been agreed earlier. He talked to Mr Fodie about wanting to have a higher base salary because he would find it tough in the tertiary sales role as he would be up against the ex Renaissance account managers who were working for Cyclone. Mr Cook also advised Mr Fodie that it made sense for him to keep some of his primary and secondary accounts in order to keep his sales up when he started off in the tertiary market. Mr Fodie advised Mr Cook that he would talk to Ms Stephens. The Authority did not hear from Ms Stephens who resigned from Renaissance in November 2010.

[27] Mr Cook said that he talked to Ms Stephens the following day of the Parnell Conference and she advised him that she had spoken to Mr Fodie and she really wanted him on board as a tertiary account manager. She said that the package he had requested of 80/30/10 was okay and that Mr Cook shouldn't be too worried about the restraint of trade and should just agree to it. Mr Cook said he told Ms Stephens that he would agree to the package offered and restraint of trade. Mr Cook said that Ms Stephens advised him that she knew he would do a good job. Mr Cook said in his oral evidence:

Confirm with Lynne will take the position then another meeting with Ross to accept the offer starting on 1 October 2010.

[28] Mr Cook said that he then spoke to Mr Fodie and Mr Fodie also advised him having already spoken to Ms Stephens that she was agreeable to the split Mr Cook wanted. Mr Fodie and Mr Cook then shook hands. Mr Cook could not recall discussing a start date with Ms Stephens for the new role but said that discussion took place with Mr Fodie.

[29] Mr Fodie when he gave his evidence to the Authority said that the deal was done between Mr Cook and Ms Stephens and then Mr Cook and Mr Fodie. In answer to a question from Ms Coats he said it was Ms Stephens who agreed to the 80/30/10 package with a restraint and it was his view that Ms Stephens made the final offer to Mr Cook. Mr Fodie said it was then up to Ms Stephens to follow up the offer with Mr Rendell and he knew that Mr Rendell would need to talk to payroll to put the changes through. As to who had made the offer, Mr Fodie's oral evidence was different to his written evidence in which he said:

As far as I was aware I had authorisation from Lynne to agree to the new package with Dean and I did so ...

What was known by Mr Rendell, Mr McLean and payroll about any offer made to Mr Cook about his remuneration package and role on 30 September 2010?

[30] The evidence from the respondent witnesses was that only Mr Rendell and Mr Webb had authority within Renaissance to approve remuneration increases for employees.

[31] Mr Rendell said he had never received a request from Mr Fodie, Ms Stephens or any other manager requesting approval to increase Mr Cook's remuneration.

[32] Mr McLean was aware of some emails between Mr Cook and Mr Fodie about proposed changes to remuneration/role but was not copied into all emails between Mr Fodie, Ms Stephens and Mr Cook. Mr McLean said in his evidence that he was not informed by either Mr Fodie or Ms Stephens of any changes to the remuneration package for Mr Cook from 1 October 2010.

[33] Mr Rendell set out the process in his evidence for approving remuneration increases at Renaissance. The first step was a completed request form from the employee's manager to the most senior manager within their area of business. In the circumstances here that would be a form completed by Mr Fodie and supplied to Ms Stephens. The form would require Mr Fodie to provide information regarding the proposed remuneration increase and the reasons why one was being requested – in this case appointment to a new role. Ms Stephens would then consider whether an increase was appropriate and would talk to the business unit accountant as to whether funds were available. If Ms Stephens was happy to proceed she would then take the form and talk to Mr McLean and if he was happy with the proposed increase then he send it to Mr Rendell. If Mr Rendell approved the proposed remuneration increase, the form would then be returned to Mr McLean who would provide the necessary documentation such as a variation and then have Mr Fodie speak to Mr Cook and have him sign a variation to his employment agreement.

[34] Mr Rendell said that the employee's manager should not communicate with the employee about any proposed remuneration increase until he [Mr Rendell] had approved it and the relevant documentation had been prepared. It was clear however

from the emails that Mr Fodie had been discussing a proposed role change and remuneration package with Mr Cook at least two or three weeks prior to the Parnell conference. Finally payroll is informed of the change when all the paperwork is signed.

[35] At each step of the process there would be discussion between the managers at the various levels as to the appropriateness of the increase. Mr McLean said that the process had been in place since a few months after he started as Group HR Manager in 2009. He said that although the process is not written down in any policy or procedure it was discussed frequently at executive managers' meeting which both Mr Fodie and Ms Stephens attended. Mr McLean said that it is particularly important to have the checks and controls in the process because Renaissance is an NZX –listed company with financial reporting requirements and obligations to its shareholders. Mr Rendell said that he had never had any direct discussion with Mr Fodie or Ms Stephens about the process but it was one that was well understood by the executive management team. Mr Fodie said in his evidence that he was not aware of the process as detailed by Mr Rendell that was required to be followed for a variation of terms and conditions although was aware that Mr Rendell needed to be advised of any variation so that payroll could be informed.

[36] Additionally Mr Rendell decided in July or August 2010 that the remuneration review process across Renaissance Group needed to be more consistent with all remuneration reviews conducted after financial year end 30 September 2010 and that the same process of benchmarking against market rate would be applied to all reviews. He said that any remuneration increases agreed as a result of that process could then get backdated to 1 October and that the executive management team were advised there would be no remuneration increases approved until the end of year results for 30 September 2010 were in. The end of year result was in by November 2010.

[37] Mr Fodie sent an email to Ms Stephens and copied in Mr McLean on 30 September 2010. The email shows it was sent at 11.58pm although email dates and times are not always accurate. I think it more likely though that it was sent later in the day on 30 September 2010. In that email Mr Fodie refers to a conversation that he had with Mr McLean which was confirmed by Mr Rendell that there are to be no

REM reviews until year end results are in. He makes the comment: *this is going to be a problem*. He does refer earlier in the email to Mr Cook and says:

Dean Cook – slightly different as we are looking to shift him from a K-13 role to a tertiary role, however he hasn't had a pay rise for a number of years.

