

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 253
5421476

BETWEEN MANFRED LANGE
Applicant

A N D EFI NEW ZEALAND
LIMITED
Respondent

Member of Authority: K J Anderson

Representatives: D Organ, Advocate for the Applicant
R Upton, Counsel for the Respondent

Investigation Meeting: 10 April and 28 April 2014 at Auckland

Submissions Received: 14 May and 5 June 2014 from the Applicant
28 May 2014 from the Respondent

Date of Determination: 23 June 2014

DETERMINATION OF THE AUTHORITY

Introduction

[1] Mr Manfred Lange brings various claims in regard to monies that he alleges he is entitled to be paid by his previous employer, EFI New Zealand Limited (EFI). The first set of claims being pursued by Mr Lange relate to bonus incentive payments for the years 2011 (\$41,674.40), 2012 (\$6,067.42), and 2013 (\$15,820.67). The total sum claimed for bonus incentive claims is \$63,562.49.

[2] Mr Lange also says that EFI “miscalculated” his leave balance by using an incorrect anniversary date, and combined with the sums Mr Lange claims are due as bonus incentive payments for 2012 and 2013 (above), he has been underpaid in regard to his final holiday pay entitlement by \$8,905.31.

[3] Finally, Mr Lange seeks recovery of an alleged shortfall in regard to KiwiSaver contributions from EFI, based on the sums he claims are due to him in regard to the incentive bonus payments and holiday pay; being the sum of \$2,524.29.

[4] Interest is sought on any monies awarded by the Authority at the rate of 5% per annum from 1 September 2013.

[5] In responding to the claims of Mr Lange, EFI says that the company has consistently informed him that it will pay any monies to him that it is legally required to. Consistent with this position, EFI commissioned an independent expert (Mr Wade Glass) to determine the quantum of any monies that may be owing to Mr Lange. The outcome of this exercise was that Mr Glass concluded that the total sum owing to Mr Lange was \$9,360.30, plus a KiwiSaver contribution of \$374.41. EFI says that these sums were subsequently paid to Mr Lange on 10 March 2014¹.

[6] The respondent rebuts the alternative claims of Mr Lange and says that he has now been paid all monies that he is legally entitled to.

Background

[7] Mr Lange commenced his employment with a company called Prism Software Limited (Prism) on 3 December 2008. According to the *Individual Employment Agreement* (IEA) Mr Lange was employed in the position of Technical Director – MIS Products². The IEA is signed for the employer by Kathleen Mitchell, Global Director, Professional Services and Technology. Rather oddly, Ms Mitchell signed the IEA on behalf of an entity called Productivity Software Limited. No explanation has been given about this particular oddity but it is commonly accepted that the employer of Mr Lange was Prism.

[8] In regard to remuneration, Mr Lange was paid a salary of \$175,000³ per annum; with Prism making a contribution of 4% of the gross salary amount. At *Schedule 1* of the IEA, it is provided that:

A bonus of \$10,000 based on mutually agreed KPIs to be set at the beginning of the financial year and will [sic] paid at the completion of

¹ The submissions for Mr Lange acknowledge that he has been paid the sum of \$9,360.30 but he has not been paid the KiwiSaver amount of \$374.41

² The IEA does not include a commencement date but it is commonly accepted that it was 3 December 2008

³ The salary subsequently increased to \$187,460.

each financial year. Initial bonus period to be reviewed at the end on [sic] the 2009/10 financial year.

[9] The evidence of Mr Filip Buyse, the General Manager of the Web2Print component of EFI's business, is that when Mr Lange was employed, he (Mr Buyse) was the Chief Executive Officer of Prism. Mr Buyse attests that in August 2011, EFI purchased the assets of Prism and as a result, EFI became his employer, and of particular relevance, also the employer of Mr Lange. While Mr Lange takes issue with some of the evidence of Mr Buyse in regard to how EFI became his employer, I am satisfied that it is established that EFI New Zealand Limited became Mr Lange's employer where upon the amalgamation of a company called Productivity Software Limited (PSL) and Prism, the amalgamated company became EFI New Zealand Limited.

