# Christian Schuler v New Era of Networks (Singapore) Pte Ltd
# [2002] SGHC 220

**Case Number** : Suit 1303/2001/W

**Decision Date** : 19 September 2002

**Tribunal/Court** : High Court

**Coram** : Lee Seiu Kin JC

**Counsel Name(s)** : Michael Eu (ComLaw LLC) for the plaintiff; Andy Leck and Jonathan Lim (Wong & Leow LLC) for the defendant

**Parties** : Christian Schuler — New Era of Networks (Singapore) Pte Ltd

## Judgment

*Cur Adv Vult*

## GROUNDS OF DECISION

1 The Defendant is a company registered in Singapore and is the local subsidiary of New Era of Network, Inc ("NEON"), a U.S. company.

2 The Plaintiff was an employee of the Defendant. By letter dated 23 May 2001, the Defendant terminated the Plaintiff's employment by giving him six months' notice pursuant to the terms of his employment. This meant that his employment would end on 23 November 2001. However the letter stated that the Defendant was in the course of investigating an allegation that the Plaintiff had made an unauthorised bonus payment to himself of the sum of $72,000. Pending that, the Defendant reserved its right to take further action against the Plaintiff. At that time the Plaintiff was the Defendant's Senior Vice-President and Managing Director, responsible for its operations in the Asia-Pacific.

3 By a further letter dated 6 June 2001 the Defendant advised the Plaintiff that it had completed the investigation and was satisfied that the Plaintiff had made the bonus payment without authorisation, in contravention of its instructions. On that ground, the Defendant terminated the Plaintiff's employment with immediate effect. This would have the effect of depriving the Plaintiff of the six months' salary that he would have received had he been permitted to serve out the notice period in accordance with the terms of the letter of 23 May 2001. The Plaintiff contends that the summary dismissal was wrongful and commenced this action to claim the following:

(i) US$100,000 being salary in lieu of notice or alternatively damages for wrongful termination;

(ii) US$40,000 being the balance of the unpaid bonus for the year 2000;

(iii) US$10,000 being the balance of his bonus for the first quarter of 2001;

(iv) US$150,000 being the bonus for the second, third and fourth quarters of 2001 or alternatively damages; and

(v) interest and costs.

4 The Defendant denies all liability on the ground that the dismissal was justified and that the Plaintiff was not entitled to the bonuses claimed. The Defendant counterclaims for $72,000 which the Plaintiff had caused to be paid to himself as part payment of his bonus for the first quarter of 2001 (and in respect of which the Plaintiff claims the balance of US$10,000).

### The facts

5 The Plaintiff joined SLI Consulting International AG ("SLICI") in 1992 and in 1996 acquired a 13.3% share of the company. He developed the company's business in the USA and Asia-Pacific, incorporating the following subsidiary companies in the process: SLI Consulting Sdn Bhd in Malaysia, SLI Consulting Ltd in Hong Kong and SLI Consulting Pte Ltd in Singapore. In October 1998, he moved to

Singapore and became the Managing Director of SLI Consulting Pte Ltd. He was concurrently a director in all SLI Consulting entities in Malaysia, Singapore and Hong Kong.

6 Under the terms of his employment contract with SLI Consulting Pte Ltd, he was paid a gross salary of $15,000 per month and an objective-based bonus of $120,000 per year. In respect of termination, SLI Consulting Pte Ltd had the right to forthwith terminate his employment at any time without prior notice in the event of any misconduct, disobedience, negligence, incompetence and breach of duty of good faith on his part in the course of carrying out his duties as a Managing Director. Otherwise, his employment may be terminated, unless mutually agreed, by six months' prior written notice.

7 In early 1999, NEON entered into negotiations to acquire SLICI and all its subsidiaries. At the time the shareholders of SLICI were Franz Koepper who controlled 66.6% of the total shareholding, the Plaintiff who had 13.3%, and two others who held the remaining 20%. The acquisition took place in May 1999. Koepper was appointed a Senior Vice-President of NEON and the Chief Executive Officer of the SLI group worldwide.

8 Sometime in June 1999 Koepper, on behalf of the Defendant, verbally agreed with the Plaintiff that from the date of the acquisition the Plaintiff would be employed by the Defendant on the same employment conditions that he had prior to the acquisition. Koepper also informed him that a written contract would be drawn once the revised terms have been agreed upon. They agreed that for the time being, the Plaintiff would be employed on the conditions of his original employment contract with SLI Consulting Pte Ltd but increases of salary and objective-based bonus might also be made by oral agreement according to any increased responsibilities.