[38] That reference to Mr Cook read in the context of the email as a whole could support that Mr Fodie regarded Mr Cook's situation as different to that of other employees referred to in the email because Mr Cook was to change roles and not simply receive an increase to his remuneration. Although the evidence before the Authority from Mr Cook and Mr Fodie was to the effect that the offer had been made and accepted that day, there was no specific reference in the email to that.

[39] I shall turn to now what Mr Cook did following the Parnell conference. I set out the various interactions that he had with Mr McLean, Mr Rendell, Mr Webb and the two general managers he reported to following Mr Fodie's departure from Renaissance in November 2010 before returning to determine the issues.

What did Mr Cook do after the Parnell conference?

[40] Mr Cook said that as far as he was concerned he had been offered and had accepted a new remuneration package and a new role as tertiary account manager on 30 September 2010 and that he commenced that role from 1 October 2010 by meeting with different tertiary institutions including finding new areas of potential sales at the University of Canterbury.

[41] He described in an email dated 3 November 2010 to Mr Fodie and copied to Ms Stephens that tertiary was going *pretty well* and he had been making some good progress. He set out in the email that he had an issue as to how he and the other account manager in Christchurch, Paul, split the schools from his K13 role and said that he still had to deal with those clients. He also said in the email that when he was offered the tertiary position it was meant to start from October and commission was guaranteed for 3 months but noted that he had not been paid for October.

[42] In his oral evidence Mr Cook said that when he was not paid the increased remuneration he put it down to Mr Fodie and Ms Stephens having a period of absence/leave from Renaissance leading up to 8 November and therefore a possibility that the right people at payroll may not have been informed. In terms of the offer

itself he said he had agreed to the new role and had the role. In terms of the absence of any documentation Mr Cook said that he was not surprised and with respect in particular to the restraint of trade that he had agreed verbally to one and understood that for three months he could not work for a competitor in the same position after leaving.

[43] Mr Fodie responded to Mr Cook's email with an email dated 8 November 2010 and advised that he had copied Mr Cook into a couple of emails to *Steve and Shaun* around the package and he made the following comment – *from my viewpoint and reflected in our discussions, Lynne authorised me to move forward with this but I am unsure if this was communicated up to Shaun? Or if Shaun received it and never did anything with it? Best I can do right now is get Steve involved...*

From my perspective and based on the discussions we've had and emails you've been passing through, you're doing a great job down there!

[44] Mr Fodie then sent an email to Mr McLean on 8 November 2010 and copied in Mr Cook and Mr Rendell. He said:

Hi Steve Further to my earlier email, the package as agreed by Lynne is:

- *\$80K base*
- *10K car*
- *\$30K commissions – guaranteed for the first quarter given the newly established role and client base both needing to grow and under threat from competition (ex Renaissance staff)*
- *3 month restraint of trade*

Thanks Ross

[45] Mr McLean said in his evidence that on receipt of the email from Mr Fodie he knew the proposed terms were not approved by Mr Rendell given the directive to all managers that there be no remuneration increases approved before financial year end. It was unclear what the earlier email from Mr Fodie to Mr McLean was, if indeed there had been one.

[46] Mr Rendell said that it was highly inappropriate that Mr Cook was copied into the email because there had been no approval given to the remuneration proposed in

the email. He said that he was not provided with information to support the significant increase in the remuneration that the email proposed and that it did not appear that Mr Cook's role was fundamentally changing and his sales result were not good enough to warrant him being rewarded. Finally Mr Rendell said that there was no remuneration request form provided to him for him to accept or reject.

[47] Mr McLean and Mr Rendell had formed these views about the email but the evidence does not support that either of them then discussed these views and the contents of the email with Mr Fodie or with Ms Stephens. Mr Fodie said and I accept this evidence that no-one from Renaissance ever contacted him to talk about what had been agreed with Mr Cook.

[48] Mr Fodie in his oral evidence at the Authority investigation meeting did not accept that his email of 8 November to Mr McLean was a request for approval. He said that it was *merely setting out what had been agreed*. Mr Fodie said in his oral evidence that he understood Ms Stephens had authority to make decisions about remuneration. He said that it was Ms Stephens' responsibility to advise Mr Rendell and Mr McLean what had been agreed. It is not clear on the face of the 8 November 2010 email that it is a request for approval. There is no mention of that being the purpose of the email. Ms Coats in her submissions emphasised that the email only made reference to what was agreed by Ms Stephens and makes no mention of Mr Cook. The strength in that argument is diminished somewhat because Mr Cook is copied into the email.

[49] Not only was Mr Fodie not contacted at this time but I think it less likely that Mr McLean or Mr Rendell contacted Mr Cook to follow up Mr Fodie's email. On 11 November Mr Cook emailed Mr McLean, Mr Rendell and Mr Fodie although starting the email with *Hi Steve* and said that he had not heard anything about his contract and was concerned that it was not going to be sorted for the next pay round and that would mean he was going to be owed a considerable amount of back pay. Mr Cook asked if something could be *sorted asap*.

[50] On 12 November 2012 Mr Cook sent a further email to all three men and asked why no-one had responded to his email. That same day Mr Rendell sent an email to Mr Cook only and said *you need to discuss this with your manager Ross. HR and Payroll can only process this once approved paperwork has been provided*. It

was somewhat unusual that Mr Fodie had not been emailed directly to provide the paperwork rather than it being left for Mr Cook to arrange.

