

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 309
5434441

BETWEEN JOSEPH McDAID
Applicant

A N D HUAWEI TECHNOLOGIES
(NEW ZEALAND)
COMPANY LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Susannah Maxfield, Counsel for the Applicant
Stephen Langton and Angela Evans, Counsel for the
Respondent

Investigation Meeting: 24 June 2014 at Auckland

Date of Determination: 16 July 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr McDaid) alleges that the respondent (Huawei) has breached his employment agreement, has made misrepresentations during negotiations which led to Mr McDaid's employment, has failed to pay wages due and owing to him, should incur penalties for the breaches and damages pursuant to s.6 of the Contractual Remedies Act 1979.

[2] Huawei denies any breach of Mr McDaid's employment agreement, deny misrepresenting the terms of his employment prior to Mr McDaid's engagement, claims that the employment agreement signed between the parties is the entire agreement between them, denies other remedies and contests any ground for a penalty.

[3] Mr McDaid was recruited to join the senior management team of Huawei New Zealand in mid-2010. There were lengthy negotiations. Of particular importance are a series of emails from Huawei's HR Manager, Ms Wang, in early June 2010.

[4] It is common ground that Mr McDaid did not accept the offer that emerged from those June 2010 emails but a month later resumed in negotiation and an employment agreement was signed which resulted in a start date of 9 September 2010.

[5] Because Ms Wang's emails are critical to Ms McDaid's misrepresentation claim I refer now to those relevant emails:

- (a) Ms Wang's email of 3 June 2010 offered a base salary of \$180,000 per annum, a sales incentive plan (SIP) of \$77,000 and an annual discretionary bonus. In respect of the bonus component, Ms Wang has this to say in her email "*I have seen it very generous in the past, equal to 3/4 months' salary*";
- (b) In her email of 8 June 2010, Ms Wang increased the offer to "*220k base plus 90k SIP plus discretionary bonus (partly organisational performance and partly individual performance) plus normal redundancy package two weeks for each year, up to one year's payment*";
- (c) In her 9 June 2010 email, Ms Wang increased the offer again to:
 - *Base 220k*
 - *Transportation allowance 4.8k*
 - *SIP: 94k*
 - *Annual bonus: based on the history records, it varies from individual to individual. For sales capacity staff, averagely [sic] 3 to 4 months' salary per year (subject to company performance and individual performance)*
 - *Six month redundancy*
 - *One way economy air ticket for you and your dependant family members from MEL to AKL*

- *The overall offer is roughly about 380k in total.*

[6] Then there was an email exchange initiated by Mr McDaid on 18 June 2010 in which he sought more definition of the annual bonus figure. Ms Wang referred him to the proposed employment agreement and repeated that the bonus historically had been paid out to similar position holders at 3 to 4 months' salary. Ms Wang then makes the point again that the bonus, which she describes as discretionary, is subject to both company performance and individual performance.

[7] Then in 2011, Huawei decided not to award 2010 bonuses to sales employees who received 2010 SIP payments because sales performance was below expectations. Mr McDaid was one of a number of Huawei staff in that position.

[8] The evidence is that Mr McDaid queried the decision and claimed to have been promised a bonus of 3 to 4 months' salary during the recruitment process.

[9] As part of Mr McDaid's following up on that situation, a meeting was arranged between Mr McDaid and Mr Zhang who was Chief Executive Officer of Huawei in New Zealand at the relevant time. Also in attendance were two support people at least for the first part of the meeting.

[10] At the end of the formal meeting involving the four persons, there was an agreement that Huawei would check the legal correctness of its decision not to make a bonus given Mr McDaid's contention that he had been promised a bonus if he was rated a B for his performance in 2010, which he was. Conversely, Mr McDaid was going to think about whether he felt he had been discriminated against in not being paid the bonus.

[11] In the one-on-one meeting which followed (this meeting involving only Mr McDaid and Mr Zhang) Mr McDaid's evidence is that Mr Zhang threatened his job if he persevered with his claim to be paid a bonus.

