

**ATTENTION IS DRAWN TO THE ORDER  
PROHIBITING PUBLICATION OF CERTAIN  
INFORMATION (REFER PARAGRAPHS 5 - 7)**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2014] NZERA Auckland 321  
5432069**

BETWEEN	ANDREW SIMPSON Applicant
AND	IBM NEW ZEALAND LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Sarah-Jane Neville, Counsel for Applicant Gillian Service, Counsel for Respondent
Investigation Meeting:	1 – 3 April and 28 May 2014
Submissions Received	9 June 2014 from Applicant and from Respondent
Determination:	23 July 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Andrew Simpson, was employed by the Respondent, IBM New Zealand Limited (IBM), from 8 July 1996 until he resigned on 9 August 2013.

[2] Mr Simpson claims that he was unjustifiably constructively dismissed by IBM and that his employment was affected to his disadvantage as a result of a series of actions by IBM.

[3] IBM denies that it unjustifiably constructively dismissed or unjustifiably disadvantaged Mr Simpson, and claims that he voluntarily terminated his employment following his resignation on 9 August 2013.

[4] IBM counter-claims that Mr Simpson breached his terms and conditions of employment in several respects during the course of his employment.

## **Prohibition on publication**

[5] I order that the evidence given or pleadings filed in this matter (which includes briefs of evidence, the statement of problem, the statement in reply, and all associated documents) are prohibited from publication until this order is revoked or varied by further orders of the Authority.

[6] I further order that the names of IBM's clients referred to in this matter are not to be published. The IBM client names are to be referred to by letters bearing no relationship to their actual names.

[7] These orders are made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.

## **Issues**

[8] The issues for determination are whether or not:

- Mr Simpson was unjustifiably constructively dismissed by IBM
- Mr Simpson was unjustifiably disadvantaged by:
  - a. IBM failing to implement a salary alignment process and an agreement to increase his salary in circumstances in which the increase had been promised to him to retain his employment in IBM;
  - b. IBM failing to treat Total Contract Value (TCV) writebacks in a fair and reasonable way such that Mr Simpson was unjustifiably disadvantaged in the calculation of the commission component of his remuneration package
- IBM dealing with Mr Simpson in such a way as to constitute a breach of its good faith duties towards him by failing to deal with him in an honest way since January 2013 in relation to:
  - a. Issues relating to the TCV writebacks;
  - b. The salary increase claim; and
  - c. Issues leading to the termination of his employment

- Mr Simpson breached his obligations to IBM contained within his individual employment agreement (the Employment Agreement), confidentiality agreement (the Confidentiality Agreement), and Business Conduct Guidelines (BCG) during employment and after his employment ended by:
  - a. failing to return all company property to IBM on the termination of his employment; specifically IBM confidential information located on a personal hard drive, and failing to provide IBM with the encryption software and other passwords required to access the laptop he had used during the course of his employment;
  - b. not adhering to and breaching IBM's BCGs by storing unauthorised and inappropriate material on his IBM laptop and making covert recordings of conversations with other IBM employees.

### **Background Facts**

[9] IBM is a global technology and innovation company with operations in over 170 countries. It invents and integrates hardware and software and provides support services to its customers.

[10] Mr Simpson was employed in New Zealand and progressed through various positions with IBM following his initial employment as a Customer Services Representative in July 1996. He was appointed as a Senior Solutions (Base Growth Seller) in May 2010, and continued in that role until his resignation on 9 August 2013.

[11] Mr Simpson was employed subject to the Employment Agreement which included such terms as:

**Reviews:** *Your remuneration will be reviewed regularly and at least every 12 months.*

**Incentive Plan:** *You will participate in IBM's Sales and Incentive Programmes as appropriate to changing business needs ...*

**Business conduct:** *You shall comply with IBM's Business Conduct Guidelines*

**Confidentiality:** *You will be required to sign IBM's Agreement regarding Confidential Information and Intellectual Property which will form part of this contract. You must comply with the specific terms of the Agreement.*

**YOUR ROLE:** *Maintain appropriate ethical standards, and develop relationships based on trust, confidentiality and integrity*

[12] As a Base Growth Seller, Mr Simpson formed part of the Strategic Outsourcing (SO) team. He was the only Base Growth Seller based in New Zealand and held responsibility for all 12 SO accounts in New Zealand.

[13] During his employment as a Base Growth Seller, Mr Simpson had in-country managers and out-of-country managers. From the beginning of 2012 Mr Simpson reported to Mr David Paterson as his in-country Manager, to Mr Philip King as his out-of-country functional manager, and to Ms Joanne Dooley, at that time Director of SO, as his second-line out-of-country Manager. The out-of-country managers were based in Australia.

[14] In December 2012 Mr Paterson resigned and was replaced by Mr Andrew Fox, and in April 2013 Ms Kate Tulp was appointed as Strategic Outsourcing Business Unit Executive, replacing Mr Fox as Mr Simpson's direct line manager.

[15] In January 2013 Mr King resigned and was replaced by Ms Catherine Gullo as Mr Simpson's out-of-country functional manager.

*Performance prior to 2010*

[16] During the first few years of his employment with IBM Mr Simpson had been subject to a Performance Improvement Plan (PIP) which had been successfully completed.

[17] Prior to his move into the sales area in 2010 Mr Simpson said he had been rated in the top 2% to 4% of all IBM employees across Australia and New Zealand on the IBM Personal Business Commitments rating scale. In 2010 his in-country manager at that time, Mr Davenport, had advised him that he was on a development list for future IBM leaders.

[18] Mr Simpson said he had noticed a change in culture when he had moved into sales in 2010, finding it more forceful; however he said that despite a lack of consistency he had been successful in achieving the targets he had been set.

*Mr Simpson's Pay Structure*

[19] Mr Simpson's total potential remuneration, referred to as On Target Earnings (OTE), comprised a base salary, allowances and a target commission incentive component (At Risk Earnings). His income was split in the proportions 55% base salary and 45% At Risk Earnings.

[20] The At Risk Earnings component was agreed each year with IBM sellers as part of a global budgeting process. Each seller received an Incentive Plan Letter (IPL) which set out the terms and conditions, the quota (target), and the territory (clients), over which incentive income (commission) was earned.

[21] The IPL also provided that IBM could adjust quotas during the term of the IPL, stating:

***Right to Modify or Cancel:*** *The Plan does not constitute an express or implied contract or a promise by IBM to make any distributions under it. IBL reserves the right to adjust the Plan terms (including, but not limited to, changes to sales quotas or other performance objectives, changes to customer territory assignments, or changes to target incentives or similar earnings opportunities) or to modify or cancel the Plan, for any individual or group of individuals, at any time during the Plan period until any related payments have been earned under the Plan terms.*

[22] A seller can receive Total Contract Value (TCV) recognition towards his or her signings target provided three criteria apply, these being:

- (a) The value of the deal is less than US\$10 million;
- (b) No Client Solutions Executive is assigned to the deal; and
- (c) The deal is within the seller's territory (as set out in the IPL)

[23] However IBM can adjust the deals on which the individual earns commission, including by permitting a seller to have credit for a deal which is not in their IPL territory.

[24] Ms Dooley gave evidence concerning occasions when special approval had been sought for Mr Simpson to receive credit towards attainment of his signings target for deals that were not within his territory.

[25] A Base Growth Seller earns commission when a contract has been signed which is based on the predicted value of the contract. IBM measures the total revenue value that the contract will generate which is referred to as the TCV. TCV writebacks are an adjustment

that decreases attainment against revenue and normally occur where a client cancels their contract or terminates a contract during the term. A TCV writeback therefore ensures that IBM does not overstate its financial position, where future revenue has been forecast and will not be received.

[26] Mr Simpson's At Risk earnings made up 45% of his OTE. Ms Dooley explained that IBM is a high performance culture in which it is expected that each seller will meet 100% of his or her allocated quotas, including 100% of the At Risk component of their OTE.

[27] During the time Mr Simpson was a Base Growth Seller there were three different IBM worldwide sales plan changes reflecting different business focuses within the IBM SO Base accounts.

#### *2011*

[28] In 2011 the primary measure of the sales plan measured achievement by revenue so that the Base Growth Seller was compensated based on any net new revenue achieved in the named SO accounts, i.e. on anything above the contracted base contract amount.

[29] The secondary measure in 2011 was Challenges which were set by the Base Growth Seller's manager for each quarter. The Base Growth Seller could earn credit if the challenges were achieved.

#### *2012*

[30] In 2012 global changes in the way IBM measured and rewarded its sellers changed the primary measure of the sales plan which, together with net new revenue in the SO accounts, also included revenue from smaller transactional or hardware sales and was known as Integrated Technology Software (ITS) revenue.

[31] The second change in 2012 was to include signings in the SO accounts as a secondary measure of the sales plan. IBM measures the total value that the contract will generate which is referenced as the TCV. If Mr Simpson achieved his TCV signings he would be paid 35% of his At Risk Earnings remuneration.

[32] There was also a third component in 2012 of Challenges, set at 15%.

#### *2013*

[33] In 2013 the primary measure changed from revenue to signings and the secondary measure became total SO and ITS revenue in the SO accounts.

[34] Additionally to the measures set out above, Mr Simpson could get credit towards his quota if there was positive activity on any of his SO accounts, even if he had not personally contributed to the sales activity which resulted in increased revenue or signings.

*IPL Quota increase 2012*

[35] Quota increases are set at a global level and then flow down to each region and each country. The global figures reflect the level of growth that is needed to support regional success.