[51] At or about this time Mr Cook was offered a written variation to his employment agreement. The variation contained clauses relating to confidentiality, intellectual property and a restraint of trade. In consideration for these terms and conditions the variation provided that the employee would receive a one off bonus of \$10,000 gross to be paid on a date six calendar months after the date the employee signed the document and has not given or received notice of the termination of their employment.

[52] Mr Cook did not sign the variation. Magnum has relied on the fact that Mr Cook did not sign to support that he never agreed to a restraint in trade. That is a matter I shall return to in determining the issues however Mr Cook said that he did not see the written variation as directly relating to the tertiary role and that there was nothing in the variation about the split he had agreed to. Mr Cook said that he had conversations with Mr McLean about the variation document and his concerns but could not get Mr McLean to put anything in writing. Mr McLean said that he did not recall speaking to Mr Cook before December 2010 but that he possibly could have.

[53] Both Mr Fodie and Ms Stephens resigned from their employment during November 2010.

Who did Mr Cook talk to then about the position and the remuneration package he says he was offered and agreed to?

Dean Rogers

[54] Dean Rogers was appointed to the role of general manager of the education sales division for Renaissance Corporation after Mr Fodie left in November 2010. He resigned from that role in or about mid December 2010. Mr Cook reported to Mr Rogers. Mr Rogers gave evidence at the Authority investigation meeting. He said that he understood from Mr Fodie, Ms Stephens and Mr Cook that Mr Cook was working as a tertiary account manager at that time he was appointed as general manager and he was aware that Mr Cook had previously been a K13 account manager. He said under questioning that it was common knowledge that Mr Cook was a tertiary manager although accepted under questioning from Ms Coats that

knowledge Mr McLean and Mr Webb had about the tertiary role would have come more from Mr Cook than the other way.

[55] Mr Cook told Mr Rogers that he was not receiving the remuneration package that he said had been agreed to. Mr Rogers followed that up with Mr Fodie who confirmed that the package was agreed to, describing it in his written evidence as a *done deal*. Mr Rogers said that he raised the issue of Mr Cook's remuneration with Mr McLean around 13 – 17 December 2010 when he visited him at his office in Auckland. In his written evidence he described Mr McLean as ambivalent and unwilling to do anything. In his oral evidence he said that he had a number of other matters to discuss with Mr McLean and when he raised Mr Cook in passing the word *useless* was used. Mr McLean recalled there was a meeting but more to deal with Mr Rogers' issues.

Richard Webb

[56] Mr Cook went to a meeting in December 2010 in Wellington to meet with Mr Rogers and Spencer Ho who was a tertiary account manager from Dunedin to undertake some planning for the new education plan in the K13 and tertiary market. Mr Webb joined the group and Mr Cook spoke to him about the issues he had with getting paid in his new role as tertiary account manager. Both Mr Rogers and Mr Cook said in their evidence that Mr Webb told Mr Cook *he would sort it out or get it fixed*. Mr Rogers said that he saw, and overheard, Mr Webb telephone Mr McLean to talk about the situation with Mr Cook and that he said it needed to be sorted out. Mr Rogers said that he thought after hearing at least Mr Webb's part of the telephone discussion with Mr McLean a positive situation would come out of the discussion for Mr Cook.

[57] Mr Cook said that after he left the meeting Mr McLean called him. He thought this was because Mr Webb had telephoned Mr McLean. Mr Cook said that Mr McLean asked him to send through what had been agreed and he would get it sorted. Mr Cook duly forwarded an email dated 9 December to Mr McLean and copied in Mr Rogers. In the email Mr Cook set out what he should have been paid for October, November and December and the remuneration package. He also refers to working out with Mr Rogers and Mr Ho where the role will be going. Mr McLean's recollection of both the telephone call and the email was not clear and he could not recall a discussion with Mr Webb or indeed receiving the email. I find the evidence

supports it more likely than not that Mr Webb did reassure Mr Cook he would get the situation with his remuneration sorted and/or fixed and that he made a call to Mr McLean to ask him to attend to the matter. I find it more likely than not that Mr McLean advised Mr Cook as well to the effect that he would sort it out.

[58] Mr Cook said that Mr McLean then telephoned him on 14 December 2010 and he took a note of the discussion that provided: *Steve called at 3.30pm to say that he had heard from Shaun, said he thought I was going to get back to help about what I wanted but would put through the offer I had to Rick to get it sorted ASAP.* Mr McLean did not have any particular recollection of the conversation of 14 December 2010 but accepted that there may have been a discussion. He did not accept he would have said that the situation would get sorted because he said he did not have that level of authority. I think it likely that Mr Cook's note is reflective of what was said on that occasion.

[59] Mr Cook said that he did not hear anything further after 14 December so telephoned Mr Mclean to see what was happening on 21 December 2010. Mr McLean for the first time told Mr Cook that Ms Stephens and Mr Fodie had no authority to offer him the role or the increased package and he talked about the correct processes not having been followed. The evidence supports the conversation became quite heated with Mr Cook still clearly wanting his remuneration sorted out and paid.

David Olliver

[60] Mr Olliver was at the time of the investigation meeting employed by Renaissance Limited as general manager – New Zealand sales YOOBEE Ltd. Prior to that he was the general manager – education and government from 10 January 2011 to 1 July 2011. He was appointed following Mr Roger's departure and Mr Cook then reported to Mr Olliver. Mr Olliver had previously been employed by Renaissance for several years.

[61] Mr Olliver spoke with Mr Cook by telephone on 23 December 2010 and Mr Cook told him that there were some issues that remained unresolved around his remuneration. Mr Olliver agreed to look into the issues on Mr Cook's return from his Christmas holiday. Mr Cook returned to work on 17 January 2011.