[12] Mr McDaid told me this conviction of his that Mr Zhang had threatened his employment was the gravamen of his dispute with Huawei and fundamentally changed his relationship with the employer for the balance of the employment.

[13] But Mr Zhang flatly denies he threatened Mr McDaid's employment and also denies that the relationship between the two men changed fundamentally after the 23 June 2011 meeting, as Mr McDaid contended.

[14] There is a covert audio recording of the meeting which has been transcribed and made available to the Authority. It is appropriate for me to note at this point that Mr Zhang speaks English as a second language and while my assessment of him giving evidence is that he speaks English well it is I think self-evident that persons speaking a second language will not be as adroit with that language as they would be in their mother tongue.

[15] In any event, there is a straightforward conflict between the two men about what was said and a number of ways in which the audio record of the meeting can be interpreted. For Huawei, it says that Mr McDaid's behaviour after the meeting was not consistent with his present contention that this meeting changed his relationship fundamentally with the employer because Huawei says that the behaviour of the parties toward each other did not change and it maintains that Mr McDaid never raised with anyone the suggestion that he felt confronted by Mr Zhang's alleged behaviour.

[16] Then in early 2012, Huawei decided to stop offering SIP to new employees and to see if it was possible to negotiate SIP out of the contracts of existing staff. Of course this affected Mr McDaid as well as other staff.

[17] When Mr McDaid was confronted with the proposal that Huawei sought to remove the SIP component from his remuneration, he said that he saw that proposal as a *fate accompli* and that whatever he said or did, Huawei would get its way.

[18] Huawei's evidence is different; both Ms Wang, the HR Manager, and Mr Zhang, the Chief Executive Officer, were very clear in the evidence they gave me that they understood that this was a contractual term that Huawei was bound by. This was not a situation where Huawei had a discretion pursuant to contract, as they said the company had in respect to the bonus for instance; this was a situation where the SIP payment was a part of the remuneration of the individual and that evidence is supported by the fact that the SIP payment is included within the clause headed "*Remuneration*" in the operative employment agreement and not in the subsequent clause headed "*Discretionary Benefits*".

[19] In any event, Huawei says that agreement with Mr McDaid was reached to remove the SIP payment from 2012 onwards and that that agreement was achieved by Huawei making payments to Mr McDaid in consideration of his agreement.

[20] The agreement was recorded in a letter dated 27 March 2012 and a payment of \$69,559.33 was made by Huawei in consideration of Mr McDaid accepting the removal of the SIP entitlement from 2012 onwards.

[21] Mr McDaid left the employment in May 2013.

Issues

[22] Mr McDaid claims a range of remedies for a variety of breaches but I am satisfied that the principal issues that the Authority needs to address can be subsumed under two broad questions, the first dealing with Mr McDaid's entitlement to a bonus (the misrepresentation allegation), and the second dealing with the alleged breaches of his employment agreement.

[23] The Authority's response to those issues will determine Mr McDaid's entitlement to the range of remedies that he seeks.

[24] Because there is also a range of important issues associated with the meeting between Mr McDaid and Mr Zhang on 23 June 2011, I propose to address that issue separately as well.

[25] Accordingly, I intend to consider the following questions:

- (a) Did Huawei misrepresent the bonus to Mr McDaid?
- (b) What happened at the meeting between Mr McDaid and Mr Zhang on 23 June 2011?
- (c) Has Huawei breached the agreement by failing to pay SIP to Mr McDaid?

Has Huawei misrepresented Mr McDaid's entitlement to bonus payments?

[26] I am not persuaded there has been any misrepresentation. That said, it is plain that the Authority has jurisdiction to determine a misrepresentation. A clear statement

of the law is contained in *Brake v. Grace Team Accounting Ltd* (ERA Auckland AA409/10) where Member Dumbleton made the following pertinent observation:

The Authority accepts that in principle statements made before an employment relationship exists may be actionable under the Employment Relations Act. Remedies such as those for misrepresentation available under section 6 and section 7 of the Contractual Remedies Act 1979, and for misleading and deceptive conduct under section 12 of the Fair Trading Act 1986, are not dependent on the existence of an employment relationship to give the Authority jurisdiction, as this has been extended by section 162 of the Employment Relations Act ...