[36] IBM has the right set out in the IPL to adjust or modify a seller's quota. Ms Dooley explained that team quotas are set for each territory at the beginning of each year in January, and can be affected by the IBM Global budget release in February. If a quota is increased due to an IBM Global budget release, the Base Growth Sellers' quotas will need to be adjusted to ensure any revised budget and the corresponding revised quota is allocated across all members of the team.

[37] Ms Dooley said that sellers are used to their quota being adjusted up and down. The standard February budget update each year comes from New York and flows down to the country markets.

[38] Mr Simpson said that in July 2012 he received a 68% revenue quota increase based upon a revenue number committed to the business by the CEO in respect of business from Customer A.

[39] Ms Dooley confirmed that in 2012 a budget release in February meant she had to increase the quota for the SO Australia/New Zealand (A/NZ) team. Mr Simpson's quota was to increase from USD \$10.96 million to USD \$14.44 million.

[40] However Mr Paterson (at that time Mr Simpson's in-country manager) had failed to load the quota increase details onto Mr Simpson's IPL, and the mistake had not been realised until four months into the six month quota period.

[41] On 29 April 2012 Mr Simpson raised his concern with the quota increase in an email to Ms Dooley and several other IBM managers. Mr Fox confirmed that this was eight weeks from the half year period end, and said that Mr King was to investigate the concern at the quota increase raised by Mr Simpson.

[42] Mr Michael So, Finance Manager SO, had been contacted in regards to the matter and had emailed a response to Ms Dooley and Mr King on 30 April 2012 stating: "*Here is the facts from Andrew, the Feb Budget update cycle we did increase Andrews TCV quota ... On*

*the flip side, we gave Andrew a Quota reduction in the Fed cycle for his Revenue element.”*  
His conclusion was that he believed: “*our IH quota deploy to Andrew Simpson is very fair and balanced.*”

[43] Ms Dooley said that whilst she could have insisted that the mistake in failing to load the quota increase onto Mr Simpson’s IPL was corrected, in fact she had decided to exercise her discretion not to correct the mistake in Mr Simpson’s quota. This had the effect of not fully deploying the team’s allocated increased quota and she had borne responsibility for this.

[44] Ms Dooley also said that whilst increases in quota were not unusual, it was highly unusual for a Base Growth Seller not to accept a quota increase. Mr Simpson’s objection to accepting the quota increase had been viewed adversely by Mr Peter Campbell, General Manager IBM Global Technology Services Australia and New Zealand (A/NZ), who had wanted Mr Simpson to come off sales plan as a result.

[45] However, as it had been accepted as a genuine mistake, Mr Simpson had remained on sales plan with the original US\$10.96 million quota.

[46] As a result, Ms Dooley said that Mr Simpson had benefitted in the second half of 2012, ending the financial year at 127% of quota which meant he earned commission at an accelerated rate of 2:1 for all achievement over 100%.

#### *TCV writebacks*

[47] Mr Simpson claimed that there were two significant TCV writebacks in 2012 in respect of which he had never earned TCV commission payments, but was allocated all of the negative writebacks for all remaining future years of the contracts in a 6 month sales plan cycle, thereby which causing him a substantial loss of earnings.

[48] As set out in Mr Simpson’s IPL letter under the heading: Right to Modify or Cancel, IBM reserves:

*... the right to adjust the Plan terms (including, but not limited to, changes to sales quotas or other performance objectives, changes to customer territory assignments, or changes to target incentives or similar earnings opportunities) or to modify or cancel the Plan, for any individual or group of individuals, at any time during the plan period ...*

(i) *Customer B writeback in 1H 2012*

[49] The first writeback occurred in 1H 2012 in connection with a US\$2.8m contract with Customer B which involved the cancellation of a project which had 3 years remaining, resulting in a TCV writeback for the remaining years of the contract.

[50] Mr Simpson said he had been manually excluded from the TCV (Signings) incentive due to the size of the deal with Customer B and on that basis he considered that he should have been excluded from the Customer B TCV writeback. The impact was an adverse 45% incentive component of his remuneration and he had been financially disadvantaged to the value of \$7,850.00 gross.

[51] He had raised his concern with various members of IBM management, including Ms Dooley, Mr King, Mr Fox and Mr Paterson, and had been advised that it would be investigated for exemption after the 1H 2012 sales period had closed, however he had subsequently received no feedback.

[52] Mr Fox confirmed that he had agreed to investigate an exemption for Mr Simpson from the Customer B writeback, and had discussed the process at length with the then Operations Manager, who had in turn investigated this with Business Operations in IBM Australia.

[53] He said the Operations Manager had subsequently confirmed that an exemption would not be granted to Mr Simpson because of IBM's IPL rules under which IBM was entitled to reverse TCV recognition and typically did so.

[54] Mr Fox explained that this situation was not unique to Mr Simpson as TCV writebacks generally applied to all SO sellers, management, and executives in A/NZ who were paid on New Zealand business from the account in which the writeback occurs.

[55] Mr Fox said that he had been one of several management members who had explained to Mr Simpson that IBM could not recognise the deal and that he had been treated no differently to anyone else; however Mr Simpson had not accepted the explanation.

[56] Mr King gave oral evidence that he believed that Ms Dooley had been submitting Mr Simpson's exemption requests for approval, and he had been surprised that Mr Simpson had not been granted an exemption, particularly in regard to the customer B writeback. However Ms Dooley in her evidence was very clear that Mr King was mistaken in his understanding of the process involved.

[57] Ms Dooley said that in respect of the Customer B reversal, it could not be taken to IBM Global as an exemption because in 2012 Mr Simpson had received recognition by way of “*net new revenue*” from this project against his sales plan.

[58] However she had agreed with Mr Simpson that she would investigate an exemption for him in respect of the Customer B writeback, and accordingly she had discussed the situation regarding the Customer B exemption request for Mr Simpson with Mr Campbell during May 2012. His view had been that:

- a. Mr Simpson’s attainment against budget for the year was tracking well and he ended the year on 127% against target;
- b. Mr Simpson was carrying a lower quota as a result of rejecting a quota increase earlier in the incentive year; and
- c. He did not support exemptions in 2012 as Global IBM was critical of the high number of exemptions sought for IBM A/NZ sellers in 2011 such that only one exemption was advanced in 2012.

She had therefore been unable to advance further Mr Simpson’s Customer B exemption request because the criteria for exemption requests had not been met.

[59] Ms Dooley said she had ensured Mr Simpson had been advised of the outcome. However he had continued to voice his dissatisfaction with the situation.

*(ii) Customer C writeback in 2H 2012*

[60] Mr Simpson said that in 2H 2012 he had been affected by a TCV writeback involving Customer C. There had been a TCV writeback in respect of a period of 6 years which had impacted on the second half 2012 sales cycle. The impact of the TCV writeback meant that his quota attainment was -23% for 5 months of the second half 2012 sales cycle and as a result he had been financially disadvantaged to the value of \$13,542.00 gross.

[61] Mr Simpson claimed that he had not received any TCV Signings incentive on the initial contract for Customer C, and again he had felt concerned about being assigned the TCV writeback when he had received no benefit. He had raised this issue with Ms Dooley and Mr Fox, who he claims did not take any steps to address his concerns.

[62] Ms Dooley said that an original contract was signed with Customer C in 2002 covering a period of 10 years. In 2010 there had been a further deal signed with Customer C.

Mr Simpson had not worked directly on the Customer C deal, however as it was one of the accounts in his territory, he had received credit towards his sales quota for the 2010 signing in the way of net new revenue.

[63] Another Australian Deal Maker had been responsible for all the work resulting in a five year extension on the Customer C deal in June 2012, but as Customer C was one of the accounts in his territory Mr Simpson had also received the benefit of this signing in the first half of 2012.

[64] However there was subsequently an internal IBM issue with the accounting for the deal, which resulted in the TCV writeback against all quota attainment figures for everyone with Customer C as part of their territory.

[65] Ms Dooley explained that because Mr Simpson had been credited for the Customer C deal in the first half of 2012; the easiest way for IBM to account for the TCV writeback was to debit the signing from his achievement results for the second half of 2012.

[66] Mr Simpson had been one of a number of sellers affected by the Customer C TCV writeback and Ms Dooley had advised all the sellers, including Mr Simpson, by email on several occasions of the Customer C TCV writeback. She had also held two or three meetings with the sellers.

[67] Ms Dooley said that all of the sellers had been disappointed by the Customer C TCV writeback decision; however it had been explained that it was not acceptable business practice to record the deal as a positive increase for the purposes of attaining the sales target, and she said all of the sellers had accepted this, apart from Mr Simpson.

[68] Ms Dooley said that Mr Simpson had asked her to take the issue to IBM Global and apply for an exemption for him in respect of the Customer C writeback; however she had told him that she could not take it forward as there was no deal and no employee had been credited for it.

[69] Ms Dooley explained that there had been occasions when TCV writeback exemptions had been sought on the basis that there was no benefit to IBM in having a demotivated sales workforce.

[70] She said she had fully explained the exemption request process to Mr Simpson on several occasions, in particular that there are three elements that formed the basis for a TCV writeback exemption being whether:

- (a) a seller had received benefit or credit in a prior period;

- (b) there would be a material impact on the seller's attainment of quota for the year; and
- (c) the A/NZ manager supported the exemption.

[71] The exemption process was lengthy, requiring the country manager's support before it could be taken out of country, and involving 10 approvers before an exemption would be given the final approval by Global IBM.

[72] Ms Dooley said she had been the manager responsible for advancing exemption requests for Mr Simpson. She had reviewed the exemption request for Mr Simpson, but she could not take the Customer C request forward given the netting off of the loss against the win.