9 Sometime in February 2000, the Plaintiff was promoted to the position of Vice-President and headed its Asia-Pacific Commercial Business unit. The promotion and new reporting lines were introduced during a Sales Conference held in February 2000 at Denver, Colorado, USA. At a subsequent Sales Conference in July 2000 at Denver, the Plaintiff was further promoted to Senior Vice-President and Managing Director of the Defendant, placing him in charge of NEON's operation in the Asia-Pacific.

10 Around October 2000, the Plaintiff negotiated with Leslie Lundberg, NEON's Vice-President, Human Resources in respect of his remuneration for 2000 and 2001. Lundberg confirmed that for 2000, the Plaintiff's base salary would be US$160,000 with an objective-based bonus of a further US$160,000. For 2001, Lundberg confirmed that the Plaintiff's base salary would be US$200,000. As for the objective based bonus, Lundberg suggested that it be based on a percentage of revenue and proposed a figure of 0.8% on the basis of a target revenue of $25 million and target bonus of US$200,000. According to the Defendant, the parties did not reach any agreement on the issue of the target bonus for 2001 by the time matters came to a head in May 2001. However the Plaintiff contended that there was agreement on an annual target revenue of US$16.7 million with a first quarter target of US$2 million. I shall deal with this dispute of fact later.

11 In early January 2001 the Plaintiff requested Lundberg to process and make payment of his bonus for the year 2000. Lundberg requested the Plaintiff to provide some information for that purpose, which the Plaintiff did. Lundberg consulted Fred Horn, NEON's Executive Vice-President, Operations at the time, and the person to whom the Plaintiff reported directly. There was some disagreement as to the quantum that the Plaintiff was entitled to. The Plaintiff claimed that he ought to receive the full US$160,000 while Horn took the position that he was only entitled to three-quarters, i.e. US$120,000 as he had only achieved the target revenue for the first three quarters of 2000. The matter was escalated to Pat Fortune, the President and Chief Operating Officer of NEON at the time, who decided that the Plaintiff should only receive US$120,000 as his bonus for 2000. He was eventually paid that sum. The Plaintiff was unhappy with the decision and in an e-mail dated 17 March 2001, notified Fortune that he would refer the matter to his legal counsel in the US. The Plaintiff followed this up with an e-mail dated 6 April to Leonard Goldstein, NEON's corporate counsel, setting out his case and holding out for a settlement.

12 Such were the inter-personal atmospherics in the first three months of 2001. Meanwhile another acquisition was in the offing. On 20 February 2001 Sybase, Inc ("Sybase"), a company listed on the New York Stock Exchange, entered into an agreement ("Acquisition Agreement") to acquire all the shares of NEON. A public offer was also made to acquire all the publicly traded shares of NEON. This acquisition triggered the chain of events that gave rise to the present dispute.

13 The Acquisition Agreement provided that NEON and its subsidiaries could carry on their normal business during the transition period, but they were not to enter into any commitments that were not in the ordinary course of business. In order to comply with those provisions it was decided to implement certain payment control procedures which would give the NEON head office close control over cash

disbursements. Another reason for these measures was the need to ensure that the financial information that had been disclosed to Sybase during the due diligence exercise remained accurate. Indeed, according to Lonnie Clark, NEON's Vice-President, Accounting, there was talk at the time that various individuals were going to pay bonuses to themselves without validation that they had earned it and Sybase had requested NEON to tighten its controls.

14 Pursuant to this decision, two instructions emanated from NEON corporate headquarters to its subsidiaries worldwide. The first was dated 4 April 2001, an e-mail from Brian Duff, the Vice-President and Corporate Controller. It was addressed to various authorised signatories of bank accounts and the Plaintiff's name was under the "cc" category. This e-mail, which the Plaintiff admitted receiving, reads as follows:

> Subject: Payment of Commission and Bonuses – Sybase definitive agreement
>
> Steve Webb has asked me to inform you that in order to ensure compliance with the terms of the NEON/Sybase Definitive Agreement any and all payments of commissions and bonuses worldwide relating to Q1 2001 or prior performance requires to be pre-approved by Leslie Lundberg and Brian Duff. This e-mail is going to you as you are all authorized signatories on your respective country bank accounts. By copy of this e-mail you are instructed not to sign or have signed on your behalf any checks relating to commission or bonuses payments without Leslie or my pre-approval.
>
> This procedure will be in place only through the transition and is aimed solely at ensuring compliance with the terms of the Definitive Agreement entered into with Sybase. Attached is a listing of all our active bank accounts and the respective signature authorizations. If you have any questions please contact me.