[10] While there is no dispute in regard to EFI being the cited respondent in regard to the claims of Mr Lange, there is a dispute about when he commenced his employment with EFI. While it is the evidence of Mr Buyse that in August 2011, EFI purchased the assets of Prism, and in doing so, EFI became the employer of Mr Lange; in legal terms, this cannot be right as the amalgamation of Prism and PSL was not effective until 1 December 2012.

[11] It follows that 1 December 2012 must be the date that EFI became the legal employer of Mr Lange and Prism ceased to exist as a legal entity. But in any event, for the purposes of these proceedings, it is accepted that Mr Lange's terms and conditions were provided by a new employment agreement which took effect on 1 November 2011. I will return to this matter in due course as it appears to have some bearing on Mr Lange's claim relating to the bonus entitlement for 2011.

The new employment agreement

[12] Mr Lange entered into a new employment agreement, signed by him and Prism on 28 November 2011 (the 2011 agreement). Relevant to the matters before the Authority is *Schedule 1 – Employee Details*. First, the title of Mr Lange's position changed. In his 2008 employment agreement the title of the position was Technical Director – MIS Products. The position title in the 2011 employment agreement is EFI NZ APPS Director of Software Engineering. Not much rests on this change of title except it is notable that while the employer signatory party is Prism and the employer

party is also of this name (clause 1.1), it appears that Mr Lange was now actually employed by EFI and this is commonly accepted by the parties.

[13] The following provisions of Schedule 1 are also relevant to Mr Lange's claims:

2. **Reporting to: Filip Buyse, Bob Rothschild**
3. **Commencement date: 1 November 2011**, with service being recognised as continuous from 3 December 2008 for the purpose of the Employee's service related benefits.
6. **Remuneration and benefits:**
 - 6.1 **Base Salary:** NZD\$144,521. In the event the responsibilities of the role are expended [sic] the employer will review the compensation.
 - 6.2 **Bonus Incentive:** 12.5% of the actual salary in the given year based on mutually agreed KPI's to be set at the beginning of each financial year with an option in the first year only to achieve a 2 x multiplier on the bonus if stretch goals are achieved.
 - 6.3 **Other benefits:** Kiwisaver; if the employee has elected to contribute to Kiwisaver, the employer will contribute to Kiwisaver an amount calculated on 4% of the employee's gross salary.

[14] In regard to the base salary of \$144,521, Mr Lange told the Authority that when he entered into the 2011 agreement, he incurred a substantial reduction in his salary, from \$187,460 (- \$42,939). However, he agreed to the reduced salary as he believed the new bonus incentive arrangement would allow him to recover much of this reduction. Mr Lange says that the negotiation of the new arrangement took several weeks and while he was not really satisfied with the outcome, he needed to "hang onto" his job. As I understand it, the overall relevance of Mr Lange's evidence in regard to the change in the remuneration levels between the 2008 and the 2011 agreements, is that because EFI (allegedly) failed to pay the due entitlements to the incentive bonuses, Mr Lange has incurred a twofold loss. That is, a reduced salary and lower bonus payments than Mr Lange had anticipated.

The issues in dispute

The bonus entitlements

[15] As set out above, the bonus incentive payment in each financial year is to be calculated by the use of a simple formula. That is: 12.5% of the actual salary. The actual salary applying to Mr Lange, from 1 November 2011, was \$144,521. However, a key component of an entitlement to the payment of a bonus is that “mutually agreed” key performance indicators (KPIs) are “to be set at the beginning of each financial year ... ”⁴.

[16] And then there is a rather odd final component to the bonus incentive provision. There is: “...an option in the first year only to achieve a 2 x multiplier on the bonus if stretch goals are achieved”. While the parties have not really been able to explain exactly why this option applies to the “first year only” or how the “first year” is defined, it seems that notwithstanding these particular oddities, Mr Lange, potentially, would have been able to double his bonus entitlement “if stretch goals are achieved”. But the parties have not been able to explain to the Authority how “stretch goals” are defined and there is no evidence of such ever being discussed or recorded during the term of Mr Lange’s employment.