[73] Mr Simpson said that he had subsequently understood from a contact in Australia that in 2013 all the Australian Base Growth Sellers received an exemption in respect of the Customer C deal.

[74] Ms Dooley explained that the exemptions had been approved for the Australian Base Growth Sellers because they had not been involved when the deal was signed, nor had they received any revenue credit in their sales plans in prior years. This situation had differed from that of Mr Simpson who had received recognition by way of "*net new revenue*" from this project in 2012.

[75] Ms Dooley refuted Mr Simpson's claim that he had not received any feedback on the exemption issue from IBM, stating that she had ensured he was advised of the outcomes.

[76] Mr Fox also stated that he had been one of several members of the management team who had explained to Mr Simpson that IBM could not recognise the Customer C deal; however Mr Simpson had not liked the explanation.

#### *Salary increase*

[77] Mr Simpson said that in the second half of 2012 he had tried to deal with the two TCV writeback issues together. He had understood that the TCV exemptions in respect of the Customer B and Customer C writebacks were being pursued until he had been told by Mr Fox that he should be focussing on getting a salary increase approved.

[78] He said he had been advised by Mr Paterson and Mr King that he should seek a salary alignment or retention payment. Mr Simpson said that Mr Paterson had advised him that the salary alignment process would address some of the wrongs that had occurred in 2012.

[79] On 15 November 2012 Mr Simpson advised Mr King by telephone and subsequently by email that: *“I am considering an offer which has been presented to me for alternative employment”*. In the email Mr Simpson also advised that: *“... I do not feel that I am being fairly awarded for the investment of time I make during working hours and in my personnel (sic) time”*.

[80] Mr King said that as a response to this information, he and Mr Paterson had discussed a salary alignment process for Mr Simpson, referred to in IBM as an out of cycle (OOC) increase.

[81] The procedure for an OOC salary increase is that it must go through a number of channels before it is approved and is subject to the relevant budget that is available at that time.

[82] Mr Simpson stated that if he had not had a commitment from IBM to increase his salary, he would have left IBM for alternative employment due to the misalignment in his salary with his Australian peers and the issues with the TCV writebacks and unreasonable target allocation.

[83] Mr Fox said he had been aware that Mr Paterson had committed to advance a request for an OOC salary increase for Mr Simpson as soon as there was budget available. They had discussed the request and an email had been sent to Mr Tim Roberts, HR Partner for IBM New Zealand.

[84] In response to the email dated 5 December 2012 from Mr King in which he had raised his concern that an OOC salary increase request for Mr Simpson might not be advanced given the resignation of Mr Paterson, Mr Roberts said he had his first meeting with Mr Simpson on 6 December 2012.

[85] Mr Roberts said that at the meeting on 6 December 2012, Mr Simpson had shown him a presentation relating to commission and TCV writebacks. He had advised Mr Simpson that these subjects were outside his area of responsibility, and advised that he should therefore contact the GTS Business Operations Manager.

[86] Mr Simpson had also discussed ‘salary alignment’ comparing his salary to his peers in Australia. Mr Roberts said that he had expressed his view that conceptually a salary alignment with his Australian peers was not relevant because comparing a New Zealand salary with an Australian one was not useful given the different markets.

[87] He had then explained to Mr Simpson the OOC salary application process which involved a salary increase request outside of the annual salary review process being submitted by the manager, it receiving approval from the Business Unit Executive, and then being reviewed at the A/NZ level.

[88] Mr Roberts said his role had been purely related to the process involved with making a request and linking communications between the manager, the Business Unit Executive, and the A/NZ personnel. Mr Simpson had sought assurances and guarantees that the OOC salary increase would be approved, however he had said that he was unable to provide these because he could not guarantee what would happen at the A/NZ level, and in any event he was acting only to consolidate requests across Global Technology Services (GTS).

[89] Mr Simpson also raised the option of a retention payment with Mr Roberts, who had advised him not to pursue a retention payment which would be a one-off payment, because a retention payment option would not be a sustainable mechanism to address the issues Mr Simpson had raised.

[90] Following the meeting with Mr Simpson, Mr Roberts asked Mr Fox to complete the paperwork to process an OOC salary increase to be sent for review at A/NZ level.

[91] Mr Fox said he had worked with Mr Paterson who had prepared a business case to justify the OOC salary increase, and the necessary paperwork had been completed. The justification comments box on the OOC salary increase application documentation included the statement:

*Consistent high performer with respect to his peers. 120% of target in 1H12. Andrew is the only base growth seller in NZ so is required to operate at a higher level than should be expected of a band 8. Andrew has formed excellent client relationships....*

[92] Mr Roberts said that he had received the completed paperwork for the application for an OOC salary increase on 13 December 2012. On 14 December 2012 Mr Roberts said he had contacted his HR counterpart in Australia to advise him to expect the OOC salary increase application in respect of Mr Simpson and had been advised that there was at that time no budget for OOC salary increases.

[93] He had then advised Mr Fox to discuss this information with Mr Simpson in an email dated 14 December 2012 which stated:

*Hi Andrew,*

*I have been advised that there is a freeze on all salary increases.  
Can you please speak to Andrew Simpson and advise him that while  
we cannot proceed with this Out of Cycle in 2012, we will look to  
proceed next year when and if we have the opportunity.*

[94] Mr Fox said he had met with Mr Simpson and explained the situation in a face to face meeting. He said that Mr Simpson had been displeased with the news, and thereafter there had been two or three other occasions when Mr Simpson had asked him and Mr Roberts for future updates. On each occasion he had confirmed that the OOC budget was still unavailable and his application was still waiting to be progressed.

[95] Mr Roberts confirmed that between January and June 2013 Mr Simpson had continued to raise the issue of his OOC salary increase, and both he and Mr Fox had continued to respond that there was no OOC funding available.

[96] He said that on one such occasion Mr Simpson had emailed them asking for clarification on the OOC salary increase and in email dated 3 April 2013 he had responded:

*Hi Andrew S,*

*As discussed, there has been no change to the situation described by  
Andrew. ANZ are unable to process or review any out of cycle salary  
increase requests as there is currently no out of cycle funding.*

[97] Mr Fox explained that after Mr Paterson's departure at the end of December 2012 a review of the area over which he had had responsibility had taken place. Mr Fox said that this had given him the opportunity to determine how best to tackle the challenges facing the SO part of the IBM business. As identified, Mr Fox said that challenges had been:

- a. There was large pipeline of business with Customer D and IBM had not managed to close those opportunities; and
- b. The overall New Zealand SO portfolio key client business was shrinking

[98] Mr Fox said that it was therefore necessary for the business to focus on ensuring that sales increased, which in turn meant securing the existing base sales and then growing that base. Growing the base was a key part of Mr Simpson's role, and as 2013 proceeded the focus had been on this part of the business which had not been previously necessary due to its former stability.

[99] Mr Fox explained that Ms Kate Tulp, who had a strong sales background, had been brought in to lead the process of growing the base.

[100] When Mr Simpson had raised the OOC salary increase with him in 2013, Mr Fox said he had advised that there was no point in pursuing one at that stage as IBM globally had changed its policy around salary increases, effectively skipping the 2013 in cycle salary review process. In addition the business position had changed and GTS performance overall in A/NZ had fallen.

[101] He therefore had encouraged Mr Simpson to work with Ms Tulp to do everything he could to improve the business position in line with her requirements, and advised him that the OOC salary increase could be revisited at a later date. Mr Fox said he had reminded Mr Simpson that requests for OOC salary increases needed business support and budget and, due to the change in the business during that time, the support was no longer there.

[102] Ms Tulp said she had been made aware in April 2013 that Mr Simpson had been expecting an increase to his salary via an OOC salary request. In May or June he had asked her about the process and what was being done to secure his salary increase. Because there was no OOC salary increase funding available at that time, she had advised him that she could not update him on any progress in the matter. She had also advised him that Mr Fox was the appropriate person to ask as he had initiated, and had ownership of, the OOC salary increase process.

[103] Mr Simpson said he had been upset to discover subsequently that the OOC salary increase had not been sent to Australia, and that he had been ignored when the annual in cycle salary reviews were completed when Ms Tulp first started her role in April 2013.

[104] In respect of the annual in cycle salary review process, Ms Tulp said she and Mr Roberts had advised Mr Simpson that the regular salary review that usually happened in the first half of the year had been deferred by IBM Global until the second half of 2013.

[105] Ms Tulp said that on this basis she had not committed to an in cycle salary increase for Mr Simpson or to any other member of the sales team, that he or she was eligible for a salary increase, and that no member of the sales team received a salary increase.

[106] Mr Roberts said that in fact although Ms Tulp and Mr Fox had not been aware, there had been a few exceptions to the salary review deferment, but that the exceptions had been only for employees whose salary had been at the lower end of their salary band.

*Performance issues and the Performance Improvement Plan (PIP)*

*(i) Issues with Mr Simpson's sales performance*

[107] Ms Dooley said that in reviewing performance in the SO base, she looks at deals that had been driven by the seller and excludes all other positive benefits that may have been flowing into the seller's territory. This analysis could expose areas of sales weakness around the seller's personal contribution to the business, and around the actual deals and pipeline being built when additional factors are removed, particularly in the large SO accounts.

[108] The outcome of her analysis had revealed that Mr Simpson was not delivering personally to the accounts for which he was responsible. Whilst he was an excellent transactional seller, which related to ITS and deals of less than US\$500,000.00, he had a weakness in relation to larger deal opportunities in that he was not initiating or driving new opportunities, particularly in the US\$250k to US\$10 million range.

