

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 29
5552663

BETWEEN ROSS WEYMOUTH
 Applicant

A N D HAWKINS CONSTRUCTION
 LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Angeline Boniface, Counsel for Applicant
 Chris Hogg, Counsel for Respondent

Investigation Meeting: 23 and 24 February 2016 at Christchurch

Submissions Received: 24 February 2016 for the Applicant
 24 February 2016 for the Respondent

Date of Determination: 11 March 2016

DETERMINATION OF THE AUTHORITY

- A. Mr Weymouth had no entitlement to be paid a loyalty bonus in 2014 and 2015. He did not suffer an unjustified disadvantage in his employment and was not unjustifiably constructively dismissed.**
- B. Costs are reserved.**

Prohibition from publication order

[1] Evidence was heard about a member of staff of the respondent who remains employed by it. This evidence included details of his remuneration at the start of his employment and of an insulting term that was allegedly used about him by one of his managers.

[2] As this staff member did not take part in the proceedings, I prohibit from publication the name of this individual. He shall be referred to in this determination as Mr X.

Employment relationship problem

[3] Mr Weymouth claims that his individual employment agreement was breached by the respondent (Hawkins) by it failing to pay him a \$10,000 loyalty bonus in each of the years 2014 and 2015. He further claims that he was unjustifiably constructively dismissed and/or unjustifiably disadvantaged in his employment as a result of the failure to pay the loyalty bonus.

[4] The respondent denies that Mr Weymouth was entitled to receive a loyalty bonus for the years 2014 and 2015 and denies that he was unjustifiably constructively dismissed and/or unjustifiably disadvantaged in his employment.

Brief account events leading to the termination of employment

[5] Mr Weymouth is a quantity surveyor and was employed by the respondent company between 9 January 2012 and 27 July 2015. Mr Weymouth was recruited as part of the Canterbury Earthquake Rebuild Solution Project. He was employed on a fixed term agreement, the term of the agreement being the time that it would take to complete the services that the respondent company was providing to IAG, one of the major insurers involved in assessing claims arising out of the significant September 2010 and February 2011 earthquakes in Canterbury.

[6] Mr Weymouth was employed pursuant to the terms of an individual employment agreement, and the terms of an offer letter. The individual employment agreement contains the following terms which are material to this matter:

1. ***ENTIRE AGREEMENT***

1.1 *This agreement (including the attached Letter of Offer and Schedule) is the entire employment agreement between the Company and the Employee. Any prior contract, agreement or arrangement is replaced by this agreement.*

...

6. ***VARIATIONS TO AGREEMENT***

This agreement may be varied at any time by mutual agreement between the Company and the Employee, with any such variation to be recorded in writing and signed by both parties.

...

14. ***SALARY/WAGE AND BENEFITS***

14.1 *The Company will pay the Employee the remuneration and provide the benefits set out in The Letter of Offer in the manner set out in that letter.*

...

16. **COMPENSATION**

16.1 *Unless the Company has expressly agreed to the payment of overtime rates of pay, the remuneration received by the Employee pursuant to this agreement will be deemed to compensate fully for all time worked and duties performed under this agreement.*

[7] The letter of offer, which was dated Thursday, 15 December 2012, but was presumably intended to be dated 2011, contained the following terms:

6. **SALARY**

Your salary will be \$65,000 per annum, which shall be paid monthly on or before the 20th of the month into a bank account nominated by you. The monthly payment is payment for the month in which it is paid.

There will be a \$10,000 (Less PAYE) loyalty bonus, paid on completion of 12 months service. The payment will be made in the month following your anniversary date.

The Company reserves the right to alter the pay date or pay cycle upon reasonable notice to you.

...

You are entitled to seek independent advice prior to agreeing to and signing this agreement.

Please carefully review this letter and the attached Fixed Term Individual Employment Agreement.

...

Employee declaration

I have read, considered and agreed to the terms and conditions of employment contained in this letter and the attached Fixed Term Individual Employment Agreement and Position Description.

I was given the opportunity to seek independent advice prior to signing the Agreement.

