

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2025] NZEmpC 157
EMPC 438/2024**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN ALLIED INVESTMENTS LIMITED
 Plaintiff

AND PETER JONES
 Defendant

Hearing: 16 - 18 June 2025
 (Heard at Wellington)

Appearances: S Hornsby-Geluk, counsel for plaintiff
 T P Cleary, counsel for defendant

Judgment: 28 July 2025

JUDGMENT OF JUDGE J C HOLDEN

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Allied Security challenges a determination of the Authority

[1] This judgment resolves a de novo challenge by Allied Investments Ltd (which trades as Allied Security) to a determination of the Employment Relations Authority that found that Allied Security had unjustifiably constructively dismissed Peter Jones and that its claims against him were unsuccessful.¹

[2] For the reasons explained, the challenge is unsuccessful.

Mr Jones’s employment transferred to Allied Security

[3] Mr Jones was employed by Recon Security Ltd from 2008 until he joined Allied Security in September 2021. Prior to joining Recon, Mr Jones had been working in the security industry in Wellington for approximately 12 years.

[4] He was employed by Recon as a salesperson. His remuneration package included a retainer and commission. The retainer was set very low – essentially at the minimum wage; Mr Jones received most of his earnings from commission. That commission structure suited Recon because it meant that if Mr Jones did not manage to sell security services and products in a given time period, the expense to Recon was limited.

[5] Mr Jones was highly regarded at Recon. Blair Malcolm, the managing director and principal shareholder, gave evidence that Mr Jones had built professional

¹ *Jones v Allied Investments Ltd* [2024] NZERA 595.

relationships with many of Recon's customers and sold some of the largest security contracts in Wellington. Over the period of his employment with Recon, he dramatically increased his network and, in Mr Malcolm's view, was one of the go-to security consultants in Wellington. Mr Jones's professional network, and his passion for cold-calling, generated up to 30 quotes a week. That helped keep four to five security technicians and approximately 100 additional staff employed permanently.

[6] Mr Jones did not directly calculate his commission payments; those were done by Recon's payroll team. From about June 2019, Rhiannon Hunt, who was then Recon's financial payroll advisor, took over calculating Mr Jones's commission from an employee who was leaving. At that time, Mr Jones had been in a personal relationship with Ms Hunt for approximately two years. This was not secret; it was widely-known at Recon.

[7] Ms Hunt gave evidence that she followed the same process as the previous employee had done. She prepared a report from exporting data from accounting and job management software. Her calculations then were reviewed and signed off by Mr Malcolm.

[8] Mr Malcolm was not concerned about any possible issue that the relationship between Mr Jones and Ms Hunt created as he considered Ms Hunt to be a very honest and trustworthy employee who had provided accurate reports for many years. In addition, the report simply collated data and Mr Malcolm had to approve the calculations before payments were made.

[9] In September 2021, after a due diligence process, Allied Security bought Recon's business.

[10] Mr Jones was offered ongoing employment with Allied Security by letter dated 6 September 2021. The letter of offer was concise, offering Mr Jones the opportunity to transfer his employment to Allied Security, on the basis that:

The terms and conditions of employment will be the same as your current employment agreement, with the following amendments:

1. Your employer will be Allied Investments Ltd T/A Allied Security

2. Your date of commencement of employment will be 20th of September 2021

In all other respects your terms and conditions will be the same as you previously enjoyed. In particular:

1. Your employment agreement is the Individual Employment Agreement (IEA) you have signed with Recon Security Limited.
2. Your rate of pay will remain unchanged.
3. Your ordinary hours of work, and usual shifts and duties will be as set out in your employment agreement or associated documents.

[11] As part of the arrangements around the sale of Recon's business to Allied Security, Mr Malcolm was employed by Allied Security as the director of sales, strategy and acquisition. Mr Jones was his only subordinate.

[12] Mr Jones gave evidence that he gladly accepted the new employment with Allied Security and was very keen to continue his high sales levels with it. He also was pleased that Mr Malcolm had come over to Allied Security in a management role in Wellington and that Mr Jones would report to him. As far as Mr Jones was concerned, his Recon commission structure continued unchanged when he started with Allied Security.

Allied Security changed the process for calculating commission

[13] For the first three months of Mr Jones's employment with Allied Security, things continued as they had been at Recon; Ms Hunt continued to undertake the commission calculations, which were provided to Mr Malcolm who checked and approved them. Mr Jones's commission payments were in line with previous earnings.² He received payments (covering the previous month) of:

- (a) October 2021: \$21,234.32;
- (b) November 2021: \$19,497.59;

² IRD records indicate that, in the 5 months immediately preceding the sale, Mr Jones's commission payments averaged approximately \$21,900 per month, and ranged between approximately \$13,400 and \$42,800.

(c) December 2021: \$24,657.79.

[14] In November 2021, however, Chris McDowall, a director of Allied Security and its general manager, operations, realised that Mr Jones and Ms Hunt were partners. He and Damien Black, the managing director of Allied Security, considered that to be an unacceptable conflict of interest, and they took over the calculation of Mr Jones's commission.