The 2011 bonus claim

[17] The amounts claimed by Mr Lange, not only for the 2011 year but also the other periods involved, have varied somewhat from the time that he made his initial claims. This appears to have created some confusion, even possibly frustration, for the respondent. However, at the request of the Authority, Mr Lange has now presented spreadsheets setting out in some detail the claims for the respective years and how they have been calculated. For the 2011 year, Mr Lange calculates that there is a bonus shortfall of \$41,674.40.

[18] Mr Lange refers to the 2011 employment agreement, Schedule 1 – Employee Details, and clause 3, commencement date. As discussed earlier, the commencement date of the IEA is 1 November 2011. The relevant provision that Mr Lange relies upon, in regard to his bonus calculations, is that his service is recognised as being

⁴ The financial year is the calendar year

continuous from 3 December 2008 "... for the purpose of the employee's service related benefits".

[19] It is the position of Mr Lange that the bonus entitlement under the 2011 IEA is a "service related benefit". Mr Lange then posits that under clause 6.2 of the 2011 IEA, he is entitled to 12.5% of his actual salary for CY2011. Mr Lange then extrapolates this further and says that because his total salary for 2011 was \$182,080.69, then 12.5% of this figure is \$22,760.09. Mr Lange then says that this figure should have the 2 x multiplier applied to it as the "stretch goals" were achieved. Hence, the bonus entitlement is \$45,520.17. But Mr Lange acknowledges that he was paid a bonus for the 2011 year of the sum of \$3,845.77, therefore the shortfall claimed is \$41,674.40.

[20] However, EFI has a quite different view of matters. As mentioned earlier in this determination, in order to assess whether Mr Lange may be entitled to be paid any additional monies, Mr Glass was engaged as an independent party to assess the situation pertaining to the claims of Mr Lange. EFI says that it has relied upon the outcome of the investigation conducted by Mr Glass and has paid Mr Lange all entitlements, as found due to him by Mr Glass. While it is accepted that Mr Glass is an independent party, it appears that he was engaged at the initiative of EFI, without any discussion with Mr Lange, and/or any regard to him accepting the conclusions reached by Mr Glass.

[21] Mr Glass has provided an affidavit as to his involvement with this matter including his calculations and conclusions. He attended an investigation meeting on 28 April 2014 where he answered questions from the Authority and those put to him in cross-examination by the advocate for Mr Lange.

[22] Mr Glass is an experienced chartered accountant and he has attested to being independent to the parties in the proceedings before the Authority. In regard to the 2011 bonus claim, Mr Glass states that his interpretation of "service related benefits" is that this term encompasses benefits that would have accrued from Mr Lange's original starting date with Prism, as explicitly recognised in the 2008 IEA, such as leave entitlements. I agree with this interpretation and I also note that in regard to a bonus entitlement for Mr Lange, the 2008 IEA provides that:

A bonus of \$10,000 based on mutually agreed KPIs to be set at the beginning of the financial year and will be paid at the completion of each financial year. Initial bonus period to be reviewed at the end on [sic] the 2009/10 financial year.

[23] Mr Glass comes to the conclusion that Mr Lange was entitled to be paid a bonus of \$9,316.26 for the period 2 August to 31 December 2011. The earlier date is identified as being when EFI “acquired” Prism and hence Mr Glass posits that 2 August 2011 would have been the first opportunity for EFI and Mr Lange to engage on the matter of appropriate KPIs. However, Mr Glass then attests that because he was not provided with any evidence of KPIs for the period 2 August to 31 December 2011, he could only “assume” that it was the intention of the parties that the CY2012 (calendar year 2012) was to be the first year for which KPIs would be set.

[24] Mr Glass also refers to a letter from EFI that states that Mr Lange’s bonus for the CY2011 would be \$7,424.02. This letter has been produced to the Authority. It is dated “Monday, February 24, 2014”. Presumably there is a typing mistake and the year should be 2012, but the letter informs Mr Lange that:

Following the 2011 performance review, this letter provides you confirmation of your bonus. The details are as follows:

- You will receive a bonus of NZD\$7,424.02. Your bonus will be paid with the April 2012 payroll.