[8] The copy of the letter of offer that Mr Weymouth had signed was dated 31 January 2012, although he says that he had originally signed a copy on or around 20 December 2011, which he had then scanned and attempted to return to the Rebuild Solutions Manager (Human Resources) and Administration Support, Lynda Cochran, now Lynda Mathieson. It appears that this original copy was never received by Ms Mathieson because of technical issues with the email, and that she asked him to resign the contractual documents on 31 January 2012, after Mr Weymouth had started work.

[9] It was Mr Weymouth's oral evidence to the Authority that, when he had first read the offer letter, he had believed that the reference to the loyalty bonus under the heading of *salary* meant that the bonus must have been an annual payment, just as his salary was.

[10] Mr Weymouth also provided in evidence a copy of a document headed up *Employment Agreement Details Drafting Form* (EADDF). The Authority heard evidence from Ms Pam Blacktopp, the respondent's Human Resource Manager for the Canterbury Recovery Project, who said that this form had not been sent to Mr Weymouth as part of his contractual documentation. She also stated that it was an internal administration form only and had no contractual force. Notwithstanding this, Mr Weymouth relies on this form in part because, against the heading *Salary*, the following is stated:

\$65,600 (\$10,000 Loyalty Bonus)

[11] Under the subheading of *Other*, is stated *N/A* (not applicable).

[12] It was Mr Weymouth's written evidence that he had received the EADDF at the same time as he had received the draft employment agreement and letter of offer in December 2011, and says that this reinforced his belief that the \$10,000 loyalty bonus was not just a one-off payment, but a regular payment to be made on an annual basis. However, in his oral evidence, he says that he first saw the EADDF in late January 2012, after he had re-signed the agreement and letter of offer. I believe that this is much more likely to be accurate, as it is supported by contemporaneous documents. It cannot, therefore, be the case that the EADDF reinforced Mr Weymouth's belief that the loyalty bonus was an annual payment at the time when he had first accepted the offer of employment in December 2011.

[13] Mr Weymouth said in his oral evidence that he had asked Ms Mathieson to record the \$10,000 loyalty bonus in the EADDF when she had asked him to re-sign the documents in January 2012. Ms Mathieson, however, does not accept this evidence, saying that the reference to the bonus must have been in the form at the time when she completed Mr Weymouth's contractual documentation in December 2011, as she used the contents of the form to fill in the template documentation. I prefer Ms Mathieson's evidence on that point.

[14] Mr Weymouth and Ms Mathieson do agree, however, that during the meeting between them in January 2012, Mr Weymouth asked Ms Mathieson to confirm whether the bonus of \$10,000 was to be an annual bonus. This is because, Mr Weymouth said, he had reread the contractual documentation over the 2011/12 Christmas break and it had occurred to him that the wording regarding the loyalty bonus was not clear.

[15] Mr Weymouth says that Ms Mathieson stated that she would confirm that with someone else at Hawkins and, a few hours later, came back and told him that the bonus was confirmed as a loyalty incentive and that it would be paid annually.

[16] Ms Mathieson gave evidence to the Authority¹. She said that she was employed by the respondent between October 2010 and August 2013 and that she is independent of Mr Weymouth, not being a friend or family member. Ms Mathieson said that she did not have any input into the making of the offers of employment to Mr Weymouth but was responsible for finalising the written employment agreements between the parties. She would also be involved in passing communications between prospective employees and the recruitment managers. She said that, at the time when Mr Weymouth was recruited, Hawkins was in the midst of a fairly frantic recruitment exercise, competing with its competitors for qualified professional staff.

[17] Ms Mathieson says that she recalls Mr Weymouth asking her whether the loyalty bonus was to be annual and that she consulted with one of the recruiting managers at the time, Mr Ben Pritchard, to get his view. She says that she asked Mr Pritchard about the bonus while she was standing in his office and that another recruitment manager, Mr Richard Jack, overheard the conversation and joined in.

[18] Ms Mathieson says that Mr Pritchard and Mr Jack discussed the way that they felt under pressure, and frustrated, and that they lacked confidence in the ongoing partnership between the respondent company and IAG. She says that she perceived that Mr Pritchard and Mr Jack felt the partnership would not exceed a lengthy timeframe, but that, if it did, Mr Weymouth would certainly receive his bonus. She says that the recruiting managers made it very clear to her that, if the project continued, Mr Weymouth would receive his loyalty bonus each year.