15 On 10 April 2001 Clark sent an e-mail to various authorised signatories of the bank accounts of NEON and its subsidiaries worldwide. The Plaintiff's name was also in the "cc" category. However he denied receiving it. The e-mail contained the following message:

> Subject: New Purchase control procedures – Sybase definitive agreement
>
> Importance: High
>
> To all,
>
> This message is to inform all authorized signatories on respective country bank accounts of a new purchase control procedures [sic]. These procedures will be in place only through the transition of the merger and are aimed at ensuring copliance [sic] with the terms of the Definitive Agreement we have entered into with Sybase. Effective immediately, all cash disbursements for items in excess of $10,000US, or the equivalent amount in your respective functional currency, must be approved by myself and/or Rick Adam prior to the release of company funds. Should you have normal operating rent or payroll tax obligations that exceed this limit, these items will be excepted from this authorization control.
>
> All authorizations should be faxed or emailed to my attention. Please copy Suelyn Perkins-Ghormley on all authorizations requests so that she can be sure to assist us in working through the authorizations on a timely basis.
>
> Thank you for all your help implementing these procedures.

Lonnie

16 It should be recalled that NEON was in a state of flux by this time as the acquisition by Sybase was expected to result in a major restructuring. The Plaintiff said that by early April 2001 he was being sidelined as all his subordinates were transferred to other supervisors and he was without any functional staff. He was cut off from the executive circulation list. As he had accumulated a substantial amount of leave, he took leave for four weeks from 4 April 2001 and after that extended it for another three weeks. He said that when he went to the office during that period, he could not do anything. Indeed by 23 April 2001, the decision was made by Sybase to terminate his services due to redundancy and preparations were afoot to give him the formal notice.

17 Meanwhile the Plaintiff wanted to be paid his bonus for the first quarter of 2001. He sent an e-mail dated 6 May 2001 to Horn, copied to Fortune and Lundberg in the US, and to Peh Soo Lin and Tan Yew Yen in Singapore. Peh was the Defendant's Regional Manager, Human Resources and Tan was its Accountant. The e-mail advises that he had authorised payment to himself of a provisional bonus of US$40,000 and asks Horn to verify the exact amount. It states as follows:

> Subject: RE: APA Q1/2001
>
> Hi Fred
>
> I believe this one has to be reconfirmed by your self as you've negotiated targets/compensation with me. Dan Carle never responded to any attempts of my attorney to contact him. Len Goldstein has left the company around the date of your e-mail. As the operational Review confirm the revenue numbers outlined and beat your 2 [million] Target given during the executive meeting I have authorized payment of a Q1/2001 provisional Bonus of USD 40K (Target Bonus 50K/Q, 200K/Y). Please verify the exact amount and let me know of any adjustments/amendmends [sic].
>
> Agree on focussing growing the business furhter [sic].
>
> Best regards,
>
> Chris Schuler

18 The following day, on 7 May 2001, the Plaintiff presented the Defendant's cheque for $72,000, being payment of the provisional bonus of US$40,000 in equivalent Singapore currency. The payment was cleared on 8 May. Up to that time, there had been no response to his e-mail of 6 May from Horn or anybody else in the US. It is this act that the Defendant relies on to summarily dismiss the Plaintiff in its letter of 6 June 2001.

19 The Defendant alleged that the Plaintiff had committed misconduct by contravening the instructions given in the two e-mail dated 4 April and 10 April 2001 thereby breaching his duty of fidelity and good faith to the Defendant. The Plaintiff alleged that he did not receive the e-mail of 10 April and submitted that he had not contravened the instructions in the 4 April e-mail. Furthermore, even if he was in contravention, the Plaintiff contends that it was an oversight on his part and did not justify summary dismissal.

**E-mail of 10 April 2001**

20 The main dispute of fact between the parties is whether the Plaintiff received e-mail of 10 April 2001 sent by Clark. In the ordinary course of things, that e-mail would have been delivered by the computer system, like all the other e-mail referred to in evidence (the deliveries of which are not in dispute). Occasionally e-mail fail to get delivered to certain addressees for a variety of reasons. In such instances the e-mail system would generate an e-mail to the sender advising of the non-delivery. Clark said that she had not received any such e-mail advising her of non-delivery of her 10 April e-mail to the Plaintiff. Counsel for the Plaintiff did not cross-examine Clark on this point nor suggest to her that she had received such a non-delivery advice.