On behalf of EFI, I want to thank you again for your contribution in 2011 and look forward to continued success in 2012.

[25] While Mr Lange was informed that he would receive a bonus of \$7,424.02 as evidenced by the attestations of Mr Glass and Mr Lange, only \$3,845.75 was paid by EFI. There is no evidence available to the Authority as to why this lesser sum was paid.

[26] Returning to the respective calculations of Mr Glass and Mr Lange, and with due respect to both, I conclude that they are both mistaken in the regard to the methods that they have adopted.

[27] Firstly, both Mr Lange and Mr Glass have calculated the bonus based on applying 12.5% to the gross earnings of Mr Lange. Mr Glass calculates that Mr Lange earned \$74,530.09 from August to December (inclusive) 2011; hence 12.5% of this figure is \$9,316.26. We have previously examined how Mr Lange arrived at his claim of \$41,674.40.

[28] However, with due respect, I conclude that there is a fundamental flaw in regard to the calculations used by both men. This is that the 2011 IEA was not effective until 1 November 2011. Until this date, in the absence of any evidence before the Authority to the contrary, it must be concluded that the 2008 agreement applied in regard to any bonus entitlement due to Mr Lange. It follows that I do not accept Mr Lange's proposition that the bonus incentive scheme provided by the 2011 IEA was a service related benefit, or that it can be applied retrospectively, as urged by Mr Lange. At best, the 2011 IEA provision could only apply for the last two months of that year; i.e. November and December. Even then we are left with a vacuum in regard to the situation regarding the setting of KPIs for those two months.

[29] However, a commonsense approach would be that the KPIs for 2011, assuming they were agreed under the terms of the 2008 agreement, would apply. The salary applying from 1 November 2011 was \$144,521 or \$12,043.41 each month. Hence, 12.5% of \$24,086 ($\$12,043.41 \times 2$) is \$3,010.75. In addition to this, in accordance with the terms of the 2008 IEA, Mr Lange would have been entitled to \$10,000 for the 12 month period, or \$833.33 per month \times 10 months (January to October 2011), this brings us to a sum of \$8,333.33. Therefore, the total bonus due to Mr Lange for CY2011 is \$11,344.08 – less the \$3,845.77 received; leaving a final figure of \$7,498.31, as compared with the conclusion arrived at by Mr Glass that Mr Lange is entitled to \$5,470.51. An order for payment of a further \$2,027.80 will follow - plus a further Kiwisaver contribution of \$81.11 ($\$2,027.80 \times 4\%$).

[30] Given the above findings as to when the 2011 incentive bonus provisions were applicable from, it probably goes without saying that I find it unnecessary to give consideration to the “stretch goals” matter advanced by Mr Lange. But in case there remains any doubt, I conclude that in addition to the date of activation of the 2011 bonus incentive provisions, there is another substantial factor that weighs against Mr Lange's claim. This is that there is no evidence at all about stretch goals being discussed between the parties in 2011. Indeed, the evidence of Mr Buyse is that stretch goals were never ever agreed for Mr Lange, or anyone else within EFI, at all.

[31] In summary, in regard to Mr Lange's claim for the incentive bonus for CY2011, I find that he has an entitlement of \$7,798.24. Even then it has to be said that this is based on an assumption that mutually agreed KPIs were set for CY2011 and that Mr Lange achieved these to a 100% performance level. In the absence of any

evidence from EFI to the contrary, I make the assumption that both of these criteria existed.

The 2012 bonus claim

[32] Mr Lange claims that there is a bonus shortfall of \$6,067.42. He has calculated this sum as being 12% of \$148,644.67, but this sum includes the bonus paid for 2011; the sum of \$3,845.77. Mr Lange says that the \$3,845.77 was a component of his “actual salary” for CY2012 given that he was paid this amount in that year.