¹ Ms Mathieson was also defending an action against her brought by Hawkins, which is the subject of the Authority's determination, case number [2016] NZERA Christchurch 30.

[19] Ms Mathieson says that the conversation was not formal and that she *did not push the matter any further*. She also said that Mr Pritchard told her that it was unnecessary to amend the employment agreement to reflect that the bonus would be paid annually. Her oral evidence is that she and Mr Pritchard and Mr Jack were all extremely busy and it was no surprise to her that they said not to amend the contract. Her priority was the processing of new recruits who were desperately needed at that time.

[20] Ms Mathieson's evidence is that Mr Weymouth was employed at the same time as another quantity surveyor (referred to in this determination as Mr X) and that, during her conversation with Mr Weymouth, Mr Weymouth advised her that Mr X would be likely to ask her to clarify his bonus structure as well. She says that, when she was discussing with Mr Pritchard and Mr Jack Mr Weymouth's annual bonus payment, she also mentioned Mr X and that Mr Pritchard and Mr Jack advised that the same bonus arrangement would apply to Mr X. She says she had such a clear memory of the conversation because Mr Pritchard had used an insulting name to describe Mr X, which she felt was inappropriate. She also was aware that what Mr Pritchard and Mr Jack were saying about the longevity of the project would impact on her employment too, which is another reason she remembers it clearly.

[21] In reliance upon this conversation with Mr Pritchard and Mr Jack, Ms Mathieson relayed back to Mr Weymouth that the loyalty bonus was payable to him annually.

[22] On Monday, 11 February 2013, one of the project directors for the Canterbury Recovery Project, Dean Boston, sent a letter to Mr Weymouth in the following terms:

Dear Ross,

12 month Loyalty Bonus payment

This documentation confirms your first 12 month of service loyalty bonus payment of \$10,000 less PAYE.

As per your letter of offer, we acknowledge the contribution you have made to the team and the Canterbury Recovery Project success in the first 12 months of your service, and therefore are pleased to confirm that you will receive a one-off payment of \$10,000 (less applicable taxes), this will be processed in the next payroll.

[23] Prior to sending Mr Weymouth that letter, Mr Boston also wrote to him referring to the development of a remuneration scheme *to recognise and reward the*

loyalty and performance of employee's [sic] working in the projects' silo's. The memorandum to Mr Weymouth from Mr Boston went on to state the following:

Although this remuneration scheme is still in the design phase, Hawkins has decided it will make a discretionary bonus payment to you this month. If the remuneration scheme progresses as we are currently thinking this discretionary bonus will form part of a larger retention award of which an additional amount is retained for future payment should you meet specific retention criteria.

[24] As part of this discretionary bonus (which, it is understood, came to be called a Discretionary Retention Bonus (DRB)), Mr Weymouth was paid 2.5% of his base salary, as at 30 November 2012, pro-rated in respect of his service up to the maximum of one year. This resulted in a bonus payment to him of \$1,429 before tax, paid on 18 December 2012. The memorandum also stated that, if the company decided to proceed with the remuneration scheme (which it subsequently did) then a further 5% would be retained for payment at a future date.

[25] On 28 March 2013, Mr Boston wrote to Mr Weymouth advising him that his salary was to be increased from \$65,000 to \$75,000 a year with effect from 1 April 2013. This increase was made as a result of the company receiving a reference request for Mr Weymouth from another potential employer.

[26] On 17 April 2013, Mr Weymouth tendered his resignation but was persuaded to stay after being given a further pay rise of \$10,000, which took his salary to \$85,000 with effect from 1 May 2013.

[27] On 25 November 2013, Mr Weymouth received a further increase in his base salary to \$90,000, backdated to 1 September 2013.

[28] On 17 December 2013, Mr Boston confirmed the DRB, which resulted in Mr Weymouth being paid a discretionary bonus payment of \$1,949.86 before tax (being 2.5% of his gross earnings) with a further 5% being retained, to be added to the retained portion from the previous year. In a memorandum from Mr Boston to Mr Weymouth, it was made clear that payment of the aggregated retained portion was to be made at the conclusion of the Canterbury Recovery Project, if the employees were still in employment at that time. The DRB was therefore a loyalty, or employee retention bonus scheme.