[27] Section 162 of the Employment Relations Act 2000 (the 2000 Act) confers jurisdiction on the Authority to make order that the High Court or the District Court may make under the Contractual Remedies Act 1979 (the 1979 Act) in any matter relating to an employment agreement.

[28] If a misrepresentation is a false statement of fact the misrepresentation is only actionable if it had the effect of inducing the completion of the bargain. The aggrieved party is entitled to claim damages as if the misrepresentation were a term of the contract that was subsequently broken.

[29] There is a limitation on the wide sweep of the law on this point; s.4 of the 1979 Act establishes an exemption excluding liability for misrepresentation where the Court or Tribunal is satisfied that the “*entire agreement*” clause of the operative employment agreement ought to take precedence.

[30] What Mr McDaid says in the present case is that he was made an offer of employment valuing the package at around \$385,000 and that in reliance on that representation, he entered into the employment.

[31] Included within that package which Mr McDaid says he was promised is an element which is always described in the email traffic between the parties as a discretionary bonus. That discretionary bonus was said by Ms Wang for Huawei to generally be three to four months’ salary based on historical data for like positions to the one that Mr McDaid occupied.

[32] Mr McDaid says that because he was not paid a bonus of that magnitude, or at all, there was a misrepresentation for which he is entitled to remedies.

[33] I have not been persuaded by Mr McDaid's argument for a number of reasons. First, and perhaps most importantly, I am satisfied on the evidence (almost exclusively the email traffic in June 2010 between Ms Wang and Mr McDaid which I have already referred to in detail) that throughout the parties' negotiations, the bonus was always correctly described as "*discretionary*". Mr McDaid is a senior commercial manager with special expertise in the telecommunications industry. I am satisfied that he knew or ought to have known what was meant by the expression "*discretionary bonus*". It is inconceivable that he could have misunderstood what was being suggested to him by email. The use of the word "*discretionary*" makes it abundantly clear that there is no entitlement to a bonus. Common usage of the expression "*discretionary bonus*" conveys a sense that the payment contemplated is not an entitlement that can be relied upon but a payment which may be made, at the discretion of the employer.

[34] It cannot seriously be contended that a senior commercial manager with special expertise in a particular industry would not understand that the concept of a "*discretionary bonus*" imported the idea that a discretion vested in the employer to pay or not pay and if to pay, what level payment was to be made.

[35] I am satisfied that no reasonably savvy commercial person in Mr McDaid's position would expect that they could rely for budgeting purposes on the receipt of a bonus which was described as discretionary.

[36] That view of matters is supported by the operative employment agreement executed by the parties. That agreement, duly signed by Mr McDaid on 8 August 2010, contains two relevant provisions. Clause 5 is entitled "*Remuneration*" and it refers to two components only, namely the salary and the sales incentive plan (SIP). There is no reference at all in that clause to any other payment including the discretionary bonus.

[37] The following clause, clause 6, is entitled "*Discretionary Benefits*" and because it is germane to the issues between the parties, I set out its terms in full:

The company may at its discretion, from time to time provide you with other benefits. Unlike your remuneration, the company may cease providing these benefits or change the basis on which it provides them at its discretion and you do not have an entitlement to continue to receive these benefits or to receive any other payment or benefit in lieu.

Unless you are advised in writing that a benefit is part of your remuneration, it will be a discretionary benefit to which this clause applies.

[38] Moreover, there is a definition of “*remuneration*” at clause 26.7 of the so-called Terms Sheet. That definition is in the following terms:

26.7 Remuneration means the base salary and other benefits set out in clause 5 of the accompanying letter (as varied from time to time).