[33] The IEA uses the terms “base salary” (clause 6.1) and “actual salary” (clause 6.2), and hence this creates some ambiguity. Either way, it seems to me that the focus should be on “salary” and I conclude that this should, more probably than not, be the base salary. Indeed, Mr Lange appears to accept that this is so as in his brief of evidence dated 4 February 2014, as at para.4 he acknowledges that the bonus should be calculated as 12.5% of \$144,798.93. This is also accepted by EFI.

[34] EFI accepts that a bonus was due to Mr Lange for CY2012. EFI also believes that 2012 would be the year that if stretch goals were attained, then potentially the 2 x multiplier may have been applicable: 2012 being the first financial year that EFI actually employed Mr Lange under the terms of the new employment agreement. This seems to me to be an entirely logical conclusion.

[35] That then takes us to the setting of mutually agreed KPIs. Mr Lange’s evidence is that “all mutually agreed KPIs were achieved”, but there is no tangible evidence before the Authority of any mutual agreement being reached between Mr Lange and EFI in regard to the KPIs. Indeed, the evidence about the setting of KPIs is inconclusive. We have what appears to be a computer “screen shot” sourced from EFI by Mr Glass and attached to his affidavit (Appendix 1). At para.29 of the affidavit, Mr Glass attests to being “... provided with an internal email trail involving several EFI employees and pertaining to the matter of [Mr Lange’s] achievement of bonus KPIs for CY2012”.

[36] An email dated 20 February 2013 from Jeff White to Marc Odlin and Filip Buyse seems to have some relevance:

Marc,

Filip and I discussed the MBOs based on Manfred's plan.

Goal 1 – deliver at least 1 large DSF customisation in FY2012 – We give him a 3.5 on this because he has done a very good job on testing, releasing and getting the customisations done. Sanil agrees that his builds are very good and wants to use their resource for other DSF builds.

Goal 2 – deliver 80% of PRISM road map for 2012 – We give him a 2.5 on this. They completed about 60% of the road map items but we also moved some things around (SNAP/FIERW) and lost 2 on the Prism team during the year.

Goal 3 – deliver WFO phase 3 within budget, time, specs and quality – 3.0 on this as the project was fixed by the NZ team and was a mess when they got it from Europe.

Goal 4 – do other reviews – gave him a 1 – I have not received any reviews yet.

So overall he is between a 2.5 and a 3.

Filip – feel free to add comments.

[37] A further email dated 20 February 2013, suggests that the bonus that should be recommended was to be 65% of the achievable potential.

[38] Mr Lange has produced a document titled “*2012 Performance Planning & Assessment Form for Manfred Lange*” (the form). The evidence of Mr Lange is that he recollects that he “contributed the information” contained in the “Employee’s Comments” section of the form, whereby section 1 provides for an “Evaluation against Competencies”. In regard to four of the competencies, Mr Lange gives himself a competency rating of 3 out of 5. Then in section 2, “Evaluations against 2012 Goals/ Objectives”, there are two “Achieved”, a “No Longer Applicable” and two “In Progress” evaluations; but in the absence of any assistance from the parties, it is not possible to reach any conclusions about what this all really means. The final section 3, “Overall Performance Summary” contains no informative assistance at all.

[39] The evidence of Mr Buyse is that the 2012 KPIs were discussed with Mr Lange in March 2012. Mr Lange denies this. He says that there was no conversation about the 2012 bonus. Mr Lange refers the Authority to an email from him to Mr Buyse and Mr White, dated 27 March 2012, whereby he puts forward “a few suggestions” for his KPIs for 2012. Mr Lange also proposes an appropriate time

to discuss his suggestions. Mr Buyse replies to this email on 30 March 2012 and informs that he will look at scheduling a meeting for “next week”. However, Mr Lange says that a meeting to discuss his suggestions never took place and hence his KPIs were not discussed or agreed.

[40] While it does appear likely that the 2012 KPIs were not actually mutually agreed, as envisaged by the provision in the employment agreement, the screen shot and the February 2013 email trail, along with the 2012 performance planning and assessment form, all suggest that both parties had at least some understanding of what was required from Mr Lange in order for him to achieve an incentive bonus. In particular I conclude that Mr Lange’s input into the 2012 performance planning and assessment form and the details he has entered, are a substantial indication that he accepted that certain KPIs had been agreed to, and indeed he went as far as rating himself in regard to his overall competency as to his achievements in at least four areas of his performance.