[109] Ms Dooley explained that in early 2013 the spotlight was on the ability of the SO business in New Zealand to resolve issues with a long pipeline of opportunities with client D that IBM had been making no progress on closing.

[110] As New Zealand's only Base Growth Seller, Ms Dooley said she had examined what Mr Simpson personally had been contributing to the pipeline growth in New Zealand, and asked Ms Gullo, and Ms Tulp once she had assumed responsibility as his Manager, to ensure that Mr Simpson received the direction he needed to improve his sales ability.

[111] Ms Dooley said she had also been aware that Mr Simpson had been instructed by the project executives on two of the SO accounts in his territory not to interact with the client as the client feedback was very negative about him and they had asked for Mr Simpson not to deal with them. She had regarded this as a serious issue for Mr Simpson since client relationships were a critical part of the IBM sales methodology.

[112] As a result she had made Ms Tulp aware of her concerns, and they had agreed that Ms Tulp would form her own view when she had come to know the role, her team and the market.

[113] Since Ms Gullo and Ms Tulp were under an imperative to drive more business, Ms Gullo began running weekly cadence calls with each Base Growth Seller which Ms Dooley also attended. The cadence calls were detailed and operational and the questions Ms Gullo asked were aimed at examining each seller's pipeline of opportunities.

[114] Ms Dooley said that during the weekly cadence calls the Operations team would pull together all the data on all the deals in Mr Simpson's territory, and he would then update them

on each deal and they would discuss each account under his territory. Her observation had been that Mr Simpson often updated them if there was an ARC (a type of credit that a seller will receive in the SO accounts arising out of increased revenue from an existing account) but could not show sales leadership on key deals, nor did he present plans to show what actions he was taking to achieve his quotas.

[115] Ms Tulp explained that as a Base Growth Seller, Mr Simpson was set signings and revenue targets on a six monthly basis and was tasked with finding enough pipeline opportunities and progressing them to closure in order to meet his six monthly targets. He was required to keep IBM sales forecasting tools up to date with current information about his pipeline, and to provide accurate sales forecasts on a weekly basis to up-line management.

[116] On a weekly basis therefore management is able to see whether each seller has enough pipeline opportunities and are progressing them to successfully meet their targets. If not enough pipeline opportunities are present, or not enough progression is being made, management can provide coaching to the seller.

[117] Ms Tulp said that Mr Simpson's role as a Base Growth Seller required him to build a diverse network with influencers and decision makers within the full range of his account territory. In Mr Simpson's case this was the full list of all SO accounts in New Zealand, of which there were 12 key accounts. Ms Tulp said that it was expected that Mr Simpson would maintain a working relationship with at least 6 of those on a regular basis.

[118] When she started in her role, Ms Tulp said she reviewed Mr Simpson's sales results, his sales planning and his relationships with his accounts. Her review showed that Mr Simpson only met regularly with 3 of his account clients. At the weekly one to one meetings which she held with Mr Simpson they discussed his relationship with his clients, opportunities available, and what help he needed, and she said she had provided guidance about how to improve his results both within IBM and with its clients.

[119] Mr Simpson said that he recalled that he had four one to one meetings in April 2013 with Ms Tulp, but that at those meetings guidance and counselling had not been provided to a point where he could value them. He had been told by Ms Tulp to produce a territory plan, which he said he had done as requested.

*(ii) Performance Management*

[120] Ms Tulp said that she had first become concerned about Mr Simpson's performance in late April 2013. Her concern had been prompted by:

- His performance at the weekly forecasting meeting held with the Australian executives from which it had been made apparent to her by Mr Simpson that he considered making his commission more important than making the business targets he had been set. This had led to their first discussion on the difference between ITS and SO sales targets and the need to make them appropriately and in relation to the way they had been set by the IBM corporation.
- A wide array of unsolicited negative feedback she had received on Mr Simpson's style and performance from IBM Managers, Project Executives, Sales Representatives outside of SO, Client Executives, Sales Managers, and from one large client. The feedback was to the effect that Mr Simpson was regarded as arrogant, failed to listen, and was not trusted by his peers or by his clients.

[121] Ms Tulp decided to address this issue obliquely by asking Mr Simpson how he believed his relationships were in different areas and by attempting to get him to look at evidence based relationships rather than directly as she did not want Mr Simpson to lose his confidence. However from his responses Ms Tulp said Mr Simpson appeared to be oblivious to the impact of his style on his colleagues and clients.

[122] Mr Simpson said that the issues regarding his relationships with his colleagues and clients had never been clearly put to him for a response. Mr Simpson also disputed the allegation that his performance in the first half of 2013 had been below expectations, stating that his first half year performance showed significant differences in attainment to that alleged by Ms Tulp.

[123] At the end of April Ms Tulp told Mr Simpson that she wanted to help him, and she had spent a significant period of time going through sales plans and activities. In particular she said that she had wanted to help him improve the quality of information he was presenting to his management chain.

[124] Mr Simpson disputed the claim that Ms Tulp had spent a significant amount of time coaching him, saying that apart from the 4 meetings in April, there was only one meeting in May, and 3 or 4 meetings in June 2013. Mr Simpson said that deals often took months to reach fruition. He agreed that he had been aware that Ms Tulp had had concerns about his pipeline opportunities.

[125] Mr Fox said Mr Simpson had raised concern with him about his view that Ms Tulp was being unfair in seeking improvements to his performance on a few occasions. His advice had been that Ms Tulp was a fair manager and would explain what was needed to drive the

business at that point. He said he had not realised at that time that Mr Simpson had recorded some of their conversations.

[126] Ms Tulp said that she had also sought to provide external support to Mr Simpson through a sales event called Revenue Storm, ensuring that travel was available for him.

[127] Mr Simpson said he had been unable to attend the Revenue Storm training event as travel had been denied. However Ms Tulp said that she had believed Mr Simpson had not applied for travel to the Revenue Storm event until she had questioned him about it. Having checked the travel booking system, she had ascertained that Mr Simpson had made no application.

(iii) *Sametime conversation*

[128] On or about mid-June 2013 Ms Tulp and Ms Dooley had had a *sametime* conversation during which they had discussed Mr Simpson's performance:

*JD: Just another idea ... have you formally advised Andrew is on the PIP as yet?*

*KT: not yet – process is he's getting an email tonight telling him performance is not ok. We then meet on Friday and he has a week to produce what I want. If that's not up to standard then we go formal pip. Docs are nearly ready to roll  
He gets told on Friday that the next step will be formal pip*

*JD: I had an idea*

*KT: do share!*

*JD: Can you talk to your HR guy to see if we could do this .... without issues  
But, could you tell Andrew that we want him to take on RFS<250KUS  
And he can report to Steve Sherry line out of country  
No sales plan  
And then separately we replace him with a band 9 seller  
We tell him his skills are more suited to small RFS  
And essentially that's what we want him to take on*

*Avoid a pip ... however, if he does not step up in the <250KUS ...  
after 3 mths, we could have steve sherry run the pip  
And that was you have an effective seller sooner rather than later  
Would that fly?*

*KT: sounds good ... will check with HR if that's a problem, will mean  
we elongate his time in the business though, although will at  
least mean someone is doing the RFS work for Q3  
How do I get the band 9 seller though?*

[129] Following that *sametime* conversation Ms Tulp emailed Mr Roberts on 18 June 2013 and asked for his advice as to whether Mr Simpson could be offered an RFS role as an alternative to undertaking a PIP.

[130] Mr Roberts advised her that in order to offer Mr Simpson a new role, it would have to be a permanent, ongoing role, and that he would have to agree to the change, especially given the financial impact it would have on him, as RFS roles were not on a sales plan.

[131] At some time during the week commencing 21 June 2013 Mr Simpson said he had viewed the *sametime* conversation on Ms Tulp's laptop. Mr Simpson said he had taken a photograph on his mobile telephone as he had been shocked by what he had seen, particularly the references to: "*this will mean we elongate his time in the business though*" and "*but how do I get a band 9 seller though?*". His understanding from what he had seen had been that IBM wanted him out of the business and that it was seeking to avoid elongating his time in the business.

[132] He said been very concerned about the suggestion of his being placed on a PIP which he had regarded as a terminal step. He confirmed that he had not raised his concerns about the *sametime* conversation with IBM until the meeting which was held on 7 August 2013 despite being aware of several avenues he could have chosen to do so, including the IBM 'open door' or 'confidentially speaking' policies.

(iv) *Meeting held on 25 June 2013*

[133] In an email to Mr Simpson dated 25 June 2013 which was sent after the *sametime* conversation had taken place, Ms Tulp set out her view of his performance and her three areas of concern for discussion at a meeting to be held with him later that day. The email stated:

*Hi Andrew,*

*With one week of the quarter and first half to go it's pretty clear that you will fall far short of achieving your SO target for TCV:*

<i>1H2013 Revenue Target</i>		<i>US\$25.1M</i>
	<i>Forecast</i>	<i>US \$22.7M</i>
	<i>Forecast Achievement</i>	<i>90%</i>
<i>1H 2013 TVC</i>	<i>Target</i>	<i>US\$6.5M</i>
	<i>Forecast</i>	<i>US\$4.8M</i>
	<i>Forecast Achievement</i>	<i>74%</i>

*This is an unacceptably low level of performance for any seller in IBM. Clearly if you are not successful in growing our SO base client revenues then the whole SO business van not be successful and this is a position that we can not continue to let roll on.*

*..... There are however fundamental aspects of your role that are not being performed to the level that is expected of a band 8 seller and these need your immediate attention:*

*1) Planning for success*

- Your Q3 and Q4 territory plan needs urgent attention. I have asked you to ensure you are able to present this to your up line management ... so we have enough notice about assistance needed ...*

*2) Sales discipline*

- A very important part of your role is organising and co-ordinating the wide range of people who come together to work on a deal with a base account. ....A recent example of this aspect of your role being performed under the standard required is the client B meeting I scheduled two weeks ago, You didn't take notes as requested detailing the agreed team actions and time frames, and only produced the CVDM for the team a week later with very few of the agreed actions contained. ...*

*3) Effective Client Relationships*

- I am worried that you don't have an extensive relationship base built across all base growth accounts by now. I would like to*

*discuss with you the reasons for this and how you are going about relationship and stakeholder mapping for effective results.*

*We have a weekly catchup this afternoon we can start to talk about each of these areas in depth and work on a plan together to get you to the position you need to be as an IBM seller which is consistently delivering revenue and TCV above plan.*

[134] Ms Tulp said that at the meeting held later that same day when the three issues were discussed she had decided to try discussing the performance position with Mr Simpson to see if he could self-identify what he needed to do to deliver satisfactory results, and if this was not successful, she would move to a more formal PIP.