[15] When Mr McDowall and Mr Black assumed responsibility for calculating Mr Jones's commission, they had some difficulty in understanding how it was calculated. They asked Mr Jones about his commission payments, but he was unable to assist with the details as to how it was calculated, advising that he had not checked a payslip in years. He said that the commission structure had not changed in 13 years and Recon would have it all listed, but Ms Hunt was best to clarify how it was calculated. Ms Hunt was asked for a manual. Although she did not prepare a commission manual as such, Ms Hunt sent Mr Black the spreadsheet she worked from with what she said were all the workings and percentages on it. She also summarised the way in which Mr Jones's commission percentages were calculated.

[16] On receipt of Ms Hunt's explanation, Mr McDowall emailed Mr Malcolm, raising some concerns. He said, however, that Mr Jones's commission "is what it is and we will honour it, but he cannot have access to the wider Allied Security network if that applies, we don't operate on 8 per cent."

[17] Ms Hunt followed up with Mr Black on 6 January 2022, again attaching spreadsheets that included the formulae that she used for calculating commission. She concluded her email: "If you need any other information or need me to clarify anything, you can get hold of me on [phone numbers]."

[18] Mr Black had also asked for a copy of the employment agreement between Recon and Mr Jones. Ms Hunt was unable to assist him with that, but Mr Jones had a copy at home and provided that to Mr Black. It seems that was the first time Allied Security saw the employment agreement. In the event, Mr Jones did not receive his commission payments as expected in the middle of January, with Mr Black advising

Ms Hunt that Mr Jones would have to wait because the information was “not forthcoming from those from whom it was requested, in particular the employment agreement”. Mr Black offered to make a \$5,000 payment from Allied Security to Mr Jones towards the end of January 2022 while the amount due to him was finalised. Mr Jones accepted that arrangement and it seems the \$5,000 was paid in February 2022.

[19] There continued to be correspondence regarding the method of calculation of commission. By mid-February 2022, Ms Hunt was clearly frustrated and in an email on 15 February 2022, she said to Mr Black: “Sorry to be so abrupt, but I have been asked for help with these reports from you and Andrea but no one is listening to me and they are still wrong. Unless I am listened to then there is not a lot more I can do or say. Sorry.” At that point Mr Black advised her: “So I am clear, you can stay out of this. Peter sends me his sales he worked on. That is how he gets commission. I will process as per his information.”

[20] Problems persisted and Mr Jones was concerned because he was not being paid the amounts he had expected. On 6 April 2022, he said he simply did not understand how or why everything was becoming so complicated, or why his employment agreement was being dissected and misread/misunderstood when Recon already had systems in place that accounted for everything, and which had allowed commissions to be paid to him on time every time. Mr Black responded to that email saying that Allied Security would be issuing all commissions based on the employment contract Mr Jones had signed and that, if there was any dispute on payments, he was welcome to take that up with the Ministry of Business, Innovation and Employment who, Mr Black said, could then assist in defining Mr Jones’s contract for him. Mr Black said that he could not comment on what Recon did in the past, but that Allied Security’s approach was a literal one following the contract to the letter. He also referred to the calculations in September to November being processed by someone that had an “undisclosed conflict of interest”, hence his becoming involved.

[21] The provisions in the written employment agreement for Mr Jones that became the focus of Allied Security provided as follows:

Remuneration	\$35,000 per annum
Permanent mobile:	1 off payment, 138% new monthly revenue
Permanent guards:	1 off payment, 87% new monthly revenue
Monitoring:	1 off payment, 300% new monthly revenue
Casual sales:	Monthly payments, 11.1% of new revenue
Product sales	Monthly payment 30% of gross profit on completed jobs
Trail Commission	Monthly payment 10% of monitoring for the lifetime of the client

COMMISSION IS ONLY APPLIES TO REVENUE GENERATES FROM CONSULTANTS CUSTOMER BASE.

[22] A key issue between Allied Security and Mr Jones was who fell within Mr Jones's customer base for the purpose of calculating certain commission. Allied Security considered that Recon had been paying Mr Jones commission for customers who were not part of his customer base, essentially that he was being paid commission in respect of all alarm monitoring customers. Allied Security pointed to the words in capital letters at the end of the schedule in the employment agreement. It also pointed to another provision that limited the period for which commission would be paid on casual sales to six months.

[23] Mr Jones's understanding was that he was paid trail commission on alarm monitoring work (where alarms were remotely monitored for any incidents) for the life of the customer. He said he would get an initial sales commission, and because that customer then became part of his customer base, he would get an ongoing commission based on all future monthly invoices for that customer. He said that, as

he had built up a strong customer base, the ongoing trail commissions were an important part of his pay and he relied on it. He noted there was significant work required to manage the alarm monitoring.

[24] Although their recollection of the background to the inclusion of the words at the end of the main clause varied a bit, both Mr Jones and Mr Malcolm agreed it was included because there had been an issue where a sales representative had manipulated the system to the disadvantage of other sales representatives, including Mr Jones.

[25] The approach from Allied Security continued – despite concerns being raised by Mr Jones and Mr Malcolm, commission was being paid as per Allied Security’s interpretation of Mr Jones’s employment agreement; it considered the previous commission process was not consistent with the employment agreement. The approach can be encapsulated in an email Mr Black sent to Mr Malcolm and Mr Jones on 5 April 2022:

My point I guess is this, under employment law which has been waved around recently, the letter of the agreement applies. So whatever the contract says is what we apply even if there has been verbal discussion or other application of the agreement in the past.