[62] Mr Oliver in mid January agreed to investigate Mr Cook having been offered a new role and remuneration package. He was frequently asked by Mr Cook where

things were at with his investigation. Mr Olliver concluded that there was no written evidence to support Mr Cook's claims that he was offered a new role and an increased remuneration package. Mr Olliver summarised his findings to Mr McLean in an email dated 13 March 2011 in which he also proposed offering Mr Cook a new role as business development manager – government and education and an increase to his remuneration backdated to 17 January 2011. Mr McLean added some comments around the investigation and then Mr Olliver forwarded the email to Mr Rendell seeking his approval regarding the business development manager role and an increased remuneration for Mr Cook. This process contrasts sharply with that involving Mr Fodie and Ms Stephens because Mr Cook knew nothing of this proposal or indeed the email.

[63] On 17 March 2011 before Mr Rendell had got back to Mr Olliver Mr Cook emailed Mr Olliver and set out some background to his concerns about his remuneration and said that he had been underpaid \$25,000 and was no longer willing to accept any further delays. He said that if the company did not sort the matter out he would tender his resignation.

[64] Mr Olliver telephoned Mr Cook on 21 March 2011 to explain that he had not been able to put forward a proposal to Mr Rendell to backdate to 1 October 2010 any remuneration increase but that he had proposed a backdating of the increase to 17 January 2011.

[65] Mr Cook said that he was quite devastated to only be offered the increase for part of the period only that he had been undertaking the tertiary role.

[66] On 24 March 2011 Mr Cook resigned.

Did either Mr Fodie or his manager Ms Stephens have actual or apparent authority from Magnum to bind Magnum to a variation to Mr Cook's employment agreement?

Actual Authority

[67] Ms Coats submits that Mr Fodie and Ms Stephens did not have actual authority to approve remuneration increases for employees and only Mr Webb and Shaun Rendell had authority to approve remuneration increase for employees.

[68] Mr Henderson did not in final submissions rely on Mr Fodie or Ms Stephens having actual authority. The focus therefore and, the stronger argument in my view, will be on whether there was apparent authority on the part of Mr Fodie and/or Ms Stephens to agree to vary Mr Cook's employment agreement and in doing so bind Magnum.

Apparent Authority

[69] Apparent authority is the authority of the agent as it appears to others – *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 per Lord Denning at 583.

[70] Magnum denies that either, or both, Mr Fodie and Ms Stephens had apparent authority to bind the company to a variation to Mr Cook's individual employment agreement which included a different and increased remuneration package.

[71] Ms Coats referred to the principles relevant to an assertion of apparent authority in *Clark v Nelson Marlborough District Health Board* [2002] 2 ERNZ 483 (EC) at pg. 501:

- *The burden of proving the existence of an agency, where this is in dispute, lie on the person alleging its existence.*
- *Ostensible or apparent authority arises where the principal by words or conduct has represented that the agent has the requisite actual authority.*
- *The normal case will be of an apparent general authority consisting of the principal placing the agent in a position which, in the outside world, would generally be regarded as carrying authority to enter into transactions of the kind in question.*
- *Alternatively, there may have been a history or course of conduct of the agent dealing with a third party on the principal's behalf and the principal honouring the resulting transactions.*
- *However, if the third party knows that the agent's authority is limited, ostensible authority cannot arise no matter how general the authority to act may be in other matters.*

[72] Apparent authority acts as a form of estoppel, preventing the principal from denying the validity of the acts carried out by the agent with apparent authority – John Farrar (ed) *Company and Securities Law in New Zealand* (Brookers, Wellington, 2008) at 144.

[73] Ms Coats in her submissions says that the fact Mr Fodie was Mr Cook's manager and Ms Stephens Mr Fodie's manager is not sufficient to establish authority. Further she submits that there was no precise and unambiguous representation from Magnum to Mr Cook that Mr Fodie and Ms Stephens had the requisite authority to offer and agree a variation to Mr Cook's employment agreement and bind Magnum to it.

[74] Ms Stephens was the director of sales. She was on the executive management team and directly reported to the Mr Webb the chief executive officer. Mr Fodie gave evidence that he understood Ms Stephens had authority to make such decisions and Mr Rogers who was appointed to the General Manager after Mr Fodie resigned said in his oral evidence that when *Ms Stephens came in perception was that she had total authority and from the first meeting she intimated what she said would go*. Mr Cook believed that Ms Stephens had the authority to agree a remuneration package with him for starting a new role.

[75] I accept Mr Henderson's submission that Ms Stephens was placed by Magnum/Renaissance in a position which would in the outside world be generally regarded as carrying the authority to reach agreement about an employee's change in role and a pay increase and bind Magnum to any variation of an employment agreement.

[76] Mr Fodie was a general manager and Mr Cook reported to him for day to day matters. Mr Cook's employment agreement was signed by a general manager in 2008 supporting that someone in that position could sign and bind Magnum to employment agreements. Mr Cook says that he believed that Mr Fodie had the authority to agree a remuneration package with him. In any event the evidence of Mr Cook and Mr Fodie is that on 30 September 2010 Mr Fodie had spoken to Ms Stephens (Mr Fodie's manager) and that she was agreeable to the package. To the extent that Mr Fodie impliedly or expressly advised Mr Cook that he had to obtain agreement from his manager (his authority being limited to that extent) then it was reasonable for Mr

Cook to conclude both from his own discussion with Ms Stephens and Mr Fodie's advice that Mr Fodie had obtained that authorisation.