21 To corroborate his evidence that he did not receive Clark's 10 April e-mail, the Plaintiff adduced evidence of the difficulties encountered by the Defendant with its e-mail server which resulted in certain e-mail being undelivered. Marcus Wan, the Defendant's IT Manager Asia-Pacific, testified that the Plaintiff had complained to him of non-delivery of e-mail in October 2000. Wan carried out a number of test e-mail to check that the system was functioning. The Plaintiff again complained about this in December 2001 and again Wan sent a test e-mail to check. On 20 March 2001 the Plaintiff complained to Wan about an e-mail he could not send or receive and sent to Wan a test e-mail which went through. Finally on 3 April 2001 the Plaintiff asked Wan to fix his "chris.schuler@neonsoft.com" e-mail address as he was experiencing problems with it. A number of test messages flowed between Wan and the Plaintiff between 3 and 5 April to test the system. Wan did not encounter any problem with any of these test e-mail and he could only conclude that the system was working at that point in time. But Wan said that this did not mean it was working properly all the time as the Plaintiff would not have made those complaints. Wan said that there had been a lot of problems with the e-mail system since it was first installed. In response to this, counsel for the Defendant pointed out that the Plaintiff received an e-mail from Duff – who was in the same office as Clark in Denver, Colorado – on 10 April, the date of Clark's e-mail. The Plaintiff had even replied to that e-mail. This, counsel contended, showed that there was nothing wrong with the delivery of e-mail from the Denver server.

22 In general it is difficult to prove a negative and in the present case there is evidence of some problem with the Defendant's e-mail server. However there are several factors in the present case that contradict the Plaintiff's version.

23 The first is the fact that he initially took the position that he did not receive not just Clark's e-mail of 10 April but also Duff's e-mail of 4 April. This is pleaded in 2 of his Reply filed on 14 January 2002, in which he denied receiving both e-mail at the material time. However in its affidavits evidence-in-chief the Defendant produced an e-mail from the Plaintiff which was a response to Duff's e-mail. At the trial, the Plaintiff admitted to receiving Duff's e-mail, but took the position that he did not consider that the instruction applied to him. However he maintained his position that he did not receive Clark's e-mail at the time.

24 The second factor relates to the chronology of the payment. The impression given by the Plaintiff in his affidavit evidence-in-chief was that he had been open about the payment. Prior to the payment, on 5 May 2001, he had made a formal announcement by e-mail to Horn and Lundberg in the US, as well as to Tan and Peh in Singapore. It was only after he had ascertained that there was no objection from Horn or Lundberg that he effected the payment on 8 May. This was what he said in his affidavit:

> 14. Following the end of Q1/2001 in April the operational review showed that I had achieved the revenue target for the first quarter of 2001 and is entitled to a bonus of US$50,000.00 pursuant to the revised terms of my employment with the Defendants as set out above. I informed Regional Human Resource Manager, Ms Peh Soo Lin and Finance Manager Tan Yew Yen, that I would be making a provisional down payment of US$40,000.00 for the bonus for the first quarter of 2001.
>
> 15. On 5 May 2001, I made a formal announcement by e-mail of the payment of this provisional bonus to the Defendants' Fred Horn, Leslie Lundberg and Ms. Tan Yew Yen and Ms. Peh Soo Lin. I also asked Ms Peh Soo Lin to verify with Fred Horn and Leslie Lundberg on the exact amount. I understand from her that she did not receive any response from them. Accordingly, I effected the US$40,000.00 payment on May 8, 2001.

25 It was pointed out to him in cross-examination that the e-mail concerned appeared to be dated Sunday 6 May 2001 and not 5 May as he had claimed. He agreed that it was sent out on 6 May. Counsel then suggested that, as the cheque was cleared on Tuesday 8 May, he would have presented it on Monday 7 May. He conceded that it must have been presented on 7 May. When it was pointed out to him that Horn and Lundberg would not have gone to work to read the e-mail by the time he presented the cheque he changed his tack. This was what he said:

> Q: Anytime prior to close of business on 7 May would still be before business hours in US on Monday?

A: I guess so.

Q: So there would not be any time for the relevant people to approve or object to the payment?

A: Not correct. I made a provisional payment which I asked for verification of exact amount. Even if I had banked in a cheque, an objection could be made and I could be told to pay it back. AB123, I sent e-mail to Jim Parks on 10.5.2001 to say I've made payment already. On 11.5.2001, Jim Parks replies, attaching 10 April e-mail from Lonnie Clark and reminds me of this. I told Jim Parks that I had made payment already and copied to Tan Yew Yen, Lonnie Clark, Fred Horn, Pat Fortune and Leslie Lundberg to remind them to verify. This was again an opportunity for them to get back to me to say that there was something wrong. I was Senior Vice President, in charge of 100 people and eight years with company. I only get copied on an instruction, and there was not even a hint that there was something wrong. Moreover, on 11 May 2001 in telephone conference with Fred Horn and Leslie Lundberg, which my wife heard on speaker phone, Fred Horn mentioned that they were terminating me for redundancy and the bonuses for 2000 and 2001 would be paid in full. There would have been an opportunity to say that there was something wrong, but it was not mentioned at all.