[26] By April 2022, Mr Jones was frustrated. He noted that there was still unpaid commission for both January and February, which would become worse if March was added to the mix.

[27] On 22 April 2022, as well as confirming that Allied Security took a different approach to the interpretation of Mr Jones’s employment agreement than Mr Black understood Recon had adopted, Allied Security advised Mr Jones that it felt that the employment agreement he was on was not suitable and suggested that they discuss a new agreement. Allied Security’s suggested approach was a higher retainer, but a change to the calculation of commission. It also suggested a set of performance targets. Mr Jones was not happy with the proposed changes.

[28] By the end of April 2022, with no movement from Allied Security, Mr Jones said he felt he was being mistreated and managed out. He advised Mr Black of his

disappointment, his stress, frustration and anger over his situation. Mr Black's response was as follows:

Thanks Pete, from my end we have made clear our position which is to apply the employment contract exactly as it was written and agreed to.

I admit I can make mistakes and so I would like to invite you to present an alternative argument, again based on your employment agreement. Please outlining why and where our view is incorrect?

Please do not base any argument on how your previous employer interpreted and applied the employment agreement, as that is neither legal nor relevant.

We can then meet and discuss the alternative views. To be clear, this is a commission/wage dispute, not an employment dispute.

The company position is that you are or will continue to be employed by this firm as per your signed agreement. No terms and conditions of employment have changed. The only dispute is that we approach the commission in a manner that follows how we read the employment contract.

[29] That position was reiterated the following day by Mr McDowall, again emphasising the written employment agreement, "not as per how Blair [Malcolm] has done it in the past, the legal agreement is the important part here for everyone." Mr McDowall also repeated the offer to negotiate a new employment agreement if Mr Jones wished.

[30] Mr Jones's response was that he had no "alternative" interpretation himself but that Allied Security should refer back to the way Recon had interpreted his employment agreement. He said that if anything was not clear, Mr Malcolm was the best person to clarify.

[31] In the meantime, issues arose with some customers. In one case, a customer that Mr Jones regarded as his, approached him for a small job to arrange for some short-term ad hoc security guard services. Mr Jones prepared a quote, and it was accepted by the customer. Mr Jones assigned a job into Allied Security's system. Mr Jones said he was, however, told by Allied Security staff that it could not do the job and he relayed that to the customer, who was not happy. In the event, the customer approached Allied Security through another route and Mr McDowall arranged for the work to be undertaken, but no commission was paid to Mr Jones. Another example Mr Jones gave was an occasion where a customer that he regarded as his sought a

quote and that request was not passed on to Mr Jones, so he did not get the commission on that job.

[32] Mr Jones raised another matter of concern to him, which he took as an indication that Allied Security did not see him staying long-term. Allied Security arranged for sign writing to be done on company vehicles, but Mr Jones's car did not have any signwriting done on it. Mr Jones says he was told by the signwriter that he had been told to leave the car unbranded. The signwriter gave evidence that he recalled somebody speaking to him, who must have been Mr Jones, and that the signwriter had told him that he would see what graphics he had when he had done the other cars, but that he did not think he had the appropriate graphics for the particular car Mr Jones drove. The signwriter accepts he may have said he would call Mr McDowall and check what he wanted him to do, but does not agree that he would have said that he had been instructed not to sign write Mr Jones's car. The spreadsheet of instructions given to the signwriter notes for Mr Jones's car "leave unbranded, or small Allied along bottom of door". The situation is somewhat murky. Based on the instruction sheet, and the evidence of the two participants, there might have been reference by the signwriter to leaving the car unbranded, and that may have been what Mr Jones focussed on. I do not put any weight on the sign writing issue.

[33] In the meantime, discussions over the new employment agreement proposed by Allied Security continued. Mr Malcolm was effectively acting as a go-between and on 3 May 2022 he advised Mr McDowall that Mr Jones would move to a new employment agreement with certain amendments, on the basis that commission would be paid up until the date that Mr Jones signed the new agreement based on the way Recon read and honoured the employment agreement. Mr Malcolm advised that such an arrangement would be in full and final settlement of any employment dispute Mr Jones currently had.

[34] In communicating that offer, Mr Malcolm reiterated to Mr McDowall that having Mr Jones actively looking for sales jobs without a restraint of trade, at the same time Allied Security was relocating the Wellington monitoring centre, would be "catastrophic" to Recon and Allied Security's customer base. The reference to the

relocation was to Allied Security's proposal to relocate the monitoring for Wellington customers to Hamilton.

[35] Allied Security was not prepared to agree to the proposal Mr Malcolm made regarding commission payments. Essentially, it said Mr Jones could continue on his current employment agreement (as interpreted by Allied Security), or move to the employment agreement being proposed, but with no backpay. Neither option was attractive to Mr Jones.

[36] By 10 May 2022, Mr Jones had instructed a representative who wrote to Allied Security raising Mr Jones's concern over the way in which his commission had been calculated, asserting that it had resulted in an up to 80 per cent reduction in Mr Jones's earnings. The representative requested that Mr Jones's commission structure be reinstated within seven days, and advised that if the issue could not be corrected, Mr Jones would be left with no option but to resign on the basis of that being a constructive dismissal. Urgent mediation was suggested.