[135] Ms Tulp explained that the IBM business model is one built on surety of revenue flow. Signings dictated how many people could be committed to a contract, if signings dropped; the delivery employees' jobs were at risk. She had consequently tried to impress on Mr Simpson during the meeting on 25 June 2013 that securing good pipeline opportunities for the second half of 2013 was essential to ensure there was work for the many delivery employees.

[136] Mr Simpson said that without Ms Tulp's knowledge or authorisation he had recorded the meeting on 25 June 2013 as he had wanted to understand clearly what she was saying.

[137] Following the meeting held on Tuesday 25 June 2013 Ms Tulp emailed Mr Simpson asking him to consider what they had discussed at the meeting that day, and that they would follow up what had been discussed at a meeting scheduled for Friday 28 June 2013. In the email she also stated: "*Your question on whether this is headed towards a performance improvement plan is preemptive.*" The meeting did not take place due to Mr Simpson requesting it to be rescheduled in order that he could work on closing another deal.

[138] Ms Tulp said that on 26 and 27 June 2013 Mr Simpson had not attended three account planning meetings that had been scheduled some weeks prior and in respect of which he had accepted the invitations to attend. She had therefore emailed him to ask why he had not attended and to enquire about his well-being, and his response had been that he was in another meeting.

[139] Mr Simpson said that following the meeting held on 25 June 2013 he had been distressed and suffered extreme anxiety, confusion and stress and he had been to see a doctor who had certified him as medically unfit to work. However because the 27 and 28 June were

critical days for an important Customer B deal he was working on, he had continued to work, but at home rather than in the office.

[140] Mr Simpson had responded to Ms Tulp's email dated 25 June 2013 on 2 July 2014. In that email he had sought further clarification regarding the issues and concerns Ms Tulp had raised with him, however he had not received any response.

[141] Ms Tulp was on sick leave for the first week of July, returning to the office on 9 July 2013, so that the first opportunity she had to address Mr Simpson's concerns was verbally at a meeting held on 10 July 2013.

(v) *Meeting on 10 July 2013*

[142] Ms Tulp said that the meeting held on 10 July 2013, which Mr Simpson had recorded without her knowledge, had been a difficult meeting with Mr Simpson exhibiting some erratic behaviour, pacing up and down and leaving the room, and repeating questions.

[143] Mr Simpson had refused to acknowledge that the focus of his role needed to be SO, or to acknowledge the mathematics of having fewer pipeline opportunities than his target for signings, and he was focussed on attending a conference in the US. She had explained to him that his request to attend the US conference had been rejected by the CFO and the legal GMU team, but Mr Simpson had been unconvinced that she was being truthful about that.

[144] As Mr Simpson was still not engaging with the key issues on which she had tried to provide him with guidance on 25 June 2013, Ms Tulp said she had decided that a more formal process might help him to focus on what actions he needed to take to deliver results and lift his performance. Therefore later that day she had sent out an invitation for him to attend a PIP meeting to be held on 15 July 2013.

[145] The meeting was subsequently rescheduled to be held on 16 July; however Mr Simpson had emailed on 15 July 2013 to advise that he had been certified as medically unfit to attend work for a week. This was extended and he returned to work on 29 July 2013.

[146] Ms Tulp said she had emailed Mr Simpson with a sick leave plan and had addressed cancelling his attendance at the Revenue Storm training in Sydney the following week in light of his being unwell.

[147] Ms Tulp said that as Mr Simpson had asked for a copy of the PIP in his email of 15 July 2013, she had referred to preparation of the PIP documentation being a joint process: “*... I have not completed a plan in isolation, and at this stage have my suggestions that I was bringing to the meeting, which still need to be merged with yours as a joint process.*”

*(vi) Raising of a Personal Grievance 23 July 2013*

[148] On 23 July 2013 Mr Roberts had received from Mr John Saunders, HR Manager, a letter addressed to Mr Saunders raising a personal grievance on behalf of Mr Simpson. The letter dated 23 July 2013 stated that the issues which had given rise to Mr Simpson's grievance had been concerned with:

1. The numerous assurances provided to him in connection with a salary alignment process and salary increase, and the fact that he had only been advised in June 2013 that there would be no salary alignment.
2. The loss of earnings as a result of the treatment by IBM of TCV writebacks for customers B and C, and
3. The performance issues raised by Ms Tulp

[149] Mr Simpson returned to work on 29 July 2013 and the following day, 30 July 2013, he provided his CV to a prospective employer, Nimble.

[150] Mr Roberts replied to the personal grievance in a letter dated 2 August 2013, covering the points raised.

*(v) Meeting on 7 August 2013*

[151] On 7 August 2013 Ms Tulp and Mr Roberts met with Mr Simpson and his counsel, Ms Neville, to discuss Mr Simpson's performance and the issues he had raised in the personal grievance letter. Ms Neville had asked for permission to record the meeting and Ms Tulp said she had given her permission provide that a copy of the recording was provided to IBM.

[152] During the meeting Mr Roberts said that there had been discussion about the three issues raised by Ms Neville on Mr Simpson's behalf, these being the salary increase, the TCV writebacks and Mr Simpson's performance.

[153] Mr Simpson said he had been upset to learn for the first time that there was no OOC salary increase funding available.

[154] Following the discussion, Mr Roberts said that there had been a short break in the meeting during which he and Ms Tulp left the room. When they returned, Mr Simpson produced an image of what appeared to be a *sametime* conversation between Ms Dooley and Ms Tulp discussing potential options and roles to which Mr Simpson might be more suited.

[155] Mr Roberts said he and Ms Tulp had asked what the image was and how it had been obtained, however Mr Simpson and Ms Neville refused to answer the question.

[156] Mr Roberts said that at the conclusion of the meeting his understanding had been that next steps had been agreed which included exploring dates for Mr Simpson to meet with Mr Saunders to discuss his concerns, and Mr Simpson providing IBM with the document he had which in his view supported his opinion that he was in the top two sellers of SO.

[157] Further his understanding had been that Mr Simpson was to return to work on 12 August following the two and a half days leave which had been granted as a result of a request made on behalf of Mr Simpson by Ms Neville. The transcript of the meeting provided in evidence records Mr Simpson as saying: “*I think returning to work on Monday once you’ve had a chat to John and worked out a way forward from here is probably appropriate*” and Ms Neville saying: “*Back on Monday ...*”.

(vi) *Events after the 7 August 2013 meeting*

[158] Following the meeting Mr Roberts said that he, Ms Tulp and Mr Fox had met to discuss the meeting, and in particular the mechanisms Mr Simpson might have used to access Ms Tulp’s laptop, particularly in view of the fact that Mr Simpson had refused to explain how he had obtained the material. Options discussed included some sort of software to infiltrate Ms Tulp’s laptop, or knowledge of her laptop passwords. There was also concern that if Mr Simpson had accessed Ms Tulp’s laptop and taken a copy of the *sametime* discussion, he may have taken other items and files also.

[159] Ms Tulp said she had been deeply concerned about what had happened during the meeting concerning the *sametime* conversation, and had been shocked to see what appeared to be a photograph of a computer screen with IBM information on it in direct violation of IBM’s BCGs.

[160] As she had not been sure of how the image might have been obtained, she was worried that her laptop may have been accessed by Mr Simpson without authorisation. As a people manager she held a lot of private and confidential information about her team on her laptop in addition to providing access to parts of the IBM intranet to which Mr Simpson did not have authority to access. As a result she immediately invoked a potential security breach.

[161] Ms Tulp requested the IT Department to temporarily suspend Mr Simpson’s access to email and the intranet in line with standard security protocols for a potential breach. She surrendered her laptop to the security expert for a full sweep and diagnostics, and also when it was returned after a day, had to change all her personal passwords.

[162] Mr Roberts said that a decision was made to take Mr Simpson’s laptop from him as part of the steps to secure a potential breach, and he had asked Mr Fox to contact Mr Simpson to secure the immediate handover of his work laptop.

[163] Mr Fox said he had telephoned Mr Simpson on the afternoon of 7 August 2013. Mr Simpson said he was leaving Auckland to go snowboarding and he would therefore return the laptop when he got back to Auckland on 12 August 2013.

[164] Mr Fox and Mr Roberts had discussed the situation and Mr Roberts had offered to collect the laptop from wherever Mr Simpson was as the return of the laptop could not be delayed. Mr Fox said he had telephoned Mr Simpson and informed him that Mr Roberts would meet him to collect the laptop and he was surprised when Mr Simpson said he would leave it at his lawyer's office in Auckland.