[39] Mr McDaid has signed both the Terms Sheet and the employment agreement letter. It seems to me that the relevant clauses could not be clearer. Remuneration, on which the recipient can rely, is dealt with in clause 5 and the discretionary payments are dealt with in clause 6. The definition of remuneration excludes anything not covered by clause 5. The terms of clause 6 could not be more transparent; the words used by Huawei make it abundantly clear that the employee cannot rely on the receipt of any payment under this head, or indeed any particular quantum of payment under this head. It is difficult to read the words of clause 6 and arrive at any other conclusion.

[40] As an astute senior manager of mature years, I simply cannot believe that Mr McDaid entered into this arrangement with Huawei on the basis of a belief that he could rely on receipt of a bonus of any size.

[41] Furthermore, Mr McDaid did not commence in his employment until 9 September 2010. The employment agreement is dated 5 August 2010 and it is apparent that Mr McDaid signed it on 8 August 2010. The negotiations on which that agreement are based took place in June 2010.

[42] I have not been persuaded that a senior commercial manager such as Mr McDaid would have entered into that arrangement without giving it mature consideration. After all, he had from mid-June 2010 through until early August 2010 to think about the elements of the proposal and it is apparent on the evidence that he sought some definition of the bonus question during the email negotiations. Ms Wang directed him to the words of clause 6 of the proposed employment agreement. Those are the very words which spell out in no uncertain terms what the company’s obligation is.

[43] In my judgment then, Mr McDaid had ample opportunity to satisfy himself as to the nature of the bargain he was striking and I simply do not believe him when he said that he thought he had a package which required Huawei to pay a particular amount as bonus.

[44] It is true that in the email negotiations, Ms Wang offered the observation more than once that historically the bonuses paid out by Huawei to employees in similar positions to Mr McDaid amounted to three to four months' salary.

[45] Ms Wang demonstrated to my satisfaction that that observation, made more than once during the email negotiations, was demonstrably accurate as a statement of historical fact. But that is not a promise that Mr McDaid will himself receive a payment of that magnitude or indeed any payment. All that any reasonable person could take from what Ms Wang said was that historically that was the quantum of payments that had been made to people in similar positions to Mr McDaid.

[46] A reasonable person in Mr McDaid's position might extrapolate that information forward and go so far as to have an aspiration that that quantum of bonus would be received by them on into the future, but a reasonable person like the mythical man on the Karangahape Road bus could do no more than have an aspiration of a bonus of that magnitude.

[47] In order for Mr McDaid to rely upon the representation relating to the quantum of the past bonus payments (three to four months' salary), he would have to satisfy me that those statements were representations of what he could earn and there is simply no evidence that that is the case. Ms Wang made clear throughout the correspondence that she was talking about what had happened in the past and her evidence to me at the investigation meeting satisfactorily demonstrated that her statements in the emails were demonstrably true in that they were observations about what Huawei had done in the past.

[48] But that can only be extrapolated into the future if there is a straightforward commitment to pay in the future, and there is not because the payment is discretionary and not mandatory. Even if that point is not accepted, there is nothing in Ms Wang's email traffic to suggest that she was promising or even suggesting that Mr McDaid could rely on that quantum of bonus. All she was saying was that that was the quantum of bonus that had been paid in the past to people in like positions.

[49] I turn now to consider the stated basis on which the assessment of bonus payments was made by Huawei. Ms Wang said this was based on individual performance and company performance. Mr McDaid draws my attention to inconsistencies in the evidence between Ms Wang and Mr Zhang but I am satisfied that, looked at in the round, what the evidence discloses is that Huawei took the performance of the individual employee into account as well as the performance of the company as a whole. I am satisfied that the representation made by Ms Wang on these matters was an accurate statement of the approach historically taken by Huawei in setting bonuses. Again, in the context of a discretionary payment, it is difficult to see how Mr McDaid can be held to have relied upon information given to his disadvantage when all that he has been told is, on a broad brush basis, what Huawei has historically taken into account in assessing bonuses.