[37] The response from Allied Security again relied on the employment agreement, saying it had previously been applied incorrectly. Allied Security asserted that this had resulted in Mr Jones being overpaid for the period prior to December 2021. Allied Security repeated again its intention to apply the terms and conditions from the written employment agreement (as understood by it). Allied Security agreed to attend mediation.

[38] The response from Mr Jones's representative was to point out that for at least 13 years Mr Jones's commission had been calculated on the same basis as was used in the last few months of 2021, and that Allied Security's interpretation of the employment agreement represented about an 80 per cent reduction in Mr Jones's earnings.

[39] The representative said that it was quite obvious that Mr Jones could not live on an income around the level of the minimum wage, which was what he suggested the Allied Security calculation led to. He repeated Mr Jones's agreement to attending mediation, but that would be on the basis of Allied Security restoring the status quo

from 2021 so that he was back on the same terms as applied at the time of the changeover from Recon to Allied Security.

[40] The representative made clear that, if Allied Security was not prepared to pay the arrears already incurred, and to reinstate Mr Jones's earnings to the previously agreed level while the dispute was being resolved, Mr Jones may be left with no option but to resign from his employment on the basis that it was a constructive dismissal.

[41] Allied Security responded the same day, reiterating its position that it would meet its obligations under the employment agreement, as understood by it.

[42] On 27 May 2022, with no payment of arrears being received from Allied Security, Mr Jones advised Allied Security through his representative that he had no option but to resign, a decision he said he was very saddened to be forced into, but that he simply could not continue, given the way he was being treated. The representative advised that the substantial and unilateral cut to Mr Jones's earnings amounted to serious misconduct by Allied Security and Mr Jones was therefore resigning without notice, which was a constructive dismissal.

[43] On Mr Jones's resignation, Allied Security deducted \$3,052.80 from his final pay. This was done on the basis that the employment agreement provided that if Mr Jones failed to give the required four weeks' notice in writing to the employer, the employer may deduct remuneration relative to the period of notice not given from the final payment owed to the employee.

Allied Security makes claims against Mr Jones

[44] After Mr Jones left, Allied Security discovered that emails had been deleted from his laptop. Mr Black advised Mr Jones's representative that he was concerned "regarding corruption and possible fraud, but I have been blocked by all parties from accessing the data to complete an investigation." He asked Mr Jones's representative to explain why Mr Jones deleted the emails.

[45] The explanation provided by the representative about the deletion of emails from the laptop was that some emails were initially deleted to remove personal

communications that Mr Jones had undertaken using his work email address but then, on resigning, Mr Jones deleted the balance of the emails and all personal information off the laptop, leaving it clear for the next person. The representative said, and Mr Jones confirmed in Court, that Mr Jones's understanding was that all of Allied Security's sales data, files and lists were stored on its Workflow Max system (WFM) in the Cloud, and that Mr Jones had not removed any data from that system. Mr Jones explained in Court that he is not very good with computers generally and does not know how to wipe a hard drive (as was alleged by Allied Security). The laptop sat on his desk unopened and connected to monitors, essentially as a portal to WFM; Mr Jones did not use the laptop off-site. He also said that his Recon emails disappeared from the system when he got a new email address with Allied Security. His aim, he said, in deleting emails primarily was to remove his personal photos and emails. He said that somebody had told him about a method for mass deletion using "control delete" and that was what he did, but that he did not do so to intentionally delete work information from Allied Security's systems, which he understood were kept on WFM.

[46] Another issue arose because, although Mr Jones had left his work cellphone behind, it was locked. It seems Allied Security regarded that as suspicious. It asked for the PIN code to be provided. That request went to Mr Malcolm, who responded that Mr Jones had said that if Allied Security paid what was owed to him, he would give them his fingerprint. The same day, however, Mr Jones's representative advised Allied Security that Mr Jones originally had a PIN code (which the representative gave to Allied Security), but some years ago he changed to the fingerprint method and then later discovered that the old PIN code no longer worked. The representative advised that Mr Jones had no knowledge of how to change the method for opening the phone, but that he was willing to meet up for the purpose of opening the phone so that a technical person could then change the method of unlocking the phone to a PIN code. The representative noted that he understood that Allied Security had diverted calls from the phone in any event, in which case it would still be receiving all inward calls.

[47] A further concern was raised by Allied Security when it learned that Mr Jones had joined a new firm and approached customers of Allied Security for their business. It turned out that Mr Jones had been discussing a new business opportunity with

another employee of Allied Security, and had been listed as a director and shareholder of a new company, prior to him leaving Allied Security. Mr Jones accepts that he spoke with his colleague about them forming a new business. He says he did that because he was uncertain how things would pan out with Allied Security given the difficulties he was having, but that he was unaware that his colleague had registered him as a director and shareholder of the new company. In any event, Mr Jones did not work in the new business until after he left Allied Security.

[48] Mr Jones did not have a restraint of trade with Allied Security, but Allied Security says that Mr Jones used confidential information in approaching Allied Security's customers, in breach of the terms of his employment agreement.