[29] On 13 June 2014, the general manager of the Canterbury Recovery Project wrote to Mr Weymouth to advise, inter alia, that the conclusion of the Canterbury Recovery Project was projected to be July 2015. On 14 August 2014, Mr Weymouth's salary was increased to \$92,000, effective from 1 March 2014.

[30] It is Mr Weymouth's evidence that he had been expecting to receive a further \$10,000 loyalty bonus in or around February or March 2014, 12 months after he had received the previous loyalty bonus payment. He says that he approached his manager asking about the bonus in May 2014, and said that, when he received no substantive response, he tried to be patient and so waited until September 2014 before raising the issue again. Again, he received no substantive response and so wrote to an HR manager at the time, Anne Liddicoat, on 4 December 2014, raising a question about the DRB and also stating the following:

Secondly, which also requires clarification, is my loyalty bonus which was with the salary for this job. I have not received my loyalty bonus this this [sic] and would like some further information as to why.

[31] On 8 December 2013, Mr Wood, the general manager of the project, wrote to Mr Weymouth (and presumably all other staff) advising him of that year's 2.5% discretionary DRB bonus payment (which was \$2,293.21 before tax for Mr Weymouth) and advising him of his accumulated retention bonus at that point, which was to be paid at the conclusion of the project. He also announced in his letter that the 5% retention arrangement was going to cease, and be replaced by a short term incentive (STI) covering the period 1 October 2014 to 30 September 2015.

[32] Mr Weymouth sent an email to Ms Liddicoat on 29 January 2015 chasing, inter alia, with respect to the loyalty bonus and chased again on 19 February 2015. On 20 February 2015, Ms Liddicoat wrote to Mr Weymouth a letter which briefly recited his employment history with the company and quoting from the letter of offer, stating that the loyalty bonus was a one-off payment and that she could not find any further agreement in relation to any further loyalty bonus provisions.

[33] On 6 March 2015, Mr Weymouth's employment adviser, Peter Macdonald, wrote to Ms Liddicoat raising a concern about, inter alia, the loyalty bonus, saying that Mr Weymouth had *sought and received confirmation* at the time of his recruitment that the loyalty bonus was an annual incentive payment.

[34] In response to Mr Macdonald's letter, the Performance and Capability Manager for the Canterbury Recovery Project, Ms Blacktopp, responded, essentially pushing back on the points made in Mr Macdonald's letter. Her response, which was by email, included the following sentence:

In some instances, the amount of the one-off loyalty bonus was subsequently added to the employee's base salary in their next salary review and I note this occurred for Ross, forming part of his annual remuneration.

[35] Subsequent correspondence ensued between Mr Macdonald and Ms Blacktopp and, on 20 April 2015, Mr Macdonald formally raised a personal grievance.

[36] On 22 April 2015, Mr Weymouth emailed Ms Mathieson (who, by this time, had left the employment of Hawkins) asking her for confirmation that the loyalty bonus was intended to be paid annually and was not one-off, that the EADDF was a result of their discussions and, thirdly, seeking her view on whether he received pay increases in March and April 2013 in order to get him to stay at Hawkins rather than because of his bonus being rolled into his salary. Ms Mathieson responded as follows on 6 May 2015:

Hi Ross – I've answered below in blue.

I'll try my best, but I have to be honest it's a difficult one to prove – due to the way Hawkins have written the agreement.

I suspect that the argument from Hawkins will be that if it was intended to be a yearly arrangement the agreement would have stated clearly ... "per year".

What I do recall is this:-

Firstly:-

- *The templates that Hawkins use for those letters are very prescriptive, with blank gaps for specific individual information to be entered. There is no option in the template for bespoke items. Hence, the detail that the bonus was to be paid annually is silent.*
- *The Agreements are based on the information provided in the EAD's – which in your case stated \$10,000 bonus, but was silent regarding annual or one off payment.*
- *You did seek clarification with both Ben and I to whether the bonus was intended to be annual and I am certain it was.*
- *This also applied to [Mr X].*

I recall very clearly the "Wages spreadsheet for 2012" that definitely highlights your salary, plus "annual" bonus. Whether Hawkins will declare it to you is another thing ... (also for [Mr X]).