[165] Mr Simpson said that he had left the meeting held on 7 August 2013 having lost all trust and confidence in IBM. Within 2 hours of leaving the meeting, he had had his email access removed, his building access cards and car parking access revoked and he had no laptop.

[166] Following the meeting Ms Neville had emailed Mr Roberts confirming that a copy of recorded meeting would be sent to IBM. She also stated that: "*our client has lost trust and confidence in IBM*".

[167] On 8 August 2013 Mr Simpson received a job offer from Nimble, which is now his current employer. On 9 August 2013 Mr Simpson resigned from IBM.

[168] Once the laptop had been returned to IBM, Mr Roberts said IBM had wanted access to it in order to recover customer information and IBM's confidential information. However it had not been possible to do so since Mr Simpson's laptop was password protected.

[169] Mr Roberts had emailed Mr Simpson on 16 August 2013 requesting that he return his hard drive, Notes, PGP passwords and all IBM confidential information. In the same email he had also advised that IBM had decided to undertake a forensic examination of the laptop and provided him with an opportunity to respond.

[170] Mr Roberts had received a response from Ms Neville on 21 August 2013, however the PGP passwords had not been provided. Following further correspondence between the parties, on 30 August 2013 Ms Neville indicated that Mr Simpson had a backup hard drive of his IBM laptop, which had concerned IBM as it was a breach of his contractual obligations to return all IBM confidential information.

[171] During the early part of October 2013, and only after engaging the services of a third party, IBM gained access to the contents of Mr Simpson's laptop. Mr Roberts said the laptop had contained a large amount of inappropriate material which was provided to the Authority

and which included personal images, illegally downloaded films and music and unauthorised software.

[172] In addition, Mr Roberts said there had been several recordings which appeared to be secret recordings of discussions or meetings with managers including Mr Fox, Ms Tulp, Ms Dooley and Ms Gullo. There were also recordings of confidential informal meetings regarding sales opportunities with a current IBM client. Mr Roberts said that to his knowledge, those involved in the meetings had been unaware that they were being recorded.

[173] On 12 September 2013 Mr Simpson filed a Statement of Problem with the Authority. The parties attended mediation but this did not resolve the issues between them.

## **Determination**

### **Was Mr Simpson unjustifiably constructively dismissed by IBM?**

[174] Mr Simpson claimed that he had been constructively dismissed by IBM as a result of three main issues, these being:

- A failure by IBM to act fairly in respect of the Customers B and C TCV writebacks;
- A failure by IBM to advance a promised salary increase and its advice to him not to pursue a retention payment as an alternative;
- A breach of good faith in respect of the PIP

## **The Law**

[175] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[176] The starting point for any enquiry into whether or not there has been a constructive dismissal relies upon establishing the terms of the employment agreement and whether there had been a breach of the terms of that contract serious enough to warrant the employee leaving the employment of the employer.<sup>1</sup>

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<sup>1</sup> *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59, as referred to in *Wellington etc Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 [1983] ACJ 965 (at pp 112-113: p 985)+

[177] As set out in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd*<sup>2</sup> there are three fundamental situations in which a constructive dismissal claim may arise:

- i. An employee is given a choice between resigning and being dismissed;
- ii. There has been a course of conduct followed by the employer with the deliberate and dominant purpose of coercing the employee to resign;
- iii. There had been a breach of duty by the employer which causes an employee to resign.

[178] Mr Simpson is claiming a breach of duty on the part of IBM. The leading case in this type of constructive dismissal is *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW*<sup>3</sup>. The Court of Appeal in examining the question of constructive dismissal observed:

*In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.*

[179] Therefore in examining whether a constructive dismissal has occurred two questions arise:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation, and
- ii. Second, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

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<sup>2</sup> (1985) ERNZ Sel Cas 136; [19785] 2 NZLR 372

<sup>3</sup> [1994] 2 NZLR 415; [1994] 1 ERNZ 168 (CA)

[180] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*<sup>4</sup> observed in describing this type of constructive dismissal:<sup>5</sup>

*It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.*

[181] To amount to a constructive dismissal the employee's resignation must be a proportionate and reasonable response to a sufficiently serious breach of duty by the employee, made in circumstances where he or she had no other option.

A. *Breach of the Duty of Good Faith*

[182] Mr Simpson had been employed by IBM for over 17 years in various roles and latterly since 2010 as a Base Growth Seller. He would therefore have been thoroughly familiar with the internal systems of IBM, especially so with his personal remuneration which comprised a base salary, allowances and At Risk Earnings component.

(i) *TCV writebacks*

[183] The commission element of Mr Simpson's remuneration, the At Risk Earnings component, was assessed in accordance with the terms and conditions and sales plans set out in the 6 monthly IPL. The IPL specified that IBM had the right to adjust the plan terms, including changes to sales quotas, customer territory assignments, target incentives or to : *"modify or cancel the Plan ... at any time during the Plan period"*

[184] The IPL also specifies that changes to IBM's plans and/or policies are not discussed below the highest level of management and that: *"Managers below such levels ... do not have the ability to change the plan terms for any employee"*.

[185] In respect of the sales quota increase for 2012, I find that IBM had the right to increase or decrease Mr Simpson's sales quota: *"at any time during the Plan"*. Ms Dooley explained fully that although she had received a quota increase which was to apply to the SO A/NZ team, the part allocated to Mr Simpson was not uploaded onto his IPL due to an error on the part of his direct manager. Following Mr Simpson's subsequent concern and refusal to accept the increase, she exercised her discretion and did not increase his quota, having taken

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<sup>4</sup> [1983] ACJ 965

<sup>5</sup> at [975]

into consideration the effect the late timing of its implementation would have on Mr Simpson. This I find to be the action of a fair and reasonable employer.

[186] In respect of the Customer B and Customer C writebacks, I find that IBM acted in regards to Mr Simpson's attainment against targets in accordance with its policies and his IPL terms, and note also that signings writebacks are generally well understood in the IBM sales community. In addition Ms Dooley's evidence was that she: "*held two to three meetings regarding the writebacks ... with all the New Zealand team who were affected*" and "*sent several emails to the team members about the issue*".

[187] Ms Dooley also raised the issue of exemption of the writebacks with Mr Peter Campbell, General Manager GTS A/NZ, whose response had been that he did not support any exemptions for 2012. Also Ms Vanessa Simpson, GTS Business Operations Executive Australia, wrote to Mr Simpson on 25 May 2012 stating: "*... Peter has asked if you still want to pursue this come and talk to him directly as currently he does not support doing any exemption for 2012*". There is no evidence that Mr Simpson availed himself of this opportunity to speak directly to Mr Campbell.

[188] Moreover I find that Mr Simpson had not been treated any differently to other IBM sellers, and in this respect note Mr Fox's evidence that: "*It is important to note that any quota increase for the business affects the quotas of everyone working in the relevant part of the business*" Although I note that in Mr Simpson's case, not having to bear the quota increase had had a beneficial effect in that he had benefitted in the second half of 2012, ending the financial year at 127% of quota thus earning commission at an accelerated rate, a fact acknowledged by Mr Simpson in his written evidence: "*Should I have accepted the increase my attainment would have reduced from 127% to 96%*."

[189] I also find that although Mr Simpson remained unhappy and dissatisfied that he had received no exemptions in respect of the Customer B and Customer C writebacks, he had been made aware by IBM that no exemption requests were to be carried forward for him. Indeed in his evidence he acknowledged that he had known IBM were not pursuing the exemption requests, stating: "*I find it hard to rationalise why IBM did not support my requests for an exemption*".

[190] I find no breach of duty on the part of IBM towards Mr Simpson in respect of the sales quota increase or Customer B and Customer C writebacks. I find that IBM clearly recognised its obligation to act in good faith by embarking on a process of explanation to Mr Simpson which involved senior levels of management.

*(i) Salary Increases*

[191] Mr Simpson has raised two matters relating to salary increases, one relating to an OOC salary increase, the other being the normal annual salary increase.

*OOO salary increase*

[192] From the evidence it appears that the suggestion of an OOC salary increase for Mr Simpson arose from several sources: (i) it had been prompted in part by a suggestion from Mr Paterson that it would be a more productive route to pursue than the writeback exemptions; (ii) in part by Mr Simpson's desire to be aligned with his Australian counterparts; and (iii) in part by Mr Simpson's alternative employment approach in his email of 15 November 2012 which had prompted the salary alignment process suggestion from Mr King in his email of 5 December 2012.

[193] Mr Simpson said that he had been made numerous promises that a salary increase would be actioned and that Mr King had made a commitment to him that his salary would be aligned to \$180,000.00 per annum. However Mr Simpson claims that it was not until the 7 August 2013 meeting that he had learnt for the first time that there had been no OOC salary increase funding available.

[194] Having considered all the evidence, I find that the New Zealand sales management team had not made promises about a salary increase, indeed it did not have that authority, but rather that it had committed to taking all the necessary steps to support an application for Mr Simpson to receive an OOC salary increase, and that Mr Simpson had been kept apprised of the situation:

- When questioned at the Investigation Meeting, Mr King said he had given Mr Simpson assurances only that the request for an OOC salary increase had been put forward;
- Mr Fox and Mr Paterson had completed all the necessary documentation in support of an OOC salary increase, and whilst this had not been sent to Australia, this was only because Mr Roberts had been informed in December 2012 that no OOC salary increase funding was available at that stage and did not become available subsequently;
- Mr Roberts had asked Mr Fox on 14 December 2012 to explain the situation to Mr Simpson which Mr Fox confirmed he had done;
- Both Mr Roberts and Mr Fox had update discussions with Mr Simpson during the period January to June 2013. In particular the email from Mr Roberts to

Mr Simpson dated April 2013 referred to their discussion on the subject and confirmed that OOC salary increases could not be progressed due to a lack of budget; and

- Ms Tulp's evidence at the Investigation Meeting held on 28 May 2014 that she had verbally advised Mr Simpson that there was no budget available for any OOC salary increases.