[49] The remedies sought by Allied Security comprise:

- (a) a declaration cancelling the findings made, and the remedies awarded by the Authority;
- (b) an order that Mr Jones repay the amount of \$12,570, being overpaid commission for the period September to November 2021;
- (c) an order that Mr Jones pay damages of \$127,150.20, due to damage caused to Allied Security by Mr Jones's use of confidential information;
- (d) an order that Mr Jones pay Allied Security damages in the amount of \$4,979.50 as a result of his actions in deleting data from his work laptop, being the cost involved in having a computer technician examine Mr Jones's laptop;
- (e) a declaration that Mr Jones breached his duties of good faith and his employment agreement;
- (f) penalties for breaches of good faith and for breach of his employment agreement; and
- (g) costs and disbursements.

There are a number of issues for the Court

[50] The principal issues for the Court comprise:

- (a) whether Allied Security's approach to Mr Jones's commission payments was a breach of the terms and conditions of his employment;
- (b) whether Allied Security cut Mr Jones out of commission to which he was entitled;
- (c) whether Mr Jones was unjustifiably constructively dismissed by Allied Security;
- (d) what remedies is Mr Jones entitled to (if any):
 - (i) shortfall in commission from December 2021;
 - (ii) withholding pay for notice;
 - (iii) loss of earnings, post-employment;
 - (iv) compensation for humiliation, loss of dignity and injury to Mr Jones's feelings;
 - (v) KiwiSaver contributions; and
 - (vi) interest.
- (e) was Mr Jones overpaid commission in 2021 and if so, how much should he repay Allied Security;
- (f) was Mr Jones in breach of his employment agreement when he deleted work emails, and if so, what damage did Allied Security suffer;

- (g) was Mr Jones in breach of his employment agreement with respect to his pre-termination activity with the other employee and/or the new company, and if so, what damage did Allied Security suffer;
- (h) did Mr Jones use confidential information post his employment with Allied Security when he engaged with customers of Allied Security, and if so, what damage did Allied Security suffer;
- (i) did Mr Jones act in breach of his obligations of good faith or his employment agreement, and if so, what, if any, penalties should be ordered.

Mr Jones's letter of offer is key

[51] Although Allied Security was firmly fixed on the written terms of Mr Jones's employment agreement with Recon, it is the agreement with Allied Security that is key, and it was broader than Mr Jones's individual employment agreement. The offer from Allied Security was quite straightforward: essentially all that was to change for Mr Jones was the identity of his employer; all other terms and conditions of employment were to remain the same.

[52] "Conditions" is a broader concept than "terms". Conditions extend to the manner in which the employment rights and obligations of the parties are performed, including the performance in practice by the employer of its obligations to pay employees.³ A consistent methodology had been in place for many years, and was accepted by both Recon and Mr Jones; Recon's practice for the calculation of Mr Jones's commission was a condition of his employment.

[53] Another difficulty for Allied Security is that an express term of its offer of employment to Mr Jones was that Mr Jones's rate of pay would remain unchanged. That was a separate line item in the letter of offer that Mr Jones accepted.

³ *Harris v TSNZ Pulp and Paper Maintenance Ltd* [2015] NZEmpC 43, [2015] ERNZ 580 at [54].

[54] The evidence was that Ms Hunt and Mr Malcolm adopted the same approach as previously when they calculated Mr Jones's commission for September, October, and November 2021.

[55] Mr Jones accepts (and accepted throughout) that Allied Security was not required to continue to use the same personnel for calculating his commission; it was able to change that, which it wished to do once it learned of Mr Jones and Ms Hunt's relationship.

[56] It was not open to Allied Security, however, to ignore the previous practice of Recon and adopt a different approach to the calculation of commission that resulted in Mr Jones being paid on a less advantageous basis than previously. That was a breach of the terms on which Allied Security employed Mr Jones.

[57] The evidence of Mr Jones, Mr Malcolm, and Ms Hunt was that the amounts paid to Mr Jones from January 2022 onward were less than he would have received using the recognised methodology for calculating commission. That too is the inference I draw from Allied Security claiming Mr Jones was overpaid in 2021.

[58] Mr Malcolm and Ms Hunt continued, off their own bat, to calculate what they considered was due to Mr Jones. Allied Security submitted I should disregard those calculations given Ms Hunt's relationship with Mr Jones and the fact that Mr Malcolm was no longer interested in Allied Security's success at the time that he performed the calculations.

[59] Allied Security's submission regarding Ms Hunt's credibility is consistent with a strong inference from Allied Security throughout these proceedings that Mr Jones and Ms Hunt had behaved inappropriately by not advising Allied Security of their relationship. I do not accept that inference. The relationship was neither new nor clandestine. Allied Security was responsible for its due diligence in purchasing Recon; neither Mr Jones nor Ms Hunt had any role in that. It seems the due diligence did not include obtaining or inspecting Mr Jones's employment agreement, or asking about potential conflicts of interest. It is neither surprising nor a point of criticism for Mr Jones not to have proactively advised Allied Security of his relationship during the

short conversation he had with Mr Black and Mr McDowall at the time of the transfer. While I acknowledge Ms Hunt and Mr Jones’s relationship could be seen as a potential conflict of interest that required management, there was no evidence that she falsified the amounts due to Mr Jones. She offered to take Mr Black and/or Mr McDowall through the methodology she used to calculate commission, but they chose not to take her up on her offer.