[41] Notwithstanding Mr Lange’s view that KPIs were not agreed to, he now says that he fully achieved the KPIs and hence he should have received a bonus of \$18,099.87; rather than the \$12,032.44 that he was paid.

[42] I note that Mr Glass calculated the bonus entitlement due to Mr Lange based on a 65% performance rating as \$11,764.91 and I concur with his conclusion about this. It has not been revealed how EFI arrived at the sum of \$12,032.44 that was paid to Mr Lange, but in any event, given that he has not been able to prove to a satisfactory standard that he was entitled to the sum of \$18,099.87, I conclude that the sum he has received for the CY2012 is, more probably than not, an appropriate payment in the circumstances.

[43] Finally, in regard to the 2012 bonus claim, I note that Mr Lange makes no mention of the application of stretch goals, as he believes that they were only applicable to 2011. However, for completeness I record that, given that the weight of the evidence points to a performance level of less than 100% for 2012, the 2 x multiplier would not have had any application in any event.

The 2013 bonus claim

[44] Mr Lange accepts that he was paid a bonus of \$4,939 but he says that a shortfall remains of the sum of \$15,820.67. Mr Lange calculates this sum on the basis that his “actual salary” for 2013 was \$166,077.34 and hence 12.5% of this sum is \$20,759.67 – less the bonus paid of \$4,939 – leaves his claim of \$15,820.67.

[45] The evidence of Mr Lange is that, “all mutually agreed KPIs were achieved”, but the evidence of Mr Buyse is that this is not right. Mr Buyse says that “typically” the KPIs for each employee were agreed in March of each year, but EFI does not have any record of KPIs being agreed with Mr Lange for CY2013.

[46] The further evidence of Mr Buyse is that even if KPIs had been agreed, the performance of the New Zealand business was such that it would be extremely unlikely that any senior staff, including Mr Lange, could have achieved them. Mr Buyse says that the New Zealand results were so poor that a number of roles were disestablished, including Mr Lange’s position. While Mr Buyse does not hold Mr Lange responsible for the overall poor performance of the New Zealand operation, he says that Mr Lange’s “methodology and practices” were a factor in the under-performance of the business.

[47] Mr Lange denies this and says that his work had an international spread and he had little influence on the New Zealand operation. Finally, Mr Buyse has not been able to explain how the bonus payment of \$4,939 was calculated. At best Mr Buyse says that it was a “discretionary bonus” and it was paid as a “goodwill gesture” towards Mr Lange.

[48] There are a number of issues that arise in regard to any entitlement that Mr Lange may have to a bonus as he claims. First, there is no evidence of any discussion, let alone agreement, about KPIs for 2013. This is most probably because it had been decided by at least March 2013 (possibly earlier), that Mr Lange’s position was to be made redundant; subject to some consultation about this. As evidenced by a letter dated 9 April 2013 from EFI to Mr Lange, the disestablishment of his position was confirmed and Mr Lange was given six months’ notice from this date. It appears that Mr Lange was placed on garden leave in anticipation that he may be required to perform some services for EFI. However, via a letter from EFI dated 17 August 2013,

Mr Lange was informed that his employment would terminate effective from 1 September 2013, and he would be paid in lieu of the unexpired notice period.

[49] The outcome of all of this is that Mr Lange did not perform any duties for EFI from 9 April until his employment was terminated from 1 September 2013. Of course, given there was no discussion or agreement about Mr Lange's KPIs for CY2013, and that he only worked for approximately three months of that year, it is difficult to see how he has any entitlement to a bonus for more than those three months of work at best, assuming that some form of pro rata methodology could be applied and that in itself is problematic.