26 It can be seen that the Plaintiff's initial position was that his 6 May e-mail to Horn and Lundberg was a "formal announcement" and he had only effected payment when he did not receive any objection from them. When it was shown that he did not wait long enough for such objection to be made, he changed his position. It became a request for verification of the exact amount. Even this explanation is disingenuous because on his own case, he had achieved the agreed target revenue of US$2 million for the first quarter and the exact amount was US$50,000. There was no need for verification of the quantum of bonus. The only verification necessary was the entitlement to that bonus. And if such verification was necessary, then he ought not to have paid himself the advance of US$40,000 before receiving confirmation.

27 Furthermore, it would appear that the Plaintiff was well aware that Horn was not the person to refer to for such "verification". This is because on 10 April 2001 the Plaintiff had sent an e-mail to Horn asking him to determine the first quarter 2001 bonus as soon as possible. Horn's reply was that the matter was out of his hands. He said as follows:

Since you informed Pat Fortune that you would have a lawyer contact Leonard [Goldstein] regarding your compensation issues I am told I am unable to address your Q1 compensation.

The matter will be handled by Leonard Goldstein and Dan Carle (Sybase).

Personally, I hope the matter is resolved quickly so we can focus on growing our business.

It was about four weeks later that the Plaintiff sent his "formal announcement" e-mail of 6 May. Although he mentioned in that e-mail that Dan Carle had never responded to his attorney's attempts to contact him and Goldstein had left NEON, it would be rather surprising in the light of Horn's statement that the matter was out of his hand that the Plaintiff could believe that Horn is the appropriate person to "verify" the bonus.

28 The third factor relates to the preparation of the cheque for $72,000 which the Plaintiff presented to his bank on 7 May. The Defendant managed to retrieve this cheque from its bank. It was dated 30 April 2001, a good six days before the Plaintiff sent the e-mail to Horn and Lundberg on 6 May. The Defendant was not able to recall when he wrote the cheque and suggested as follows:

I cannot remember when I wrote the cheque. It could be that I was in the office

> earlier in the week, and signed it and left it there and only after my announcement, banked cheque. I had informed Peh and Tan Yew Yen verbally and by e-mail that I would make such a payment. Why date there is 30.4.2001, I cannot remember now, one year later. Fact was that I had banked it only after I had announced it to my superior.

Yet this explanation does not sit well with his revised position, that he wanted Horn or Lundberg to verify the quantum of bonus. The Plaintiff had made out and signed the cheque on Monday 30 April 2001, why not send out the e-mail on that day? Why wait until Sunday to send out the e-mail before presenting the cheque the following Monday?

29 The fourth factor concerns the Plaintiff's reaction after he was told that the payment to himself of the $72,000 was in contravention of Clark's e-mail. On 11 May 2001 Jim Parks, who was in the finance department at Denver, sent an e-mail to the Plaintiff in which he said that in the course of going through the May cash flow forecast with Tan Yew Yen, she had told Parks that the Plaintff had authorised the bonus payment. Parks reminded the Plaintiff of Clark's e-mail and told him to submit the request for approval to her. In his e-mail, Parks forwarded a copy of Clark's e-mail of 10 April. The Plaintiff replied as follows:

> I've sent information about the payment to the relevant people on May 6, 2001 and asked for verification of the exact amount.

It is significant that the Plaintiff expressed no surprise to the revelation of Clark's e-mail and merely said that he had asked for verification of the exact amount from the "relevant people". Furthermore, the letter of dismissal of 6 June 2001 had specified as the reason for his dismissal the payment to himself of $72,000 in contravention of the instructions in the two e-mail of 4 and 10 April 2001. In his reply of 27 June to that letter, he did not state that he had not received the 10 April e-mail. On or before 24 July, the Plaintiff had sent an e-mail to John Chen, the CEO of NEON, in which he complained about the summary dismissal. Again he did not mention the non-receipt of the 10 April e-mail. On 24 August 2001, his solicitors wrote a letter of demand to the Defendant which also does not mention that the Plaintiff did not receive the 10 April e-mail.