[50] The final issue I turn to under this head is the question whether Mr McDaid has met the onus of demonstrating to me that he was induced to enter into this employment relationship by the alleged misrepresentation. I reach the conclusion that he has not met that test at all. For reasons which I have already advanced, I am satisfied that a senior manager of his experience, given the length of time that the negotiations took and the time difference between the period of the negotiations and the commencement of the employment, it is simply unbelievable that Mr McDaid would not have had the opportunity of carefully reflecting on what he was doing, taking advice as appropriate and being certain that he understood the ramifications of what it was that he was being offered.

[51] In the end, I have simply not found it credible for Mr McDaid to maintain, given his seniority and experience, that he did not understand what a discretionary bonus was because in essence, that is what he is inviting me to accept.

[52] On the narrow point of whether the alleged misrepresentations induced him to enter into the agreement or not, I note for the sake of completeness that Mr McDaid did not help himself by refusing to disclose the details of what on his evidence was effectively a competing offer from another employer. I would have thought that if that evidence was compelling he would have been very quick to disclose it but the fact that he declined to disclose that information suggests to me that the alternative offer was anything but supportive of his position.

What happened at the 23 June 2011 meeting?

[53] Mr McDaid told me that this meeting was “*the tipping point*” in his relationship with Huawei because it was at this meeting that he says that Mr Zhang threatened to end his employment if he persisted with his argument about being entitled to the bonus. I must say that I have not been persuaded by Mr McDaid’s evidence in this regard either. In my considered opinion, his view of what happened at this meeting is mistaken based as it is on a misinterpretation of what I am satisfied Mr Zhang said.

[54] Moreover, I heard no evidence to support Mr McDaid’s view that his behaviour towards Huawei had changed after this meeting, save for his bare assertion.

[55] Conversely, I heard evidence from Huawei that Mr McDaid’s behaviour towards Mr Zhang in particular did not change (that was Mr Zhang’s evidence) supported by Ms Wang and Mr McDaid’s evidence that he stopped forcefully asserting himself with Huawei after this meeting is also contested.

[56] Ms Wang refers in her evidence to matters after the 23 June 2011 meeting where Mr McDaid asserted himself with Huawei and especially in respect of his argument around the SIP payment, what happened there is completely inconsistent with his claimed change of behaviour post the 23 June 2011 meeting.

[57] Mr McDaid says that in that meeting, Mr Zhang, in the private part of the meeting where just Mr Zhang and Mr McDaid were present, said that if Huawei was forced to pay a bonus to staff who received an SIP he (Mr Zhang) would end Mr McDaid’s employment.

[58] In support of this view of Mr Zhang’s observation (an observation which Mr Zhang hotly disputes), Mr McDaid refers to the original segment of the covert recording which he made of that recording wherein the transcript has Mr Zhang saying something like these words:

Basically we end up employment potentially.

[59] Mr McDaid invites me to conclude, as he says he does, that what Mr Zhang was meaning was that he would “*end my employment if I continued to challenge his decision*”.

[60] But there are a number of problems with that interpretation. The first is that, as I have already noted, Mr Zhang speaks English as a second language and it is not difficult to find any number of other meanings to be ascribed to the subject passage. Mr Zhang says that what he was trying to say, and I must say that I think this is an entirely plausible explanation, is that if there was a dispute as to the entitlement to bonus between Mr McDaid and Huawei, then the parties could end up in an employment dispute.

[61] Mr Zhang's transcription of the same passage is this:

We end up with employment attention.

[62] In his brief of evidence, Mr Zhang explained the matter in these words which I quote in full:

As mentioned, English is my second language and I cannot rule out that Joe [Mr McDaid] heard me say something that I did not believe I said or intended to say but in this case I am certain that I neither said the words attributed to me by Joe nor did I ever intend to say anything to that effect. I also never, at that time or at any time afterwards, had any reason to be concerned that Joe had taken away from that conversation an intention by me to threaten to terminate his employment.

[63] I found Mr Zhang a straightforward and honest witness who gave intelligent and thoughtful answers and I have no reason to doubt his evidence on this point. What he is saying in simple terms is that even if he misapplied the language to the extent of creating the impression that Mr McDaid claims to have got, that was never his intention and there was never anything that happened after that which led him to believe that Mr McDaid had got that message.