[195] I find that in respect of the OOC salary increase, the decision to implement this would be made in Australia and would be dependent on OOC budget being available, and that this had been fully explained to Mr Simpson.

[196] Whilst Mr Simpson said that the information that his OOC salary increase would not be implemented had only been made known to him in the 7 August 2013 meeting, I note that his lawyers, Ellis Gould, in a letter dated 23 July 2013 stated: "*It was only in June this year that our client was advised that there would be no salary alignment as previously agreed.*". Therefore I find that Mr Simpson was aware that the OOC salary increase would not proceed, i.e. that budget needed to be available, and that OOC budget had not been available at the end of 2012 and during the period of 2013, prior to the 7 August 2013 meeting, and prior to his resignation.

[197] In respect of the decision to not pursue a retention payment, I find that this decision had been made by Mr Simpson after Mr Roberts had explained the implications of choosing such an option in preference to that of a salary increase.

[198] Whilst Mr Simpson had been unhappy at the fact that an OOC salary increase had not eventuated at the date he resigned, I do not find that he had been misled by IBM making promises, or guaranteeing to him, that an increase would occur, or that IBM breached its obligation to him to support an application for an OOC salary increase.

[199] I find no breach of duty on the part of IBM towards Mr Simpson in respect of the OOC Salary increase.

#### *Annual salary increase*

[200] In respect of the in cycle annual salary review, I find that in accordance with the Terms of Employment Agreement 1996, IBM set Mr Simpson's base salary at a specified yearly rate to be paid periodically and at that rate until altered after an annual review.

[201] IBM was committed to reviewing Mr Simpson's salary regularly, and at least every 12 months. I observe that '*a review*' does not necessarily equate to '*a salary increase*',

although in many instances it may do so and in general the expectation of an employee is that an increase or no change will eventuate.

[202] The Terms of Employment Agreement 1996 also contains the statement that IBM's remuneration policy is to reward employees for "*performance*". It is therefore reasonable to assume that as part of any annual salary review Mr Simpson's performance would be discussed with him, and he would be notified accordingly.

[203] As regards the annual salary review for 2013, Ms Tulp stated that this process had been deferred until the second half of 2013. Mr Fox's evidence was that IBM had changed its policy in regards to annual salary increases, "*effectively skipping the 2013 salary cycle*" and that he had provided this information to Mr Simpson. There were a few exceptions to this rule for those employees with salaries at the lower end of their salary band, I accept that only Mr Roberts had been aware of these exceptions and that Mr Simpson did not fit within this criteria being at the mid-point for a band 8 seller.

[204] At the meeting held on 7 August 2013 the IBM annual salary increase was discussed and Mr Roberts is recorded as stating that Mr Simpson's : "*performance wasn't up to standard to get support from Australia*":

[205] Mr Simpson stated that he had not heard any information about the annual salary and Mr Roberts confirmed that the New Zealand leadership team completed the annual salary review and that he did not need to know, it being the New Zealand leadership team's discretion to review salaries of IBM employees.

[206] I find that there is no doubt that the IBM management team were concerned about Mr Simpson's performance in 2013, it being clearly stated in Ms Tulp's email dated 25 June 2013 that she was not confident: "*given recent performance that you will be successful in the next 90 days ... there are fundamental aspects of your role that are not being performed ..*"

[207] Mr Simpson confirmed that he was aware of the performance issues, and the fact that according to Ms Tulp, his performance was: "*unacceptably low for any seller at IBM*", although I accept that he was in disagreement with that view.

[208] Unless stated otherwise in the Employment Agreement, it is the prerogative of the employer to determine salary reviews in respect of its employees, and I find that IBM acted in accordance with this principle.

[209] However I find that a fair and reasonable employer would also fully inform the employee of the outcome of a salary review – in either a personal communication or a face to face meeting. BM did not so inform Mr Simpson until the meeting of 7 August 2013, and I

find that whilst it was not a breach of good faith not to award Mr Simpson a salary increase, it was a breach of good faith not to inform him in the circumstances that his performance was not at the required standard to be submitted for approval by Australia management.

(ii) *The PIP Process*

[210] Mr Simpson considered that his sales figures were good for the first half of 2013 relative to the other Base Growth Sellers in Australia, and on this basis a PIP was not appropriate. However it is clear from the evidence that IBM also measured sales performance in other non-financial ways.

[211] In 2013 two main factors, being the failure to close the large pipeline of business with Customer D and the shrinking New Zealand SO portfolio business, meant a seller's performance in respect of building pipeline opportunities was under scrutiny.

[212] Ms Tulp had become concerned at Mr Simpson's performance in this respect towards the end of April 2013. There were four counselling sessions in April, and others in May and June. Mr Simpson did not dispute that the meetings had taken place, however he stated that the guidance and counselling provided to him by Ms Tulp had not been of a standard which he could value.

[213] Mr Simpson confirmed that he was aware that Ms Tulp had been concerned about his pipeline opportunities. It is also clear from the fact that Mr Simpson had raised his concerns with Mr Fox that he knew Ms Tulp was concerned about his performance.

[214] On or about 21 June 2013 Mr Simpson had seen the *sametime* discussion between Ms Dooley and Ms Tulp, from which he had reached the conclusion that the PIP decision had been pre-determined and that IBM had: "*wanted him out of the business*"

[215] Mr Simpson did not raise the issue of what he had seen with Ms Tulp, or indeed with any of the members of the management team during the 7 week period prior to the 7 August 2013 meeting.

[216] The *sametime* conversation had been succeeded by the later email dated 25 June 2013 which set out fully Ms Tulp's concerns, and concluded:

*We have a weekly catchup this afternoon we can start to talk about each of these areas in depth and work on a plan together to get you to a position you need to be as an IBM seller which is consistently delivering revenue and TCV above plan.*

[217] Following the meeting in the afternoon of 25 June 2013, Mr Simpson had requested further information. I accept that Ms Tulp had provided this verbally in the meeting held on 10 July 2013.

[218] It was during this meeting that Ms Tulp said that as a result of Mr Simpson refusing to acknowledge the focus of his role that she decided a more formal process might be helpful.

[219] I find that Mr Simpson was aware of Ms Tulp's expectations in respect of his performance and that she was concerned he was not meeting those expectations. Ms Tulp had provided support in respect of helping Mr Simpson to achieve the expectation, although I accept that Mr Simpson had not valued this support.

[220] In circumstances in which an employee is not meeting expectations, despite guidance and counselling, I find that embarking upon a PIP is a step open to a fair and reasonable employer.

[221] Whilst the *sametime* conversation indicates that Ms Tulp had already considered the PIP step, and even taken some preliminary actions in regards to the documentation, I find that the evidence indicates that a firm decision had not been made at that point. Indeed the later communications and meetings indicate that Ms Tulp was still trying to assist Mr Simpson to achieve the expected standards with less formal interventions.

[222] Moreover when Ms Tulp had decided that a PIP might be helpful, I find that she had seen the PIP process as collaborative in nature as indicated in the email of 16 July 2013. In that email Ms Tulp asks Mr Simpson to bring his suggestions to the proposed meeting to discuss a PIP in order that the process could be a joint one.

[223] Although Mr Simpson said that in his view being placed on a PIP was a terminal step, I note that he had been subjected to a PIP early in his career at IBM and that had been successful.

[224] I find no breach of duty on the part of IBM in respect of the performance management and proposed PIP process.

*B. Was the breach sufficiently serious to be reasonably foreseeable?*

[225] Having found there to have been no breach of duty on the part of IBM, other than a minor procedural flaw relating to the annual salary review procedure, there can be no causative link between a breach of duty and Mr Simpson's resignation.

[226] I determine that Mr Simpson voluntarily resigned from his employment with IBM having received an offer of alternative employment on 8 August 2013 and that he was not unjustifiably constructively dismissed

**Was Mr Simpson unjustifiably disadvantaged by IBM failing to implement a salary alignment process and an agreement to increase his salary?**

[227] In circumstances in which I have found no breach of the duty IBM owed to Mr Simpson in respect of the salary alignment process, I do not find an unjustifiable disadvantage.

**Was Mr Simpson unjustifiably disadvantaged by IBM failing to treat TCV writebacks in a fair and reasonable way thereby adversely affecting the calculation of the commission component of his remuneration package?**

[228] In circumstances in which I have found no breach of the duty IBM owed to Mr Simpson in respect of the TCV writebacks, I do not find an unjustifiable disadvantage.

*Good Faith*

[229] Section 4 (1A) of the Act:

*(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;*

**Did IBM fail to deal with Mr Simpson in such a way as to breach the good faith obligations it owed him in relation to the TCV writebacks?**

[230] IBM did not pursue the exemption route in respect of the TCV writebacks for Mr Simpson. I find that Ms Dooley had been responsive and communicative in both explaining the exemption process to Mr Simpson and why he could not be considered for an exemption in respect of Customers B and C.

[231] Moreover I accept Mr Fox's evidence that he, in addition to other managers, was had been responsive and communicative, informing Mr Simpson of the exemption request situation.

[232] I determine that IBM did not fail to deal with Mr Simpson in such a way as to breach the good faith obligations it owed him in relation to the TCV writebacks.