[50] There is an issue in regard to what the situation should be if KPIs are not "mutually agreed". It is argued for Mr Lange that EFI had a contractual obligation to agree to KPIs for 2013 and because the company failed to do so, Mr Lange should not be deprived of the chance to earn a bonus, particularly given that he was placed on garden leave from April to the end of August. But the circumstances for 2013 are quite different from that of 2012, whereby there is evidence of Mr Lange taking the initiative to promote some discussion about appropriate KPIs. However, there is no evidence of either party paying any attention to what the situation regarding bonuses might be for 2013; except of course EFI says that the performance of the New Zealand operation was such that no senior staff would have been entitled to a bonus in any event, as evidenced by the number of redundancies, among other things.

[51] While the situation is less than straightforward, I conclude that given the operational circumstances that existed for EFI in 2013 pertaining to the New Zealand operation, even if KPIs had been agreed (and they were not), it is unlikely that Mr Lange could have achieved a level of performance that would have entitled him to a bonus at all, let alone a 100% entitlement. It seems that the best he may have been able to achieve would have been based on some measurement of his performance for the first quarter of 2013.

[52] It needs to be said that it is not Mr Lange's fault that the New Zealand operation of EFI was reduced as occurred, but nonetheless that is the reality of what happened, regardless of the reasons why. The inevitable effect for Mr Lange is that it simply was not realistically or practicably possible for him to earn the bonus that he claims he is entitled to.

[53] It seems to me that by paying the sum of \$4,939 to Mr Lange, regardless of what terminology is used, i.e. discretionary or *ex gratia* payment, EFI has made some attempt at a pro rata payment in recognition of the circumstances that existed. It follows that I am left to conclude that Mr Lange has not been able to satisfy the Authority that he has any further entitlement to a bonus payment for the CY2013.

Holiday pay claim

[54] Mr Lange claims that he has been underpaid holiday pay by \$9,360.30. Mr Glass, an experienced and independent chartered accountant, had access to the records of EFI and he concluded that there was a shortfall in the final holiday pay due to Mr Lange of \$3,659.23. And Mr Glass assessed that there was a leave balance due to Mr Lange of a further \$498.09, relevant to 2008, the first year of Mr Lange's employment.

[55] Having closely examined Mr Lange's submissions on the holiday pay claim, I am not persuaded that Mr Glass is mistaken in his conclusions as Mr Lange urges. As I understand it, Mr Lange has been paid a total additional sum of \$9,360.30 by EFI in recognition of the findings of Mr Glass. This sum includes the 2008 leave balance and further holiday pay, in addition to the sum of \$5,470.51 for the 2011 incentive bonus. In the absence of any compelling proof to the contrary, I can only conclude that the calculations of Mr Glass should be accepted and that the holiday pay entitlements of Mr Lange have been met by EFI.

KiwiSaver contributions

[56] As set out above, Mr Glass concluded that Mr Lange was entitled to be paid a further sum of \$9,360.30 and he calculated the additional Kiwisaver sum contribution (at 4%) as being an additional \$374.41. Again, in the absence of any persuasive proof to the contrary, I must conclude that this is the amount due to Mr Lange. As at the time of receipt of submissions from the parties, Mr Lange accepts that he been paid the sum of \$9,360.30, but he says that he has not been paid the \$374.41.

Determination

[57] For the reasons set out above, I find that Mr Lange has a further entitlement to an incentive bonus for the CY2011. EFI New Zealand Limited is ordered to pay to Mr Lange the gross sum \$2,027.80 plus a Kiwisaver contribution of \$81.11; a total sum

of **\$2,108.91**. Finally, in the event that Mr Lange has not been paid the sum of \$374.41, being the Kiwisaver contribution calculated by Mr Glass, and which EFI have agreed to pay, this sum should be paid in addition to the above amount due.

Costs

[58] Costs are reserved. Given the limited success obtained by Mr Lange in comparison to the amounts claimed, and the resources utilised by EFI in defending the matter, it is arguable as to where the costs should lie. The parties are invited to resolve this matter if they can. In the event that a resolution is not possible, the applicant has 21 days from the date of this determination to file and serve submissions. The respondent has a further 21 days to respond.

K J Anderson
Member of the Employment Relations Authority