[64] Of course Mr McDaid says that because he got the message that his job was under threat if he continued complaining, he never raised the issue again and he stopped being assertive with the employer. But that does not ring true either and is not consistent with the evidence. Ms Wang gives evidence of Mr McDaid assertively pursuing the arguments around the end of his SIP payments, for instance.

[65] Moreover, the interpretation placed on Mr Zhang's remarks by Mr McDaid is completely inconsistent with the full transcript of the covert recording. Looked at in isolation where the subject observation is the only part of the transcript that is available, I suppose it is available for a jaundiced view to be formed of what

Mr Zhang was trying to say, but placed in the context of the whole tape, the interpretation advanced by Mr McDaid is simply incredible.

[66] The transcript discloses a collaborative exchange between two colleagues who, looked at without the benefit of any of the other evidence, appear to have an excellent working relationship.

[67] Moreover, I accept the submission made for Huawei to the effect that the transcript also discloses that far from Mr Zhang taking exception to what Mr McDaid was raising, Mr Zhang was actually supportive of Mr McDaid and wanted to ensure that Huawei fulfilled its contractual obligations in order, amongst other things, to satisfy Mr McDaid.

[68] Again, Mr McDaid wanted me to accept that once Mr Zhang had allegedly threatened his position of employment, he (Mr McDaid) backed off and ceased persevering with his argument about the bonus. But again that is not consistent with the transcript. If Mr McDaid was concerned about what Mr Zhang said there is nothing in the transcript to suggest that he changed his position, sought clarification, behaved more defensively or in any way changed his approach. None of that is consistent in my view with his "*tipping point*".

[69] After that meeting, Mr McDaid never raised an employment relationship problem, never said he was unhappy, never raised any complaint with anybody about Mr Zhang's alleged behaviour, and despite his bare claim that he changed his position in dealing with Mr Zhang after that meeting, there is no evidence to support that. Mr Zhang in particular gave evidence (which I accept) that he continued to have coffee with Mr McDaid, as he had always done, after the 23 June 2011 meeting and I am satisfied that that evidence is to be preferred over Mr McDaid's assertions.

[70] In conclusion then, I have not found Mr McDaid very believable on this point either. I do not accept his view of what happened at the 23 June 2011 meeting. I am satisfied that if there were any misunderstanding, it is a function of Mr Zhang's language skills with English and that given the complete absence of any claim after the meeting by Mr McDaid, it is difficult to see how his view of matters is to be believed.

[71] His interpretation of what Mr Zhang said is inconsistent with the full transcript of the meeting, is inconsistent with his subsequent behaviour, both in terms of his

failure to complain and his continuing to engage with Mr Zhang as if nothing had happened, and in his continued assertive advocacy of his own cause.

Has Huawei breached Mr McDaid's employment agreement by failing to pay SIP?

[72] I am not persuaded by Mr McDaid's argument in this regard either. I conclude that Mr McDaid agreed with Huawei to remove the SIP payment from 2012, that that agreement was reduced to writing by letter dated 27 March 2012 and that a payment was made to Mr McDaid by Huawei of \$69,559.33 as compensation for the loss of that benefit.

[73] The factual position here has already been sketched. In early 2012, senior management at Huawei determined that they would cease offering SIP payments to new staff and that existing senior managers would be asked to endeavour to negotiate the SIP payments out of existing employment agreements. I have already made clear that I do not accept Mr McDaid's evidence that this matter was presented to him as a *fait accompli*; I am satisfied that both senior managers of Huawei who gave evidence were very clear that the SIP payment was a contractual term for Mr McDaid and others and if they wanted to get rid of it they would have to negotiate about that.

[74] It is apparent on the evidence that the negotiations around the removal of the SIP payment was conducted contemporaneously with the assessment of Mr McDaid's entitlement to an SIP payment for the 2011 year.