[77] Ms Coats submits that emails including the ones from Mr Fodie dated 8 November 2010 reinforced that Mr Rendell and Mr McLean were the key decision makers. These emails post dated when Mr Cook says he was offered and accepted the package and new role and when he says he started in the new role. Mr Cook was not copied into emails that were sent and/or copied to Mr Rendell and Mr McLean leading up to the Parnell conference. Mr Cook was not in the management team and there was no written policy about limits on authority or containing the procedure detailed by Mr Rendell for pay increases. I do not find that Mr Cook was aware that there was a limitation of authority on the part of Ms Stephens. It was known though prior to 30 September 2010 at least by Mr McLean and Ms Stephens that Mr Fodie was discussing with Mr Cook a new role and remuneration package. After Mr Fodie sent the 8 November 2008 email to Mr McLean no-one got back to Mr Cook and said that Mr Fodie and Mr Stephens did not have authority to make the agreement with him until 21 December 2010.

[78] It was reasonable for Mr Cook and any reasonable person in his situation to believe that Ms Stephens had the authority to bind Magnum to a variation of his employment agreement with respect to his role and remuneration and, if she agreed, to arm Mr Fodie with that authority.

[79] I find Ms Stephens and Mr Fodie had apparent authority to bind Magnum to a variation of Mr Cook's employment agreement.

Was there an offer made to Mr Cook of a remuneration package and a new role that he accepted and, if so when and by whom?

[80] Ms Coats submits that Mr Cook's evidence is inconsistent in relation to when the offer was made and who made the offer. Mr Cook was clear that the offer was made on day two of the Parnell conference on 30 September 2010. As to who made the offer the oral evidence would support that Ms Stephens advised Mr Cook that the split of 80/30/10 was acceptable with a restraint of trade for 3 months. This is in the context of Mr Fodie telling Mr Cook earlier that day or the day before that Mr Rendell and Mr McLean would only agree to a 70/40/10 split. There had also been some doubt up to that point in time about whether Mr Cook would agree to a restraint of

trade. Mr Cook says that he told Ms Stephens on 30 September 2010 that he would agree to the package offered and the restraint of trade. Objectively assessed there was a meeting of the minds in terms of offer and acceptance at that point.

[81] Mr Cook then talked to Mr Fodie. Mr Fodie confirmed he had spoken to Ms Stephens and that she was agreeable to the split Mr Cook wanted. Mr Fodie and Mr Cook shook hands. Mr Cook says that it was further agreed that the start date for the new role would be 1 October 2010 with Mr Fodie. There was no evidence to support that the offer was conditional on approval from Mr McLean or Mr Rendell. Mr Cook said that if there had been such a condition he would not have started in his new role until that was given.

[82] Ms Coats' submits that Ms Stephens had asked Mr Fodie in her email of 28 September not to make the offer verbally but to get Mr McLean to do that inclusive of the new terms such as restraints and that it is inconceivable therefore that she would have made an offer to Mr Cook. I agree the contents of that email appear inconsistent with what the evidence from Mr Cook and Mr Fodie is about what actually occurred on 30 September 2010. There had been some movement though the evidence supports in the split from the earlier email. There are some other matters from that earlier email. Ms Stephens does not say to Mr Fodie that he must be clear to any employee to whom he offers/discusses a package that it is ultimately subject to approval from Mr McLean or Mr Rendell although she had knowledge that Mr Fodie was having discussions directly with employees including Mr Cook. She uses words like *give them a smaller base increase and a large OTE – give them the value they want but load it into the OTE* which would support authority on her part for that to occur and the only note of caution is that he gets Mr McLean to make the offer. There is nothing to suggest that she could not make the offer herself and/or authorise Mr Fodie to do the same.

[83] Ms Coats' submits that there would be an expectation that Ms Stephens would have followed up with Mr McLean to get documentation completed for signing if there had been an offer. I accept that would be an expectation. I cannot rule out though that Ms Stephens may have left that for Mr Fodie to do and Mr Fodie for Ms Stephens to do that.

[84] I accept Ms Coats submission that the email from Mr Fodie to Ms Stephens on 30 November 2010 does not suggest that Mr Cook was to start in tertiary role the

following day on 1 October 2010. It states about Mr Cook *we're looking to shift him from a K-13 role to a Tertiary role*. Mr Fodie though accepted in his evidence that the start date for Mr Cook's new role was agreed at 1 October 2010, the first day of the financial year for Renaissance and his email of 8 November refers to the *newly established role* suggesting that it is already in existence as opposed to yet to be created.

[85] I find that there was an offer made by Ms Stephens to Mr Cook that was accepted by Mr Cook. That offer was then confirmed to Mr Cook by Mr Fodie. Mr Cook shook Mr Fodie's hand and an immediate start date was discussed and agreed to. The offer that was agreed to was set out in Mr Fodie's email to Mr McLean, Mr Cook and Mr Rendell of 8 November 2010 being \$80,000 base salary, \$10,000 car, \$30,000 commission guaranteed for the first quarter and a three month restraint of trade. It would be apparent to the recipients of that email the remuneration package was for a newly established role.

If there was an offer, then were the essential terms of the offer certain?

[86] Ms Coats submits that if the Authority was to find that Mr Fodie and Ms Stephens had apparent authority to bind Magnum to a variation of Mr Cook's individual employment agreement and an offer was made then there was no certainty as to essential terms.

[87] Ms Coats refers specifically to the exact restraint of trade protections being unclear – a three month restraint of trade with no detail as to type, scope or geographical boundaries and further no definition around the new job. Ms Coats submits that there was evidence from Mr Olliver and Mr McLean that Mr Cook was not performing the new role although that was not the evidence from Mr Fodie and Mr Rogers who both managed Mr Cook at different times after 1 October 2010 and Mr Rogers until mid December 2010.

[88] The question for the Authority is whether the essential terms of the agreement are clear or can be ascertained – *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433(CA). There is no difficulty with the remuneration package. It is clear.