30 The Plaintiff claimed that in a conference telephone call he had with Germanowski, Horn and Lundberg on 6 April 2001, he had told them that he had not received the 10 April e-mail. The Plaintiff's position is somewhat supported by Lundberg, who said this in cross-examination:

> Q: In that conversation, did you, Fred Horn or Glen Germanowski ask Plaintiff to explain payment?
>
> A: Yes.
>
> Q: What was his answer?
>
> A: He felt he had - can't recall exactly, but I think he claimed he had not received the e-mail from Brian Duff and Lonnie Clark and he felt that he had the right to pay himself.

31 However Germanowski distinctly recalled that the Plaintiff did not say this at all. That call was made on Germanowski's request, in order to give the Plaintiff an opportunity to explain the matter. This was what Germanowski said in evidence:

> The phone conversation was initiated at my request with Leslie Lundberg and Fred Horn on it because we had looked inside to verify that memos were sent by Lonnie Clark and Brian Duff and cheque was made out by Plaintiff and cashed by him. We wanted to find out what Plaintiff's answer for that was, why he cashed the cheque, having received those monies. I was looking for mitigating circumstances where I would have to extend investigating to check anything he said. I recall beginning by

> asking Plaintiff for his side of the story. I referred him to our earlier letter saying that we were investigation the memo from Lonnie Clark and Brian Duff and asking why he cashed the cheque. His response was fairly straight-forward and a bit surprising. He had a sense of frustration, saying that he had earned it, had been asking for it, so he cashed the cheque. …

I should add that the same sense of frustration at having earned the bonus as described by Germanowski is found in the Plaintiff's letter to the Defendant of 27 June and his e-mail to John Chen, the CEO of NEON.

32 Counsel for the Defendant pointed out that Lundberg had qualified her answer by saying that she could not recall exactly and that she thought that the Plaintiff had claimed he had not received the two e-mail. He also pointed out that Lundberg, who was giving evidence by video conferencing from Denver, Colorado, had been cross-examined for more than three hours and where she was it was almost midnight at the time the question was asked. This is in contrast with Germanowski's assertive evidence on the matter. Counsel pointed out that as NEON's associate general counsel, it was his job to investigate the matter. Germanowski was the person who initiated the call for the purpose of giving the Plaintiff the opportunity to explain his action. As Germanowski had said, he was looking for mitigating circumstances where he would extend his investigation. The Defendant had not investigated into whether the 10 April e-mail was received by the Plaintiff and Germanowski said that if he had made that assertion he would have investigated it. This is consistent with the documentary trail which does not show any denial by the Plaintiff of receipt of that e-mail.

33 The fifth factor relates to the other contradictions that the Plaintiff's version of the facts have with the rest of the evidence. I refer particularly to his allegations in respect of the first quarter 2001 bonus which is dealt with in detail further below. This shows that his evidence is not reliable. Furthermore, the Plaintiff's actions in respect of the making and payment of the cheque for $72,000 would be explicable if he did receive and was aware of Clark's e-mail of 10 April. These events occurred at a time when the Plaintiff was in the course of being made redundant and he had been frustrated by the delay in receiving his bonus for 2000.

34 On the evidence before me, I hold that the Plaintiff did receive Clark's e-mail of 10 April 2001.

**Did Plaintiff contravene instructions**

35 The Defendant claimed that, in paying to himself the bonus of $72,000 on or about 8 May 2001, the Plaintiff had contravened instructions contained in Duff's e-mail of 4 April and Clark's e-mail of 10 April 2001. The Plaintiff argued that he had not contravened the instructions, on the ground that: (i) both e-mail were not addressed to him directly as his name was under the "cc" list; (ii) Duff was junior to him in the organisation chart; and (iii) they did not relate to bonus payments.

36 I do not agree with the Plaintiff's contentions. Both e-mail are clear enough. Duff had said in his e-mail that all payments of commissions and bonuses worldwide relating to the first quarter of 2001 – the subject matter of the $72,000 – requires to be approved by Lundberg or Duff. He said that this was a transitional procedure imposed purely to comply with the Sybase acquisition agreement. Duff had given a list of the bank accounts affected, which did not include the Defendant's accounts in Singapore. At the time the Plaintiff had noticed this omission and had replied to Duff to point this out and even instructed his accountant to provide Duff with the account information to rectify this. Therefore for the Plaintiff to say that this instruction did not apply to him would be rather disingenuous on his part. Certainly he would be procuring a breach of the procedure by instructing his staff to make out the cheque for him.

37 As for Clark's e-mail of 10 April, it said that the message was to inform *"all authorized signatories"* - within which description the Plaintiff fell. The cheque for $72,000 was in fact signed by him. The instruction relates to cash disbursements in excess of US$10,000 which covers the payment in question. Again it would be rather disingenuous to say that because the Plaintiff's name was in the "cc" category, therefore the instruction did not apply to him.