[75] There is dispute between the parties about whether Mr McDaid met target or not but for the avoidance of doubt, I prefer the evidence of Huawei to the effect that Mr McDaid's entitlement was limited to only one of his targets being achieved.

[76] At a meeting on 21 February 2012, Huawei and Mr McDaid met to discuss the 2011 SIP payment and at that meeting, Huawei representatives also indicated to Mr McDaid that Huawei wanted to negotiate the removal of his SIP payment going forward.

[77] The following day, 22 February 2012, Mr McDaid emailed Ms Wang to indicate that he was prepared to accept a one-off lump sum payment or an ongoing increase in base salary to remove the SIP payment.

[78] A further meeting took place on 7 March 2012 at which two proposals were advanced by Huawei. The first was a continuation of the status quo, that is that SIP payments would continue on into the future with targets being set and payments being made in accordance with those targets.

[79] The second option which it is plain on the evidence Mr McDaid accepted was that he would withdraw from the SIP assessment from 2012 on the basis that Huawei would treat sales made in calendar 2012 as if they related to 2011 and pay out on that basis. In the result, as I have already noted, the effect of this arrangement was that \$15,666.67 was generated by Mr McDaid in terms of the 2011 SIP and the balance of \$69,559.33 was added as recompense for the removal of the SIP payments into the future.

[80] The first issue in this arrangement I have already dealt with; I am satisfied that Mr McDaid is mistaken in his contention that he was entitled to more money from the 2011 SIP than Huawei believed. I prefer Huawei's evidence. Its evidence is very clear that both employer and employee accepted at the time (2012) that Mr McDaid had only generated an entitlement to \$15,666.67 for the 2011 SIP.

[81] But the real question is whether the agreement that I have just described is legally efficacious. Mr McDaid says it is not for a number of reasons. This is so, he says, despite the fact that the agreement between the parties was performed, the money paid to Mr McDaid, no protest made by Mr McDaid at the time or any suggestion that the money was accepted in part-payment only, and of course the entitlement to continuing SIP payments was removed from Mr McDaid's employment agreement from 2012.

[82] The first question to address is whether, strictly speaking, the agreement just described was an alteration to the employment agreement and if it was whether it was in truth in writing.

[83] I am satisfied it was an alteration to the agreement and it was in writing. The issue is important because the employment agreement between the parties defines alteration to the agreement as follows:

This agreement may only be altered in writing signed by each party.

[84] Given that I accept the arrangements described above are an alteration (they must be; they involve the removal of a remuneration item from the entitlements), the question is whether the parties have complied with the contractual requirements.

[85] There is a letter dated 27 March 2012 which is signed by Ms Wang but there is nothing on that letter to indicate acceptance by Mr McDaid although as I have mentioned, it is apparent that there was no complaint from him about the payment and no suggestion that it was being treated, for example, as a part-payment only.

[86] The issue is whether Mr McDaid's signature needs to be appended to the 27 March 2012 letter in order for the alteration to be efficacious.

[87] Huawei relies on a decision of the UK Court of Appeal in *Golden Ocean Group Ltd v. Salgaocar Mining Industries Pvt Ltd & Anor* [2012] EWCA Civ 265 where that Court confirmed that an email exchange amounted to an agreement.

[88] On the basis of the decision in *Golden Ocean* above, the real agreement between the parties is not the letter of 27 March 2012 but rather the email exchange of 7 March 2012 where Ms Wang outlined the two proposals discussed at the meeting on 7 March 2012, noted that Mr McDaid accepted proposal two and then a response from Mr McDaid the same day sets out his position in what I am satisfied are the clearest terms.

[89] He says in that email:

I am comfortable with taking option 2 as compensation for losing SIP in 2012 and onward provided option 2 recognises what is in and out of my control. If option 2 does not happen for the reasons below, then we would need to discuss other compensation for losing SIP in 2012 and onward.

[90] Mr McDaid then goes on to identify difficulties about him obtaining purchase orders for the two sales that were completed in early 2012 but which the proposal was that they be backdated and he be paid for them as if they had been part of 2011 SIP, that being the basis on which option two was to work.