Secondly:-

I categorically confirm that the purpose of the two pay increases was NOT to incorporate your annual bonus into your salary.

If Hawkins state that the pay increase was to incorporate your annual bonus into your salary, then they are indirectly confirming that the bonus was intended to be paid annually.

The reasons for you [sic] pay increase were as follows:

- *You and [Mr X] were the lowest paid QS's and possibly lowest paid employees. I recall this clearly as John Fraser was trying to get you a pay rise. He was trying to help you move out of your flat. He realised that your pay was low in comparison to what was being paid in the marketplace. An increase was authorised immediately. This can be confirmed by the "Wages spreadsheet" – if you can get your hands on it.*
- *A month later in your effort to move out from your flat, you were offered a higher paid role elsewhere – to which Hawkins responded by raising your salary again.*

In each of the pay increase letters, both state ... "Except where variations have occurred as stated in this letter, all other terms and conditions will remain as stated in your current employment contract". (As does the 12 month loyalty bonus.)

Hawkins will not be able to provide evidence that the purpose of one pay rise was to incorporate your annual bonus – it is incorrect.

The purpose of the annual loyalty bonus was to ensure that you would remain with the project to the end of each additional year. The project was unpredictable in regards to a finish date. It was perceived as being very stressful and unfulfilling role for a QS and there were plentiful opportunities with commercial construction companies to tempt QS's to leave. (and they did)

If there is anything that your lawyer would like to check with me, I am more than happy to help. I am also agreeable to providing an affidavit if required.

*Kind regards,
Lynda Mathieson*

[37] Ms Mathieson sent Mr Weymouth another email on 6 May 2015 with respect to the DRB, which is not relevant to this matter.

[38] It is Mr Weymouth's evidence that the dispute with the respondent about the loyalty bonus was constantly playing on his mind, and that the matter was referred to mediation, unsuccessfully. He said that he became so stressed that he became physically unwell and that, by May of 2015, he was losing sleep and having panic attacks. He says that he was prescribed medication in July of 2015, including

Citalopram, Diazepam and Zopiclone. He was also attending counselling through EAP.

[39] Mr Weymouth said that he did not believe that Hawkins was taking his concerns seriously and that it was not prepared to discuss his case in good faith. He says that his EAP counsellor advised him eventually to resign his position as the effect on his health was becoming overwhelming. Accordingly, he wrote a letter of resignation on 16 July 2015. As Mr Weymouth is alleging that he was unjustifiably constructively dismissed, it is necessary to replicate the terms of this letter in full:

Notice of resignation

To whom it may concern

Please accept this letter as my notice of resignation. While I see the Canterbury Recovery Project with Hawkins on behalf of IAG as a privilege to be part of, it is with regret that I have put my heart and soul in this project and intended to see the project through until the end. As you can understand the project is extremely stressful even without the ongoing employment issue regarding my loyalty bonus and with seeking further formal intervention while working regarding my loyalty bonus, it is becoming unbearable to stay employed with Hawkins. It is no longer in the interests of my health as the dispute is physically making me ill while I am at work and at home. My advice from EAP in May was to remove the problems from my life that are causing distress, the only way I can see partially completing this is to leave Hawkins until the dispute is resolved.

[40] Ms Blacktopp wrote to Mr Weymouth on 17 July 2015 effectively asking him to change his mind. Mr Weymouth did agree to Ms Blacktopp's suggestion that he take a week's sick leave and then make a decision once that was over, but decided to go ahead with his resignation on 27 July 2015. He found new employment very shortly thereafter, and sustained no loss of income.

The issues

[41] The Authority must determine the following issues:

- (a) Was Mr Weymouth entitled to be paid a loyalty bonus of \$10,000 in 2014 and 2015?
- (b) Was Mr Weymouth unjustifiably disadvantaged by not being paid the loyalty bonus on an annual basis?

- (c) Was Mr Weymouth unjustifiably constructively dismissed by not being paid a loyalty bonus in 2014 and 2015?