[89] I want to address an initial issue around the restraint of trade raised by Ms Coats. Ms Coats has placed reliance on Mr Olliver's email to Mr McLean that refers

to Mr Cook not *signing the contract, did not want to sign the contract anyway* and not *agreeing to the Restraint of Trade*. Mr Olliver did not check the contents of his email with Mr Cook before sending it to Mr McLean. He appears to be confused about the contract that was presented to Mr Cook for his signature. There was only one variation document Mr Cook was presented with. This was in mid November 2010 and bore no resemblance whatsoever to the offer I have found he had been made and had accepted previously. No reliance at all can be placed on the fact that Mr Cook did not sign that in respect of any agreement reached previously as to the restraint of trade. The variation contained a completely different and inferior agreement. It is concerning that Mr McLean on receipt of that email, rather than correcting Mr Olliver on that matter and confirming with him that the variation document provided to Mr Cook did not contain the agreement Mr Cook maintained he had reached with Ms Stephens and Mr Fodie, simply noted on the email *correct*.

[90] That there was a three month restraint of trade I find was certain. There was a common intention to have one. I conclude that was the essential element of what was intended and the agreement should not fail for there being some uncertainty as to the exact wording of the clause. Renaissance would no doubt have standard clauses developed after concerns about the departure of the other account managers for Cyclone who were not so restrained from competing. Mr Cook knew about them and Renaissance's concerns. Mr Cook understood he could not work elsewhere undertaking the same sort of role for three months.

[91] Mr Cook understood that he was to take on a new role as tertiary account manager. He had discussed with Mr Fodie what that would entail. I do not find the agreement fails for uncertainty in that regard. Sometimes employees don't have job descriptions but that does not mean an employment agreement was not concluded. Mr Cook was managed throughout the period from 1 October 2010 to when he left in April 2011. What he was required to do in performing a new role was capable of being assessed and monitored.

[92] The binding agreement entered into does not fail for a lack of certainty as to the essential terms.

Did Mr Cook actually commence in the new role and if so from when?

[93] Mr Cook says that he commenced in the new role from 1 October 2010 and began the new role by contacting Universities and Polytechnics and trying to make headway into the market. He described his work as more around rebuilding relationship rather than sales because there was damage from the other account managers leaving. He said that he was unable to simply hand over his K 13 clients because Paul was too busy and therefore he worked in the two markets. Mr Rogers and Mr Fodie both agreed that Mr Cook undertook work as a tertiary account manager.

[94] Mr Fodie said that Mr Cook was contacting the key accounts at tertiary and meeting with relevant people. He said there was a difference in the size of the markets with tertiary being bigger. He did not accept that Mr Cook would still have contacted the same people in the tertiary market within the scope of his K13 role. Mr Fodie said that he was told by Mr Cook he had difficulty in giving his K13 clients to Paul and that the expected sale support did not eventuate. Mr Rogers said that he felt Mr Cook was excited to relinquish his K13 clients and that he believed that Mr Cook should as tertiary account manager be in tertiary as much as possible. Mr Cook agreed that he still signed his emails off as education account manager but said that this was because he still maintained K13 clients as well as tertiary. He said that he was introduced by Mr Webb as tertiary accounts manager in February 2011 at Otago University and he had been previously introduced as such by Mr Rogers.

[95] I find on the balance of probabilities that Mr Cook did undertake the role of a tertiary account manager from 1 October 2010. He also managed some of his K13 clients because for a variety of reasons he could not relinquish them all. That was less desirable and somewhat confusing and needed to be better managed. Mr McLean and Mr Rendell after the 8 November 2010 email from Mr Fodie raised no issue with Mr Cook or with Mr Cook's managers as to whether he was performing his end of the agreement – the tertiary manager role. Although Mr Olliver gave evidence that Mr Cook was not performing the role of tertiary manager in his view at the time he became manager he did not raise this directly with Mr Cook as part of his investigation for him to respond to. No-one did. Sales figures in my view would not tell the whole picture. In any event performance is a different issue to whether there was offer and acceptance of a new role.

What is the effect of the clause in the employment agreement that any variation to it was required in writing?

[96] Clause 24.1 of Mr Cook's employment agreement provided that any variation to the employment agreement needed to be agreed in writing. The Authority has had to consider whether that means the variation is not enforceable in two earlier cases and has found that has not stopped variations of employment agreements being enforceable – *Webb v. PDL Holding Limited* CA 2/03 H Doyle and *Harris v CentrePort Limited* WA 7/05 G Wood. I have found that there was an offer made to Mr Cook that he accepted and in consideration of and reliance on that offer he commenced a new role. Mr Fodie confirmed the terms of the agreement in his email of 8 November 2010 including as previously set out reference to the *newly established role*.

[97] I accept Mr Henderson's submission that employment relationships are built on mutual obligation of trust and confidence and the statutory requirement for good faith behaviour. A written variation should have been provided to be signed by Mr Cook. It is unsatisfactory that it was not. It was not provided because as Mr McLean expressed in his response comments on Mr Olliver's email of 13 March 2011 – *the offer never fell over out our end. There was no approval sought by Ross or Lynne for the offer, so there was no offer. All rem changes must have prior approval from Shaun*.

[98] The issues around authority were never resolved whilst Mr Cook was an employee at Magnum. No discussion took place with Mr Fodie or it would seem Ms Stephens. I have found that Ms Stephens and Mr Fodie had apparent authority to make the offer. I have found an offer was made and agreed to and its essential terms were certain. Mr Fodie reduced the offer to writing on 8 November 2010. It would seem very unfair that regardless of that finding the offer is not enforceable because it does not strictly comply with the requirements of the individual employment agreement. I find that notwithstanding clause 24.1 of the individual employment agreement the agreement reached is binding on the parties in the circumstances of this case.