[91] Clearly, on any reasonable construction, there was an acceptance from Mr McDaid in that email that, subject to the receipt of those purchase orders to justify the payments, there was a concluded arrangement and I am satisfied that the existence of the 27 March 2012 letter confirming that the payment concerned was to be made is

evidence for the view that the preconditions referred to in the email exchange had been met.

[92] If that basis for the disposition of the matter is not accepted, Huawei advances another argument, that of estoppel by convention. This proceeds on the footing that irrespective of the requirements of clause 24, an unsigned agreement can be enforced by the Authority.

[93] A case in point which I am referred to is *Energy Venture Partners v. Malabu Oil & Gas Ltd* [2013] EWHC 2118 (Comm) where the England and Wales High Court held that where parties to a contract with an “entire agreement” clause subsequently orally agreed to change a relevant provision, one party could not contend that that agreement was ineffective because of the entire agreement clause, particularly where the subsequent agreement had been performed. Moreover, the English Court held that estoppel by convention would have prevented the party from relying on the entire agreement clause to avoid the oral variation.

[94] It is submitted that estoppel by convention is established in this case and I agree. It seems to me it would be unconscionable to allow Mr McDaid to resile from understandings that he had reached with Huawei which resulted in him receiving a significant sum of money to which he was not contractually entitled save for the agreement which he now seeks to resile from.

[95] For the sake of completeness, I now address the allegation that the agreement just referred to was voidable because of the improper conduct of Huawei. This claim relies on Mr McDaid satisfying me that he was not able to prosecute his cause with Huawei after the 23 June 2011 meeting with Mr Zhang but I have already rejected that contention as not in accordance with the evidence.

[96] Moreover, I have also rejected the claim that Mr McDaid made that the removal of the SIP payment was a *fait accompli* which he was powerless to resist (again inconsistent with the evidence), and that he was entitled to \$69,567 as an SIP payment for 2011 whereas I am satisfied on the evidence I heard he was actually only entitled to an SIP payment for that year of \$15,666.67.

[97] Finally, I note that Mr McDaid’s claim that he had no alternative but to accept the offer made to him is plainly not made out. Even on his evidence, there were two options. The first option, which he rejected, was a continuation of status quo, that is,

SIP targets would continue to be set and he would continue to have access to earnings based on those SIP targets.

Determination

[98] I have not been persuaded by any of Mr McDaid's claims which seem to me to be inconsistent with the evidence I heard. It follows that Mr McDaid's proceedings fail in their entirety.

[99] One final matter needs to be addressed. After the investigation meeting concluded, Mr McDaid produced another covert recording of a meeting he had had, this time with Ms Wang. The existence of the recording emerged at the investigation meeting but it was not put into evidence by Mr McDaid for the hearing and accordingly could not be tested in the usual way.

[100] I am invited to consider the recording now as evidence for the view that Mr McDaid did raise his view of the 23 June 2011 meeting with Mr Zhang, after that meeting. The transcript appears to have Mr McDaid tell Ms Wang that Mr Zhang had threatened Mr McDaid's employment.

[101] Huawei correctly observe that the evidence was not before the Authority during its investigation; submissions for Mr McDaid say the investigation does not end at the end of the investigation meeting but that is sophistry. The practical reality is that if Mr McDaid wanted the transcript considered, he should have disclosed it so the Authority could investigate it and counsel could cross examine on it. Huawei say I should not consider it.

[102] That is difficult given that I am duty bound to read counsel's submissions and they include the offending material. What I can say is that even if the transcript is plausible evidence that Mr McDaid spoke to Ms Wang about his view of what Mr Zhang had said on 23 June 2011, that does not change my view that Mr McDaid is mistaken in his interpretation of what Mr Zhang said. Further, with the exception that there may now be one example of Mr McDaid referring to his view of the 23 June 2011 meeting, after that meeting, my conclusions in this determination remain undisturbed.

Costs

[103] Costs are reserved.

James Crichton
Member of the Employment Relations Authority