38 I therefore find that the Plaintiff had contravened the instructions in Duff's e-mail of 4 April and Clark's of 10 April. This was the ground upon which the Defendant summarily terminated the Plaintiff's employment. The next question is whether it was sufficient ground for summary dismissal.

39 Paragraph 14 of the Plaintiff's employment contract provides for summary dismissal and states as follows:

> We shall have the right to forthwith terminate your employment with us at any time without any prior notice in the event of any misconduct, disobedience, negligence, incompetence and breach of duty of good faith on your part in the course of carrying out your duties as a Managing Director with our company.

40 At the point of the acquisition of NEON by Sybase in February 2001, the Plaintiff was holding the position of Senior Vice-President and Managing Director. He was responsible for all software sales and professional services of NEON for Asia-Pacific. He had a duty of fidelity to the Defendant not only in respect of its assets but also not to jeopardise the Acquisition Agreement. He knew that the Defendant was in dispute with him in respect of his fourth quarter 2000 bonus. He was in control of the Defendant and his superiors were a long way away. They relied on him to manage the company in Singapore. He had been told by Horn that he should refer the matter of his first quarter 2001 bonus to Goldstein or Carle. Yet he chose to effect payment to himself in a manner that obviously did not give Horn an opportunity to object and stop payment and in blatant contravention of the instructions in the e-mail of 4 and 10 April from corporate headquarters.

41 In the circumstances I am unable to find the Defendant's decision to dismiss him summarily as unjustified. Accordingly the Plaintiff's claim in unfair dismissal fails and would be dismissed.

**Bonus for fourth quarter 2000**

42 For the year 2000, the Plaintiff was paid a bonus of US$120,000 in respect of the first three quarters of 2000, a sum of US$40,000 per quarter. He was not paid a bonus in respect of the fourth quarter. However he claimed that he was entitled to the bonus of US$40,000 for that quarter. In his affidavit evidence-in-chief he said that the revenue target for 2000 was about US$3.8 million and he had achieved about US$4.5 million. This is supported by the evidence of Koepper. Therefore the Plaintiff had exceeded his target and was entitled to the full US$160,000.

43 However there is no documentary evidence of any sort that supports the contention that the target was US$3.8 million. The Plaintiff himself had presented the following figures at the Denver meeting in January 2001 in relation to the Defendant's performance for 2000:

| Revenue | Q1 | Q2 | Q3 | Q4 | 2000 total |
|---|---|---|---|---|---|
| Budget | $1,488,000 | $2,440,000 | $2,949,000 | $3,601,000 | $10,460,000 |
| Actual | $2,015,000 | $2,438,000 | $2,988,000 | $2,441,000 | $ 9,882,000 |

This shows that the targets were reached in the first and third quarters of 2000, with the second quarter being missed by a marginal $2,000 and the fourth quarter being missed by 32%.

44 On 3 January 2001 the Plaintiff sent an e-mail to Lundberg to request for payment of his bonus for 2000, which he said amounted to US$120,000 as he had achieved the target for the first three quarters but missed the fourth. The e-mail goes as follows:

> Happy new year. Hope that we can get my contract finally done within the next days. In the meantime I would like that the bonus payments for Q1-Q3 2000 will be arranged. The first 3 quarters have been overachieved Q4 has been missed.
>
> Based on my calculation the bonus payment would be USD120K.

> Please confirm so we can arrange for payment.

This is entirely consistent with the presentation that he was to make in Denver at the end of that month and with the Defendant's position that he was only entitled to bonuses for the first three quarters of 2000.

45 The Plaintiff appears to say that he was entitled to some other target. But not only is there no evidence of this, it is entirely contradicted by his own presentations at the Denver sales conference. In the circumstances his claim for payment of bonus for the fourth quarter 2000 fails and is accordingly dismissed.

**Bonus for first quarter 2001**

46 The Defendant's position is that the revenue target for 2001 had not been settled. In October 2000 Lundberg had proposed to the Plaintiff a figure of US$25 million as the revenue target for 2001 with his bonus pegged at 0.8% of the actual revenue. The parties did not come to an agreement on that at the time. The Plaintiff's position was that the 2001 target revenue was settled at the annual sales conference at Denver in late January/early February 2001. He said that he had made a presentation in which he had proposed the figure of US$16.5 million as the 2001 target revenue with a US$2.785 million target for the first quarter. According to the Plaintiff, at the executive committee meeting Horn revised the first quarter figure downwards to US$2 million on account of the downturn in the economy. Therefore the matter was settled, with US$16.5 million being the target for 2001 and US$2 million the first quarter target.