Disadvantage and Constructive Dismissal

[99] There was an amendment to s.103A of the Employment Relations Act 2000 dealing with the test of justification for a dismissal or action that came into force on 1 April 2011. Mr Cook was paid in lieu of notice from 1 April 2011 and the actions complained of as unjustified causing disadvantage pre-date 1 April 2011 and fall to be considered under the old s 103A test.

[100] The Authority is required to determine on an objective basis whether Magnum's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time the actions occurred. The justification of any action is informed by the statutory good faith obligations.

[101] Mr Henderson submits that there were unjustified breaches on the part of Magnum when it did not pay the increased remuneration package and failed to treat Mr Cook in accordance with the good faith obligations and in a manner that would not destroy or damage the employment relationship.

[102] Magnum's position was that there was no breach of contract. On my findings that is no longer an argument available to Magnum.

[103] I find that Magnum unjustifiably breached its agreement with Mr Cook to pay him what was agreed on 30 September 2010. Further in circumstances where it was unsatisfied that there was such an agreement it took inadequate steps to resolve the matter. There was a failure to question Mr Fodie or Ms Stephens about the agreement and a failure by Magnum in good faith to be responsive and communicative when Mr Cook continued to raise issues that was required to be resolved in order to maintain a productive employment relationship.

[104] Matters were still not resolved for Mr Cook even when reassured by Mr Webb they would be in December 2010. Any concerns Mr Cook was not in fact maintaining his end of the bargain or performing adequately to justify such a remuneration package were not raised with him. No-one asked him about the new role and what tasks he was undertaking in a manner in which that could be properly measured. Mr Olliver finally took steps to understand what had occurred but he had the incorrect information regarding the provision and rejection of a contract. I accept Mr Henderson's submission that the investigation undertaken about Mr Cook's package and new role was incomplete and was not a full or fair investigation.

[105] I find that Mr Cook has a personal grievance that there were unjustified actions on the part of Magnum as set out above and Magnum did not act as a fair and reasonable employer would have. Mr Cook has suffered disadvantage as a result. He is entitled to remedies. I shall now go on to consider the claim for unjustified constructive dismissal.

Was Mr Cook's resignation caused by the breach of duty by the employer?

[106] Mr Cook's evidence is that he resigned because he was not paid what had been agreed for undertaking the tertiary account role. This is supported by his email dated 17 March 2011 and his letter of resignation of 24 March 2011 that refers to issues over the previous six months.

[107] Mr Cook's resignation was caused by the breaches of duty on the part of Magnum in failing to pay his remuneration package in accordance with the agreement he reached with Mr Fodie and Ms Stephens and failing to properly and fully investigate and act in good faith towards him when he advised that such remuneration and commissions were not being paid.

Was the breach of duty by Magnum of sufficient seriousness to make it reasonably foreseeable that Mr Cook would not be prepared to work under the prevailing conditions.

[108] Mr Olliver is to be commended for being the only manager who tried to resolve the issue for Mr Cook. Failure to pay remuneration as agreed though is a serious breach and it had been ongoing for a period of six months. Mr Cook had been fulfilling a new role and continually raised issues as to when he would be paid. Mr Olliver presented a proposal that would only deal with part of the period Mr Cook was concerned with and even then he could not guarantee the proposal would be approved by Mr Rendell. I find it reasonably foreseeable given the attempts by Mr Cook and promises made by Mr Webb and others to resolve the issues over a six month period to no avail that Mr Cook would not be prepared to continue working without having the issues about his remuneration resolved and payment made.

[109] I find that Mr Cook has a personal grievance that he was unjustifiably constructively dismissed from his employment with Magnum. He is entitled to remedies.

Remedies*Salary difference from 1 October 2010 to 24 April 2011*

[110] The period is one of 29 weeks. I have then calculated on a base salary of \$80000 Mr Cook should have received \$44615.38 gross. He received calculated on a base salary of \$45,000 the sum of \$25096.15. The difference is \$19519.23 gross.

[111] I order MagnumMac Limited to pay to Dean Cook the sum of \$19519.23 gross being underpaid salary as set out above.

Commission 1/10/10 – 1/4/11

[112] I accept Ms Coats submission that this is a period of two not three quarters. There were considerable difficulties with calculating commission. Mr Cook had no set targets but the first quarter was guaranteed at \$7,500. In the absence of targets and any clear and accurate records and given that there were only two quarters I have decided it fair and reasonable to award for two quarters the sum of \$15,000 less combined payments already made of \$7499.

[113] I order MagnumMac Limited to pay to Dean Cook the sum of \$7501.00 being commission.

Holiday Pay on above sums

[114] I accept that commission was a regular part of Mr Cook's pay and it was not argued to the contrary. Mr Cook is entitled to holiday pay on the above two amounts of \$19519.23 and \$7501.00 which is a total \$27020.23. 8% of \$27020.23 is \$2161.18 gross.

[115] I order MagnumMac Limited to pay to Dean Cook the sum of \$2161.18 gross being holiday pay on the above amounts.

Interest

[116] There is a claim for interest on the amounts awarded. The Authority has the power to award interest on any monetary sum awarded by way of remedy under clause 11 of the second schedule of the Act. It is appropriate to award interest on the combined amounts for unpaid salary and commission of \$27020.23 gross from 1 April

2011 until the date of payment at the rate prescribed under section 87(3) of the Judicature Act 1908 at 5%.

Contribution

[117] I do not find that Mr Cook's actions contributed toward the situation that gave rise to the personal grievances.