Was Mr Weymouth entitled to be paid a loyalty bonus in 2014 and 2015?

[42] The evidence strongly suggests that Hawkins intended at the time when it offered employment to Mr Weymouth in December 2011 that the loyalty bonus would be a one off payment, and not payable annually. This evidence includes:

- a. the plain wording of the clause relating to the bonus which it had incorporated into the offer letter (about which I shall say more below),
- b. the fact that the same wording was replicated in the terms and conditions of all quantity surveyors employed around the same time, none of whom received the bonus in any year other than 2013,
- c. the reference in other internal documents, such as spreadsheets, to the bonus being a *one-off*;
- d. the wording of the letter from Mr Boston to Mr Weymouth dated 11 February 2013; and
- e. the fact that the DRB was introduced to replace all other employee retention bonus schemes in operation, that negotiations took place between Hawkins and all employees who had such on-going entitlements, but that no such negotiations took place with any quantity surveyor who was entitled to a loyalty bonus².

[43] Mr Weymouth, on the other hand, apparently believed from day one that the loyalty bonus was meant to be annual, although he clearly had initial doubts about that, because he asked Ms Mathieson to check the status of the bonus in January 2012.

[44] However, if I accept Mr Weymouth's evidence as to his understanding, it is clear that the parties were not *ad idem* as to the frequency of the payment of the loyalty bonus. This means that it is necessary to apply the principles of contract interpretation to determine whether Mr Weymouth was entitled to payment of the bonus in subsequent years.

² Evidence of these negotiations was given by Mr Boston, who was a senior manager engaged to streamline the incentivisation and employee retention strategies in place within Hawkins.

The principles of contractual interpretation to be applied

[45] His Honour Judge Ford set these principles out in the Employment Court case of *Progressive Meats Limited v. Pohio & Ors* [2012] NZEmpC 103 where, at [29], he stated as follows:

*There was no dispute between counsel as to the applicable legal principles in the interpretation of collective agreements. Mr Cleary referred to the well-known five principles of contractual interpretation articulated by Lord Hoffmann in *Investors Compensation Scheme Limited v West Bromwich Building Society*³ which were adopted in New Zealand in *Boat Park Ltd v Hutchinson*⁴ and recently reaffirmed in *Vector Gas Ltd v Bay of Plenty Energy Limited*.⁵ As both counsel relied on the stated principles, I set them out in full:*

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were in at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the “matrix of fact,” but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

*(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as a meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (See *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 2 WLR 945)*

*(5) The “rule” that words should be given their “natural and ordinary meaning” reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera SA v Salen Rederierna AB* [1985] 1 AC 191,201:*

³ [1997] UKHL 28

⁴ [1999] 2 NZLR 74.

⁵ [2012] NZSC 5

“... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.”

[46] I also refer to the Court of Appeal case of *Silver Fern Farms Limited v. New Zealand Meat Workers & Related Trade Unions Inc.* [2010] NZCA 317 in which it confirmed that extrinsic material can be used to clarify an agreement’s meaning, even if the terms were unambiguous.

[47] I believe that, upon reading the words of the loyalty bonus clause in the offer letter, their meaning is plain, and that they convey that the bonus is payable after the completion of 12 months’ service, not after 12 months’ service, then again after 24 months’ service, and then again after 36 months’ service. This is because of:

- a. the use of the words *loyalty bonus* in the singular, rather than the plural;
- b. the use of the phrase *paid on completion of 12 months service* rather than, say, *paid after completion of each 12 months’ service* or *paid after completion of 12 months’ service, and every 12 months thereafter*;
- c. the use of the phrase *anniversary date* in the singular instead of the plural.

[48] In Mr Weymouth’s favour is the fact that the loyalty bonus is listed under the heading *salary* and not, say, *remuneration*. However, whilst a salary is paid annually, it is also paid monthly, and Mr Weymouth does not argue that the loyalty bonus was payable monthly. Therefore, the reference to the loyalty bonus under the heading of *salary* is of weak persuasive force. Mr Weymouth could also rely on the use of the word *anniversary*, as an anniversary can obviously occur more than once. However, as noted above, that argument is weakened by the use of the word *date* rather than *dates*.