47 However the subsequent documented communications do not support this. About a month after the Denver conference, on 1 March, Horn sent an e-mail to Lundberg, and copied to the Plaintiff and Fortune, which indicates that there was agreement that the revenue target for 2001 would be US$25 million. That e-mail goes as follows:

> Please make sure Mr. Schuler is paid his 2000 bonus per my earlier email ($120k) promptly. I understand that he disagrees with m position on his bonus for the year. If he wishes to discuss this with [Fortune] please facilitate this discussion.
>
> Also, I understand that you are ready to send him the 2001 plan. Please send him this as soon as possible. I believe the high level business terms ($25mUSD) are not in dispute.
>
> Please confirm his payment and the sending of this years plan.

48 In cross-examination the Plaintiff said that he was surprised at this change of position by Horn, but did not explain the reason. This was what he said:

> When he sent this e-mail, I was surprised to see US$25 m again. We had several disputes about the way NEON was conducting the business. There is a marked change in Fred Horn's tone towards me - he called me "Mr Schuler" whereas before that I was "Chris".

Whereupon the Plaintiff was shown his e-mail in reply dated 9 March 2001 which goes as follows:

> For the record
>
> 1. I have still not received the 2001 plan and outstanding employment contract (which I have requested for more than 8 months now and which should have been automatically taken care of with two promotions 2000 form SLI MD to NEON VP/MD and SVP/MD APA0. Please do not get back to me on this later than March 12, 2001.

> 2. In relation to the "high level business terms" I have not agreed on USD25 Mio. which would suggest a growth of 150% for Asia Pacific. In line with the corporate revision and ahead of the Sales Conference I have suggested a budget of USD16.5 Mio 65% growth.
>
> 2. [sic] As far as it concerns the dispute on the Bonus 2000 my position remains the same as per my earlier e-mails.

It would appear that about one month after the Denver sales conference the Plaintiff himself had forgotten that his 2001 target had been agreed at US$16.5 million. His response to this question on cross-examination was a meek: *"Mistakenly I had written this"*.

49 There followed an exchange of e-mail which confirms the Defendant's position that the matter was far from settled. Indeed, the Plaintiff himself, in an e-mail dated 6 April 2001 to Goldstein (NEON's corporate counsel) said, in relation to the January/February 2001 Denver conference: *"… The finalization of my contract and plan in Denver was purposely delayed in light of the Sybase Acquisition. The target bonus and its underlying financial targets, which were presented to me, were never realistic."* It is clear from the evidence that there was no agreement at the Denver conference to set the revenue target at US$16.5 million for 2001 and US$2 million for the first quarter as the Plaintiff contends.

50 The Plaintiff relies on the evidence of Koepper to support his position that Horn had reduced the first quarter 2001 target to US$2 million from US$2.785 million. However I am of the view that Koepper was a partisan witness as he himself had a disagreement with NEON and from the position he took in relation to the 2000 target (see above). It is rather surprising that Horn would gratuitously reduce the Plaintiff's proposal of US$2.785 million to US$2 million. And that is certainly not corroborated by the rest of the evidence. I therefore find that there was no agreement at the Denver sales conference that the first quarter 2001 target would be US $2 million.

51 The parties agree that the revenue achieved in the first quarter was US$2.119 million. Even if the first quarter target proposed by the Plaintiff in his presentation at Denver of US$2.785 million had been agreed to, it would not have been reached. Accordingly the Plaintiff is not entitled to any bonus in respect of the first quarter 2001 and his claim in respect of this must fail. As he had caused to be paid to himself $72,000 as part payment of this bonus, it follows that the Defendant's counterclaim succeeds and there shall be judgment for that sum in its favour.

**Bonus for the second to fourth quarters 2001**

52 The Plaintiff's claim for bonus for the second to fourth quarters 2001 is predicated on a finding that his summary dismissal was unfair, as well as a finding that the targets were reached in those quarters. As I had dismissed his claim in relation to unfair dismissal, it follows that this claim also fails. I would also add that there is no evidence before me of what the targets are and whether they were achieved.

**Costs**

53 In view of the foregoing, the Plaintiff's claims are dismissed and there shall be judgment in the sum of $72,000 on the Defendant's counterclaim, with interest at the usual rate from the date of the filing of the counterclaim. There shall be an order for the Plaintiff to pay to the Defendant the costs of this action, to be taxed if not agreed.

Sgd:

LEE SEIU KIN

JUDICIAL COMMISSIONER

SUPREME COURT