[60] Allied Security also accepted that, at the time these matters were being dealt with, it and Mr Malcolm were on good terms.⁴

[61] The comparison between the calculations for commission done by Ms Hunt and Mr Malcolm and those paid by Allied Security leads to a deficit of \$50,777.18, as follows:

Commission Month:	Malcolm/Hunt calculation:	Allied Security paid (in following month): ⁵	Difference:
December 2021	\$15,830.77	nil	\$15,830.77
January 2022	\$16,067.88	\$16,760.76	-\$ 692.88
February 2022	\$23,899.14	\$ 7,978.60	\$15,920.54
March 2022	\$18,699.38	\$ 9,914.36	\$ 8,785.02
April 2022	\$ 7,734.25	nil	\$ 7,734.25
May 2022	\$ 3,199.48	nil ⁶	\$ 3,199.48
	\$85,430.90	\$34,653.72	\$50,777.18

[62] Although Allied Security submitted that it had continued to pay Mr Jones commission on the same basis as Recon had, despite its concerns, that cannot be correct. The monthly figures from the Inland Revenue Department show only \$2,720 being paid in January 2022 and \$2,289.60 being paid in May 2022, which roughly align with Mr Jones’s retainer. The company transactions by payroll records show no commission payments between 15 December 2021 and 9 February 2022 and much smaller commission payments than previously for the remainder of his employment.

⁴ There has since been a falling-out.

⁵ The retainer of \$680 per week was paid on top of these figure, but that is not in issue.

⁶ Holiday pay (less the amount withheld for notice) was paid in Mr Jones’s final pay on 6 June 2022.

[63] Accordingly, Allied Security's approach to Mr Jones's commission was in breach of the terms and conditions on which he was employed by Allied Security. I accept the calculations produced by Mr Malcolm and Ms Hunt represent the best evidence before me of the shortfall in the payment of commission.

[64] He is entitled to payment of \$50,777.18 for the shortfall in commission.

Claim for withholding of commission not made out

[65] Mr Jones sought commission for the customer who approached Allied Security but was not referred to him. Allied Security says that customer was also an Allied Security customer and note it did not approach Mr Jones but another employee. There also was evidence that this was a tender writing process, which called for specific expertise and was not a process Mr Jones generally was involved in, even at Recon.

[66] The evidence provided is not sufficient to uphold that claim in favour of Mr Jones.

Mr Jones was unjustifiably constructively dismissed

[67] A resignation can amount to a dismissal where it results from a breach of duty by the employer that leads an employee to resign;⁷ the breach of duty needs to be of sufficient seriousness to make resignation reasonably foreseeable.⁸

[68] Situations where an employer fails to pay an employee the remuneration to which the employee is due, and indicates that they will not do so, can amount to a constructive dismissal.⁹

[69] In this case, issues arose in January 2021. Initially, Mr Jones hoped that the short payments would be rectified, but over the course of the next three months it

⁷ *Auckland Shop Employees v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 374.

⁸ *Auckland Electric Power Board (AEPB) v Auckland Provincial District Local Authorities Officers IUW* [1994] 1 ERNZ 168 (CA) at 172.

⁹ See for example *Strachan v Moodie* [2012] NZEmpC 95, (2012) 10 NZELR 2016 at [120]-[122] where the employer unilaterally varied its remuneration obligations. The Court recognised the inevitable continuation of the breach and that it caused a degradation of trust and confidence in the relationship. See also *Clegg v New Zealand Sugar Company Ltd* [1998] EMHNZ 846 (EmpC).

became increasingly clear that Allied Security was firm in its view that the calculation of commission would be done, not as it had been done previously, but in the way that Allied Security considered met the terms in Mr Jones's written individual employment agreement.

[70] Allied Security suggested that Mr Jones's resignation was premature given that the parties had agreed to mediation. Although the parties had agreed to mediation, however, that was against the position adopted by Allied Security that it would not move from its position that previous practice was irrelevant and that it would only pay Mr Jones what it considered to be due to him in terms of the schedule to the employment agreement.

[71] Mr Jones and his representative made clear that would not be acceptable to Mr Jones and that unless the backpay was paid, and Allied Security committed to continuing to calculate Mr Jones's commission in accordance with the practice adopted by Recon, he would have no option but to leave. Mr Malcolm also reinforced the position taken by Mr Jones.

[72] It was not unreasonable for Mr Jones to "hang in there" hoping to resolve the issues, but his resignation followed it becoming crystal clear that Allied Security was not going to honour the previous arrangements.

[73] The shortfalls in payment were significant. Mr Jones gave Allied Security ample opportunity to rectify the position, and made clear that a failure to do so would make his position untenable.

[74] The breach of Mr Jones's terms and conditions of employment was serious and it was reasonably foreseeable that he would resign.

[75] It was a constructive dismissal.

[76] Further, given the cause of Mr Jones's departure, the dismissal was unjustifiable. It was not open to Allied Security as a fair and reasonable employer to insist on unilaterally varying the methodology for calculating remuneration.¹⁰

Allied Security's claims against Mr Jones fail

No overpayment in 2021

[77] For the avoidance of doubt, it follows from the findings above that I do not accept that Mr Jones was overpaid commission in 2021, during the period in which Allied Security had taken over from Recon but Ms Hunt was still calculating his commission. No repayment is due from Mr Jones to Allied Security.