[49] All in all, I am persuaded that the plain meaning of the wording of the clause refers to a one-off payment, which would occur not more than once during Mr Weymouth’s employment.

[50] This view is strengthened by the wording of the letter from Mr Boston dated 11 February 2011. The first sentence is clearly ambiguous, and can be construed as supporting equally Mr Weymouth's position as well as Hawkins'. However, the use of the word *one-off* clearly means, on one occasion only. This letter was written before Mr Weymouth raised any concerns about the loyalty payment not being paid in 2014, and so cannot have been written in order to stave off any such argument.

[51] I am also not persuaded by Mr Weymouth's argument regarding the EADDF, as the argument he uses is the same one as his argument that the bonus being mentioned under the heading *salary* in the offer letter proves it was intended to be annual, which I have rejected as weak.

[52] These factors, coupled with the other documents I have seen which refer to the loyalty bonus being a one-off payment, persuade me that the loyalty bonus was not an annual payment. By reference to the clear terms of the offer letter, Mr Weymouth had no entitlement to be paid the loyalty bonus in 2014 and 2015. Is the position changed by Ms Mathieson's evidence regarding her conversation with Mr Pritchard and Mr Jack?

The assurances of Mr Pritchard and Mr Jack

[53] First, I accept that Ms Mathieson sought clarification from Mr Pritchard, and that she genuinely understood that she had obtained clarification from him and Mr Jack that the loyalty bonus of \$10,000 would be payable annually to both Mr Weymouth and Mr X. Whilst the respondent's counsel sought to undermine her evidence by the lack of any objective proof that such an agreement had been made, I believe that Ms Mathieson was a credible witness who was very candid about the many errors she made while carrying out her duties in a very hectic and challenging environment. Also, she had no cogent reason to lie to Mr Weymouth about her belief about his entitlement when she sent her email to him on 6 May 2015.

[54] I also accept that Ms Mathieson then conveyed to Mr Weymouth that he was entitled to receive the loyalty bonus annually. However, I do not believe that Mr Pritchard and Mr Jack actually did say what Ms Mathieson believed they did. It is my belief that their intention was to convey that Mr Weymouth would be likely to receive a pay rise of \$10,000 in the forthcoming year.

[55] I reach this conclusion because of the evidence of Hawkins' witnesses that quantity surveyors like Mr Weymouth and Mr X were junior, and untested, but that Hawkins would be willing to remunerate them at a level closer to the market rate to keep them, once it was satisfied they were capable employees. This was clearly what did happen, as Mr Weymouth did receive two pay rises in 2013 in the sum of \$10,000 each.

[56] This conclusion would also explain Ms Blacktopp's reference to the amount of the one-off loyalty bonus being *subsequently added to the employee's base salary in their next salary review*.

[57] I also accept that Mr Pritchard did not have the authority to make decisions about the frequency of the loyalty bonus. Another manager, Mr Quin Henderson, signed off the terms of offer for each recruit. He would have had to have agreed to the change in frequency of the loyalty bonus, but clearly did not.

[58] What difference does it make to Mr Weymouth's case that he received an erroneous assurance from Ms Mathieson that she had been told that the loyalty bonus was annual? I do not accept that this assurance induced Mr Weymouth to enter into the employment agreement with Hawkins. He had clearly already made that decision on or around 20 December 2011 when he signed it the first time around, and he had already been working for some days when he signed the agreement the second time. In the absence of an inducement, the erroneous *confirmation* Mr Weymouth received from Ms Mathieson was merely a non-binding statement which Hawkins was not bound to comply with, as it was contradicted by the written terms of the employment agreement.

[59] Was the clarification received by Mr Weymouth via Ms Mathieson a variation of the employment agreement that the loyalty bonus would be paid annually? I do not accept that it was. First, such a variation would have had to have been signed off by Mr Henderson, which it was not. Second, the entire agreement clause in the employment agreement precluded such a variation unless the terms of the express variation clause were complied with; namely, any variations had to be recorded in writing and signed by both parties. This was not done.

[60] Furthermore, as I have found above, I do not accept that the respondent intended to effect such a variation in any event. What occurred was an error in

understanding by Ms Mathieson. The respondent cannot be bound by such an error when Mr Weymouth was not induced to enter into the agreement as a consequence of it.