Lost Wages

[118] It was clarified that had Mr Cook not had a motorcycle accident on 3 June he would have been able to start a new role on 13 June 2011. I am satisfied that he took steps to mitigate his loss. He is therefore entitled to lost wages calculated on an \$80,000 salary from 24 April to 13 June 2011 (six weeks) but not to 25 July as claimed for that reason. I do not deduct any ACC payment received as my understanding is that such payments did not commence until one week after 13 June 2011. I calculate lost wages in the sum of \$9230.77.

[119] I order Magnum Limited to pay to Dean Cook the sum of \$9230.77 gross being lost wages under s 123 (1) (b) of the Employment Relations Act 2000.

Compensation

[120] The Authority heard from Mr Cook and his mother Gillian Cook about this claim. Doctor Page was also connected to the investigation meeting by telephone and spoke about the consultation he had with Mr Cook on 23 March 2011. Mr Cook described himself as normally a placid person and that would accord with my observations during the investigation meeting. Mr Cook clearly became angry and frustrated about the way he was treated with respect to his remuneration. He said that he felt less valued as an employee. This was confirmed by his mother's evidence who described him as stressed and angry which was unusual for him. She said that Mr Cook had told her he had a new role and it seemed to her that he wanted to prove himself in that role. She said that not being paid for the new role did impact on Mr Cook and she became worried about him. In her written evidence and oral evidence she described it all getting too much for Mr Cook and she supported his decision to resign. Mr Cook said that after he resigned it felt like a big weight off his shoulders and he mainly slept as he was exhausted for the first week or so.

[121] Dr Pages evidence supported that Mr Cook was stressed and not coping as at 23 March 2011. He did attribute some of this to the 22 February 2011 earthquake and some to work. Mr Cook said his stress increased when he was issued with a trespass notice after he resigned preventing him from going into the company store. Mr McLean said that this was because Mr Cook had obtained an insurance quote after having been into the store on several occasions for a piece of equipment that he had supposedly broken but did not bring it to the store to be fixed. Mr McLean said that it was important that the company was not seen providing insurance quotes for items they had never seen. Mr Cook did not accept that there was anything untoward in his approaches. Whilst the notice may have been seen as somewhat excessive MagnumMac is entitled to issue trespass notices and I do not place weight on that.

[122] In all the circumstances the evidence supports that Mr Cook did suffer humiliation and loss of dignity and a considerable degree of stress as a result of the ongoing breaches on the part of MagnumMac. I have taken into account that some stress may also have been attributable to the earthquake. In all the circumstances an award of \$10,000 is appropriate.

[123] I order MagnumMac Limited to pay to Dean Cook the sum of \$10,000 without deduction under s.123(1)(c)(i) of the Employment Relations Act 2000 being compensation.

Penalty

[124] I have found that there were breaches on the part of MagnumMac including breaches of the duty of good faith. MagnumMac were not active and constructive in maintaining a positive employment relationship with Mr Cook. They were not responsive and communicative about his concerns.

[125] Section 4A of the Employment Relations Act 2000 provides that a party who fails to comply with the duty of good faith is liable to a penalty if the failure was deliberate, serious and sustained. Ms Coats maintains that threshold has not been reached. I agree but it becomes very close. After receiving the 8 November 2010 email from Mr Fodie that set out what had been agreed with Ms Stephens and into which Mr Cook was copied, Mr McLean and Mr Rendell did not speak to either Mr Fodie or Ms Stephens about its contents then or ever. It was an extraordinary feature of this case that there would not immediately have been some discussion with a

manager to ascertain what was happening after receipt of the 8 November 2010 email. Mr McLean's response was simply that he knew the remuneration package would not be approved.

[126] I find there was a deliberate decision not to talk to Mr Fodie and/or Ms Stephens about whether agreement was reached with Mr Cook that could bind Magnum and whether Mr Cook was performing the new role. This prevented an understanding as to what had happened and any resolution at an early stage.

[127] It was a serious breach but what reduced the seriousness somewhat is that Magnum did not disbelieve Mr Cook that there had been an offer. They relied on a lack of authority on the part of Mr Fodie and Ms Stephens. I cannot conclude ultimately the breach was sustained as Mr Fodie and Ms Stephens resigned in November. I do not therefore impose a penalty.

Costs

[128] I reserve the issues of costs. The parties may be able to resolve these but if not Mr Henderson has until 19 September 2012 to lodge and serve submissions as to costs and Ms Coats has until 10 October 2012 to lodge and serve submission in reply.

Summary of findings and orders

- I have reserved leave for Mr Henderson to return to the Authority to amend if necessary the name of the respondent to Renaissance Corporation Limited.
- I have found that Mr Fodie and Ms Stephens had apparent authority to bind MagnumMac to a variation of Mr Cook employment agreement.
- I have found that an enhanced remuneration package and a new role was offered and accepted by Mr Cook on 30 September 2010.
- I have found the terms of that offer were sufficiently certain.
- I have found there was an enforceable variation notwithstanding that it was not in writing – clause 24.1 of employment agreement.

- I have found that MagnumMac breached the terms of that agreement and duties in good faith and trust and confidence. I have found the investigation it carried out was not full and fair.
- I have found personal grievances of unjustified action causing disadvantage and unjustified constructive dismissal and have made the following orders:
 - Reimbursement of under paid salary in the sum of \$19519.23 gross.
 - Commission payable in the sum of \$7501.
 - Holiday pay on the above sums in the amount of \$2161.18 gross.
 - Interest at 5% from 1 April 2011 until payment on the combined amounts for unpaid salary and commission of \$27020.23.
 - Lost wages in the sum of \$9230.77 gross.
 - Compensation in the sum of \$10,000 without deduction.
- I have not ordered the imposition of a penalty.
- I have reserved costs and have timetabled for an exchange of submissions if agreement cannot be reached.

Helen Doyle
Member of the Employment Relations Authority