Allied Security's claims in respect of the deleted emails and locked phone fail

[78] Allied Security sought reimbursement of the payment it made to a security consultant to investigate two laptops, one of which was the one used by Mr Jones. It does not point to any loss of valuable information as a result of Mr Jones deleting emails. While Mr Jones may have acted somewhat rashly in deleting all emails, I do not accept that it was malicious and, further, I do not accept that Allied Security suffered any loss as a result of him doing so. The claim is not made out.

[79] I also do not accept Mr Jones's actions regarding his cellphone can be criticised. Having fingerprint security on a cellphone is normal business practice and Mr Jones offered to facilitate Allied Security's access to the phone.

Mr Jones did not breach his duties to Allied Security when he engaged with another employee

[80] Mr Jones acknowledged that he spoke with another employee about setting up a business. Employees are of course entitled to make plans for their future while they are still employed with their current employer. There is no evidence that Mr Jones did anything prior to the termination of his employment with Allied Security that caused any harm to Allied Security or was in breach of his obligations of fidelity and good

¹⁰ Employment Relations Act 2000, s 103A.

faith.¹¹ Allied Security's claim with respect to Mr Jones's pre-termination activity is not made out.

Mr Jones did not misuse Allied Security's confidential information

[81] Mr Jones did not have a restraint of trade with Allied Security. He was free to operate in competition with Allied Security after he left, including that he could approach previous customers and offer them services. There are two caveats on that. First, employees are not able to take a customer list with them when they leave, or memorise such a list.¹² Second, they may not use confidential information of their former employer to the employer's disadvantage.¹³

[82] There is no suggestion that that Mr Jones took or memorised customer lists. The claim made by Allied Security is that he used confidential information in approaching customers of Allied Security.

[83] Mr Jones's employment agreement expressly provided for protection of confidential information which included:

- (a) the employer's financial affairs;
- (b) trade secrets;
- (c) confidential business and technical information;
- (d) business methods and management systems;
- (e) pricing information;
- (f) detailed information in records relating to clients, suppliers, and staff and parties with whom the employer deals commercially;

¹¹ See the discussion "Planning to compete" in Gordon Anderson and Dawn Duncan *Employment Law in Aotearoa New Zealand* (3rd ed (online), LexisNexis, 2022) at 7.52.

¹² *Caffee Coffee (NZ) Ltd v Farrimond* [2016] NZEmpC 65, [2016] ERNZ 157 at [46] citing *Peninsular Real Estate Ltd v Harris* [1992] 2 NZLR 216 (HC) at 219.

¹³ *Caffee Coffee*, above n 12, at [43] citing *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 (EWCA) at 136.

- (g) strategic information relating to marketing, advertising, or any other aspect of business;
- (h) computer software and data;
- (i) pending or prospective business transactions.

[84] In order for information to be protected, however, it must be truly confidential to Allied Security. It should possess some quality of secrecy. That may be demonstrated by steps taken to make apparent and/or preserve that secrecy but, at the very least, Allied Security must have reasonably believed it to be secret.¹⁴ Confidential information can be expected to be confidential as against third parties, including customers.

[85] In evidence, Mr McDowall referred to Allied Security's customer database for customers for whom Allied Security provided alarm monitoring, and to quotes given to customers. The particular instance that Allied Security referred to involved a customer approaching Mr Jones asking if he could do a better rate than they had been quoted from Allied Security. Clearly, Allied Security's quote was information the customer had, and was able to share with Mr Jones; in that scenario, it was not protected by confidentiality. Allied Security pointed to Mr Jones stating that Allied Security had routed the customer's monitoring to Hamilton, and was having issues with that. Allied Security suggested that Mr Jones only knew of that information because of his position with it, however, it did not go as far to suggest that it considered the rerouting to be secret or point to any steps it took to ensure it was kept confidential. In any event, there is insufficient evidence to support the claim that Mr Jones's use of the allegedly confidential information caused the customer (or any other customer) to terminate its arrangement with Allied Security and move to the company that Mr Jones then worked in.

[86] In submissions, Allied Security referred to Mr Jones advising customers that he had left Allied Security, that his new firm could provide better services, and that it

¹⁴ *Skids Programme Management Ltd v McNeill* [2012] NZCA 314, [2013] 1 NZLR at [80]; and see also *Thomas Marshall Ltd v Guinle* [1979] Ch 277 (Ch) at 248.

could match the commercial rates Allied Security offered. None of those matters involve information that is confidential to Allied Security.

No penalties are ordered

[87] For the avoidance of doubt, Mr Jones did not act in breach of his obligations of good faith, or his employment agreement and no penalties are ordered against him.

Mr Jones is entitled to remedies

Shortfall in commission payable

[88] As noted, Mr Jones is entitled to the shortfall in commission of \$50,777.18, identified above.

Repayment of deduction payable

[89] As he was constructively dismissed, he is entitled to be reimbursed for the \$ 3,052.80 deducted from his final pay for a shortfall in notice.

Lost earnings payable, but deducting ACC

[90] When Mr Jones left Allied Security, he was on accident compensation, and that was paid for a period following the termination of his employment.