[61] I therefore conclude that Mr Weymouth had no legal entitlement to receive the loyalty bonus in 2014 and 2015.

Was Mr Weymouth unjustifiably disadvantaged in his employment by the failure to pay him a loyalty bonus in 2014 and 2015?

[62] From my finding above, I must conclude that, whilst Mr Weymouth may have been disadvantaged by not receiving the loyalty bonus in 2014 and 2015, the actions of Hawkins in not paying it for those years were not unjustified.

[63] However, there was clear evidence that Mr Weymouth was told that he would receive the bonus in 2014 and 2015, and that that communication had created (or reinforced) an expectation that he would. The subsequent refusal of the respondent to pay the bonus in 2014 and 2015 in turn created an intolerable level of stress in Mr Weymouth which led to him leaving Hawkins' employment. Was Hawkins at fault as a result of this?

[64] I do not believe that Hawkins bears any responsibility for what was a genuine misunderstanding by Ms Mathieson as to Mr Pritchard's meaning. Such misunderstandings occur frequently in life and, whilst in a perfect world, Ms Mathieson documenting what she had understood would have flushed out the misunderstanding very quickly, she was not working in a perfect world. Hawkins and Ms Mathieson were operating in a stressful and ever changing environment in the months around the major earthquakes.

[65] However, I note that Ms Blacktopp did not do anything to follow up on the information that Mr Macdonald had given her on 6 March 2015 that Mr Weymouth had received clarification that the bonus was annual. If she had, it is likely that she would have gone on to have spoken to Ms Mathieson and then found out about the conversation she had had with Mr Pritchard.

[66] However, on balance, I do not believe that Ms Blacktopp taking those steps in March 2015 is likely to have resulted in any different situation. Namely, I believe that Ms Blacktopp would then have gone on to speak to Mr Pritchard who would have given the same evidence he gave to the Authority; namely, that he did not say that the

bonus was to be paid annually. That, in turn, would most likely have still led Mr Weymouth to develop the symptoms of stress that he did, and to have resigned.

[67] I do not, therefore, believe that Ms Blacktopp's failing to follow up on that information from Mr Macdonald would have made any difference to the outcome. Therefore, I cannot find that it created a disadvantage in the employment of Mr Weymouth.

Was Mr Weymouth unjustifiably constructively dismissed from his employment?

[68] In order to succeed in an unjustified constructive dismissal claim, Mr Weymouth must show that Hawkins had repudiated his employment agreement by way of a breach of an express or implied term, and that it was foreseeable to Hawkins that he would resign as a result.

[69] However, I do not accept that Hawkins did breach his employment agreement. Mr Weymouth resigned because he felt ill due to the stress caused by Hawkins' failure to pay the loyalty bonus in 2014 and 2015. Hawkins had no obligation to pay that bonus to Mr Weymouth in 2014 and 2015 and it was reasonable for it to make that position clear to Mr Weymouth. Ideally, it would have made its position clear sooner than it did, but Mr Weymouth's stress symptoms did not start in any significant way until May 2015, after Ms Blacktopp had told him that he was not entitled to an annual loyalty bonus.

[70] Under these circumstances, I am unable to find that there was any repudiatory breach by Hawkins, and so Mr Weymouth's claim of constructive dismissal must fail.

Conclusion

[71] This is an unfortunate case where an innocent misunderstanding partially led to an expectation, which in turn led to a dispute, significant feelings of stress and a resignation. It is hard to see how matters could have turned out differently, however, given the environment in which the managers and HR staff were operating at the time.

[72] I conclude that Mr Weymouth's claims must fail.

Costs

[73] Costs are reserved. If the respondent wishes to receive a contribution to its legal costs from Mr Weymouth, the parties are to first seek to agree that contribution between them. However, if they have been unable to do so within 21 days of the date of this determination, the respondent may serve and lodge a memorandum of counsel seeking a contribution towards its costs from Mr Weymouth within a further 14 days, and Mr Weymouth will have a further 14 days thereafter within which to serve and lodge his reply. The Authority will then make a determination on the papers.

David Appleton
Member of the Employment Relations Authority