**Did IBM fail to deal with Mr Simpson in such a way as to breach the good faith obligations it owed him in relation to both the OOC and annual salary review increase claims?**

[233] I have found that the commitments made to Mr Simpson by his immediate managers regarding the OOC salary increase to have been complied with in so far as the requisite preparatory steps had been carried out and the requisite documentation completed. The next step had been to forward the paperwork to Australia for approval.

[234] However that paperwork had not been forwarded to the appropriate IBM personnel in Australia as a result of Mr Roberts having been advised that there was no OOC salary increase budget funding available. That situation did not change prior to Mr Simpson's resignation, and I therefore find no lack of good faith by IBM in progressing the request for an OOC salary increase by not having submitted paperwork which could not be approved by the requisite authority in Australia, and I accept that the IBM New Zealand management team remained committed to advancing the OOC salary increase once there was budget available.

[235] I find that IBM was responsive and communicative to Mr Simpson by providing him with information on a regular basis about the situation regarding the unavailability of OOC funding for the salary increase for him.

[236] I have already dealt with the annual salary review issue and observed that it was not acting in good faith for IBM not to have updated Mr Simpson about the situation regarding the annual salary increase prior to the 7 August 2013 meeting.

[237] Mr Simpson claims that if he had pursued the retention payment route, he would have received \$11,250.00 during the period 1 January 2013 to 9 September 2013.

[238] I have already found that it was Mr Simpson's decision not to pursue the salary retention route, however irrespective of this; I find that IBM had made him no guarantee that a retention payment would be approved even if it had been requested.

[239] I determine that IBM did not fail to deal with Mr Simpson in such a way as to breach the good faith obligations it owed him in relation to the OOC and annual salary increase claim other than in regard to communicating in a timely manner on the annual salary review.

**Did IBM fail to deal with Mr Simpson in such a way as to breach the good faith obligations it owed him in relation to issues immediately prior to the termination of his employment?**

[240] The meeting held on 7 August 2013 was called to discuss Mr Simpson's personal grievance letter and although described as being a: "*difficult meeting*", in general terms it covered the items which had been raised. At the conclusion of the meeting it had been agreed that Mr Simpson would take the remainder of that day and two further days as annual leave, returning to work on 12 August 2013.

[241] I note that at the time of the meeting Mr Simpson was waiting for a response to his application for alternative employment with Nimble which he duly received the next day, 8 August 2013.

[242] During the meeting held on 7 August 2013, Mr Simpson's counsel produced a screenshot of a *sametime* discussion document, which was a confidential document between Ms Dooley and Ms Tulp, which Mr Simpson claimed he had obtained during the week of 21 June 2013. Despite requests that he do so, Mr Simpson had refused to disclose where or how he had obtained this document.

[243] Mr Simpson said that following the meeting on 7 August 2013 he had discovered that he had been suspended from the IBM security system and that on Saturday 10 August 2013 he discovered he no longer had access to the car parking space provided by IBM.

[244] Mr Fox's evidence was that he had spoken to Mr Simpson on three occasions on 8 August 2013 requesting the return of the IBM laptop, and explaining that the actions being taken were necessary as a result of him refusing to explain how he came to obtain access to the confidential screenshot document.

[245] Mr Simpson said he had reflected on what had been discussed during the 7 August 2013 meeting. He said he had felt he had been misled by IBM in respect of the OOC salary increase and that IBM had failed to address his concerns, and he had received no contact from IBM during the two and a half days following the meeting.

[246] The decision against disclosure of how he accessed the confidential *sametime* document I find led directly to the security protocols being invoked and Mr Simpson's access to the system being suspended, however this had been on a temporary basis only. All of which was a result of his refusal to explain how he had obtained confidential IBM information.

[247] In respect of the claim that IBM failed to contact him during the two and a half days following the 7 August 2013 meeting, I note that 7 August 2013 was a Wednesday and it had been agreed that Mr Simpson would take the remainder of that day and two further days as leave.

[248] Further IBM's understanding had been that there were agreed steps to be followed by both parties following the meeting and Mr Simpson's return to work on Monday 12 August 2013.

[249] Prior to his return to work on Monday 12 August 2013, Mr Simpson received an offer of alternative employment on Thursday 8 August 2013 and had resigned from IBM on Friday 9 August 2013

[250] In these circumstances I do not find that IBM failed to deal with Mr Simpson in such a way as to breach the good faith obligations it owed him in relation to issues immediately prior to the termination of his employment.

**Did Mr Simpson breach his terms and conditions of employment with IBM by failing to return all company property to IBM on the termination of his employment?**

[251] In accordance with the term of his Employment Agreement regarding confidentiality, Mr Simpson signed the IBM Confidentiality Agreement when he commenced employment. Clause 1 of the Confidentiality Agreement sets out:

*If I leave the employ of IBM, I will return all IBM property in my possession including all confidential information or materials such as drawings, notebooks, reports and other documents. Confidential information or material of IBM or its subsidiaries is any information or material:*

- a. Generated or collected by or utilised in the operations of IBM or its subsidiaries that relates to the actual or anticipated business or research and development of IBM or its subsidiaries; or*
- b. Suggested by or resulting from any task assigned to me or performed by me or on behalf of IBM and which has not been made available generally to the public.*

[252] After Mr Simpson resigned, IBM had become aware on 30 September 2013 that he had a laptop hard drive which contained a copy of the contents of his IBM laptop. IBM has since been able to manually delete the contents of the backup hard drive.

[253] In addition, Mr Simpson also retained a disc of IBM confidential material until 22 May 2014 when it was returned to IBM. Unfortunately at that stage all the information contained on the disc had been accidentally corrupted.

[254] Mr Simpson was under an obligation to return all confidential material to IBM. He failed to do so in respect of the laptop hard drive until sometime following his leaving the employment of IBM and even then the engagement of a third party by IBM had been necessary in order to access and deal with the data contained on the laptop.

[255] The retention of the disc of IBM confidential information by Mr Simpson was attributed to his requiring the information for the purposes of his personal grievance claim against IBM.

[256] By determination [2014] NZERA Auckland 183 I found the information contained on the disc to be of such a nature as to fall under the obligations contained in clause 21.3 of the Employment Agreement and clause 1 of the Confidentiality Agreement, and ordered that Mr Simpson comply with his obligations as set out in clause 21 of the Employment Agreement and clause 1 of the Confidentiality Agreement.

[257] I determine that Mr Simpson breached his obligations as set out in clause 21 of the Employment Agreement and clause 1 of the Confidentiality Agreement by failing to return all company property to IBM on the termination of his employment.

**Did Mr Simpson breach his terms and conditions of employment with IBM by not adhering to and breaching IBM's Business Conduct Guidelines (BCG)?**

[258] In accordance with the terms of the Employment Agreement Mr Simpson, in common with all IBM employees, was required to sign the BCG annually. Mr Simpson confirmed that he had signed the BCG's on 17 occasions during the course of his employment with IBM.

[259] It was a term of clause 22 of the Employment Agreement that Mr Simpson comply with the BCGs. Part 3.1 of the BCG's lists as prohibited conduct:

*Use of recording devices, including cell phone cameras and web cameras, except as authorised by management and IBM Counsel.*

[260] The BCGs also set out the core values which underpin them.

[261] Following the return to IBM of Mr Simpson's laptop, it was necessary to obtain access to the laptop and therefore the correct passwords were required, which despite initial requests to Mr Simpson were not forthcoming. Eventually Mr Simpson provided alpha numeric password combinations via counsel which in the event proved unsatisfactory. IBM had to resort to a third party to gain appropriate access.

[262] Following an examination of the contents it was found that the laptop contained large amounts of inappropriate materials, including personal images, illegally downloaded movies, music, unauthorised software and recordings of private and confidential conversations between IBM employees.

[263] Mr Simpson accepted during the Investigation Meeting that he had breached the BCGs, however in relation to the inappropriate material which had been discovered on his IBM laptop, he stated that the personal images had been personal photographs which had been transferred inadvertently from a Blackberry device, and that he had deleted the illegally downloaded movies which had been sent to him.

[264] I accept that the personal images on Mr Simpson's laptop may have been placed there inadvertently and may not have offended anyone at IBM during the course of his employment; however I find that it was a breach of the BCG core values that IBM assets, which includes physical property such as a laptop, *“should only be used to conduct IBM business or for purposes authorized by IBM management”*.

[265] The secret recording of the meetings with the management team at IBM I find to have been deliberate and sustained over a period of time, and not to have been acting in good faith. I note in this context the accessing, copying and non-disclosure of the *sametime* document, of which Mr Simpson had been aware from June 2013, but had not referenced until substantially later in the process on 7 August 2013. I observe that IBM has policies which provided avenues which Mr Simpson could have used to address his concerns about this matter and others with Ms Tulp and Mr Fox; however he failed to do so, choosing instead to make covert recordings of meetings in direct breach of Part 3.1 of the BCGs.

[266] I determine that Mr Simpson breached his terms and conditions of employment with IBM by not adhering to and breaching IBM's Business Conduct Guidelines.

## **Remedies**

### **Penalties**

[267] I order that IBM pay a penalty of \$500.00 in respect of the breach of good faith in not communicating in a timely manner the outcome of the annual salary review to Mr Simpson, the whole of this sum be paid to Mr Simpson pursuant to s 136(2) of the Act

[268] I order that Mr Simpson pay a penalty of \$4,000.00 in respect of the counterclaims, and that the whole of this sum be paid to IBM pursuant to s 136(2) of the Act .

### **Costs**

[269] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**