[91] While Mr Jones was on accident compensation, he was unable to work and received earnings-related compensation. The situation is not comparable to a situation when somebody able to work receives the unemployment benefit, where the courts have held that lost wages are payable by the employer for the period during which the employee is unemployed, even if they are in receipt of the unemployment benefit, with any issue about repayment of that benefit being between the employee and the Ministry of Social Development.¹⁵ Although he would have been entitled to paid sick leave pursuant to cl 14.2 of his employment agreement had he still been employed, he would have had to account to Allied Security for any earnings-related accident

¹⁵ *New Zealand Steel v Haddad* [2023] NZEmpC 57, [2023] ERNZ 218, at [162]–[164]; cf *Davidson v Christchurch City Council* [1995] 1 ERNZ 172 at 204.

compensation. This means the amount he received for accident compensation should be deducted from any loss of earnings calculation.

[92] Allied Security also notes that, given Mr Jones's experience and history in Wellington in the security industry, he would have been able to easily find a new position but that he chose not to look for one. Mr Jones's explanation was that he was concerned that he may have ended up in a similar position if he had moved to another firm and Allied Security had purchased that firm as well.

[93] I can understand why Mr Jones decided it was preferable for him to set up his own business with his former colleague, but I am not persuaded that the ongoing reduction in earnings should be payable by Allied Security.

[94] In my view, the appropriate period for the calculation of loss of earnings is 3 months from 28 May 2022, in line with s 128 of the Employment Relations Act 2000. Payment for the 3-month period is to be based on Mr Jones's average monthly earnings using Inland Revenue Department records for the period 1 September 2020 to 30 August 2021, with the amount of any earnings-related accident compensation received in respect of the 3-month period deducted.

Distress compensation payable

[95] Mr Jones gave compelling evidence of the impact on him of Allied Security's conduct. He had many years' experience in the security industry in Wellington and his treatment by Allied Security was entirely of its making. No blame can be attributed to Mr Jones; he had reasonably assumed he would work for Allied Security on the same basis as he had worked for Recon, but that did not prove to be the case.

[96] On the basis of his evidence and of the evidence of other witnesses, in particular Mr Malcolm and Ms Hunt, I accept that he has suffered significant humiliation, loss of dignity and injury to his feelings. In the Authority, Mr Jones sought \$30,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act. In the Court, he sought \$50,000. On balance I consider that an award of \$25,000 is

appropriate.¹⁶ That sum recognises the distress caused to Mr Jones by Allied Security's actions but also that Mr Jones is not in the most serious of cases where an employee suffers ongoing trauma and health issues, and is unable to work as a result of their treatment.¹⁷

Holiday pay and KiwiSaver due

[97] As accepted by Allied Security, it flows from my findings that annual holiday pay and payment for public holidays will need to be calculated in accordance with Mr Jones's employment agreement and the shortfall paid to reflect the unpaid commission, as well as for the payment of lost wages. The employer contribution for KiwiSaver in relation to those amounts also will need to be accounted for and paid.

Interest is payable

[98] Allied Security has paid \$79,973.61 into Court as a condition of a stay of execution. That sum was paid on 20 November 2024 and has been attracting interest, which will now be payable to Mr Jones. Apart from that sum and for that period, Allied Security has had the use of the money to which Mr Jones is entitled. It is therefore appropriate that it otherwise pay interest on the wages component of this award; i.e. on the shortfall in commission, the payment withheld for notice and holiday pay in respect of those matters for the relevant period prior to 20 November 2024, and for any amount for those matters due in excess of \$59,973.61 (noting that the \$79,973.61 included \$20,000 for distress compensation). That is to be calculated in accordance with the Interest on Money Claims Act 2016.

No penalty ordered

[99] Mr Jones also sought a penalty under s 134 of the Employment Relations Act for Allied Security's breach of contract, unlawful deduction and underpaid holiday payments. In all the circumstances, I do not consider that this is a case where it is appropriate to order a penalty. I accept that Allied Security's behaviour towards

¹⁶ That falls within the mid-range of band 2 and is a moderate amount of monetary compensation; see *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791 at [62]-[65].

¹⁷ See for example *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [53]-[54].

Mr Jones fell short of what is expected of an employer in the situation that arose, but nevertheless, do not consider that a penalty on top of the remedies already ordered for Mr Jones is necessary.

Payments to be made

[100] I direct that the registrar pay the sum held by the Court, including any accrued interest, to Mr Jones. Mr Cleary, counsel for Mr Jones, is to advise the registrar of the details of the account to which payment is to be made.

[101] The amount due to Mr Jones in excess of that is to be paid to him by Allied Security within 28 days of the date of this judgment. If any issues arise over the calculation of the amount due that cannot be resolved between the parties, they may return to the Court.

Mr Jones is entitled to costs

[102] Mr Jones is the successful party in these proceedings and is entitled to costs. The parties agreed to the proceeding provisionally being assigned category 2B for costs purposes under the Practice Directions Guidelines Scale.¹⁸ Accordingly, they should be able to agree on costs. If that does not prove possible, Mr Jones may apply for an order by way of a memorandum filed and served within 28 days of this judgment. Allied Security then must file and serve its memorandum setting out its response to the application within a further 21 days. Any reply by Mr Jones must be filed and served within a further seven days. The Court then proposes that it would deal with costs on the papers.

J C Holden
Judge

Judgment signed at 11.30 am on 28 July 2025

¹⁸ “Employment Court of New Zealand Practice Directions” (1 September 2024) <www.employmentcourt.govt.nz> at No 18.