

NOTE: This determination contains an order prohibiting publication of certain information at [115]

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2024] NZERA 595
3213019

BETWEEN PETER JONES
Applicant

AND ALLIED INVESTMENTS
LIMITED
Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Graeme Ogilvie, advocate for the Applicant
Brenda Thom, counsel for the Respondent

Investigation Meeting: 19 and 20 March 2024 in Wellington

Submissions received: 17 April, 17 May and 5 July 2024 from the Applicant
17 April and 17 June 2024 from the Respondent

Determination: 7 October 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Peter Jones was employed by Allied Investments Limited (AIL) as a sales representative from 20 September 2021 to 27 May 2022. Mr Jones claims the steps AIL took when dealing with its concerns about his commission payments left him with no option but to resign and his resignation should be treated as a constructive dismissal.

[2] Mr Jones also says failing to consult before making changes to his commission payments and reducing his wages disadvantaged him. He claims AIL's actions were unreasonable and unjustified and a breach of its good faith obligations.

[3] Mr Jones seeks unpaid commission, annual and public holiday arrears including reimbursement for the deduction from his final annual holiday pay, compensation and lost wages.

[4] AIL says its actions and the steps it took were justified. It submits errors had previously been made resulting in Mr Jones' commission being calculated incorrectly. AIL corrected those errors and says there is no issue regarding interpretation of the individual employment agreement (IEA) between the parties. AIL simply adopted the correct interpretation. AIL says it acted in good faith and in a reasonable manner when it took steps to deal with this issue.

[5] AIL says it has not breached any duty towards Mr Jones but even if it had, the parties were engaged in resolving the issues when Mr Jones resigned. Therefore, Mr Jones' resignation could not have been caused by the actions of AIL and it was not foreseeable he would resign.

[6] AIL raised counterclaims against Mr Jones seeking reimbursement for three different types of losses incurred by AIL alleged to be a result of Mr Jones' actions and that AIL says are in breach of his obligations towards AIL (set out below).

The Authority's investigation

[7] For the Authority's investigation written witness statements were lodged from Peter Jones, Rhiannon Hunt, Laura Shaw, Alvin Maharaj, Blair Malcolm, Andrew Swain and Karen Sayer. For AIL, written statements were lodged from Damian Black, Kathleen Kelly and Chris McDowall. Ms Sayer and Ms Kelly gave evidence by AVL. All witnesses answered questions under oath or affirmation from me and the parties' representatives.

[8] The representatives provided a joint memorandum on remedies and written submissions were timetabled.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues

necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[10] The issues requiring investigation and determination were:

- (a) What were the reasons for Mr Jones' resignation;
- (b) Was the resignation caused by a breach of duty to Mr Jones;
- (c) If there was a breach of duty was it of a serious nature that would mean it was reasonably foreseeable that Mr Jones would not be prepared to continue to work;
- (d) Was Mr Jones disadvantaged in his employment because AIL failed to consult with him about changes it intended to make to his commission payments;
- (e) Was there a breach by AIL of the good faith obligations towards Mr Jones;
- (f) Were any deductions made from Mr Jones' wages? If so, were they lawful and is Mr Jones due any wage, commission and/or holiday arrears;
- (g) Is Mr Jones owed unpaid Commission in the amount of \$7,000.00 from the Australian High Commission;
- (h) Has Mr Jones contributed to the situation he found himself in and, if so, should any remedies awarded be reduced?
- (i) Did AIL incur any losses attributable to Mr Jones' actions and as a result of those losses should AIL be reimbursed relating to the following:
 - Costs incurred in the analysis of the computer equipment totalling \$4,979.50;
 - Mr Jones' overpaid trail commission; and
 - Reimbursement calculated to be \$9,790.15 x 5 (\$48,950.75) for five clients purchased by AIL when it purchased Recon who ended their relationship with AIL because of steps Mr Jones took.

Mr Jones' individual employment agreement

[11] Mr Jones was employed from 2003 to September 2021 by Recon Security Limited (Recon) as a sales representative. In September 2021, Recon was acquired by AIL. Mr Jones accepted an opportunity to transfer his employment from Recon to AIL. The offer he accepted stated the following:

NEW OFFER OF EMPLOYMENT FROM ALLIED SECURITY

This letter is to confirm that Allied Investments Limited trading as Allied Security has purchased Recon Security. We understand that your employer, Recon Security had advised you that you will have the opportunity to transfer your employment to Allied Security.

This letter is to confirm Allied Security would like to offer you transfer of employment. 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 20 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 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

You are welcome to take advice on this letter and the offer of employment contained within it. If you wish to accept this offer of employment, please sign the letter in the space provided and return to me.

[12] Mr Jones' employment with AIL commenced on 20 September 2021 on the same terms and conditions he enjoyed at Recon. His rate of pay was to remain unchanged and as were his hours of work and duties.

[13] Clause 18.2 of the IEA provided:

Deductions from the Employee's salary/wages will only be implemented after a discussion has taken place with the employee.

[14] Clause 19.2 specified that the employee agreed they will hold all confidential information in confidence and will not without the written consent of the Employer directly or indirectly at any time during this Agreement or following its termination use, disclose or copy any confidential information.

[15] Mr Jones' remuneration was specified in schedules 1 and 3 of the IEA. His base rate was the minimum wage rate with commission to be paid on the various products he sold as follows:

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 payments, 30% of gross profit on completed jobs
Trail commission	Monthly payment 10% of monitoring turnover for lifetime of customer

[16] Schedule 3 of the IEA specified that commission was to be paid out on the closest pay date to the 15th of each month.

[17] Clause 30 of the IEA dealt with termination of employment. A one month notice period applied with discretion given to the employer regarding the notice period as follows:

30.3 The Employer at its discretion may make a payment in lieu of all or part of the required notice and not require the Employee to work out all or part of the Notice Period.

30.4 If the Employee fails to give the required Notice Period in writing to the Employer, the Employer may deduct the remuneration relative to the period of notice not given from the final payment owed to the Employee.

Recon staff transfer to AIL

[18] Blair Malcolm, the previous director and shareholder of Recon Security Limited, was also employed by AIL as the Director of Sales. Mr Jones reported to Mr Malcom during his employment at Recon and then at AIL. Mr Malcolm reported to Chris McDowell, General Manager, Operations, AIL.

[19] Rhiannon Hunt had also been employed at Recon since 2017 and when AIL purchased Recon she was employed to do the same administrative work at AIL which included collating each month's sales information and calculating the sales commission for the sales staff.

[20] Mr McDowell and Damian Black are both directors and shareholders of AIL. Mr Black is based in Dunedin and Mr McDowell in Wellington. Mr Malcolm, Mr Jones and Ms Hunt were also based in Wellington.

Mr Jones' commission payments

[21] For the first three months after Mr Jones started at AIL, his commission was calculated and paid in the same way it had been at Recon. Mr Jones explained the way it worked in his written evidence as follows:

The Recon commission structure was continued when I started with Allied. When a sales rep sold some security services the client became part of that sales rep's client base and the employment agreement explains how a client on one sales rep's client list stays with that sales rep. The agreed commission rates also applied to monitoring work where the sales rep gets an initial commission and because that client became part of the sales rep's client base, the rep received an ongoing commission based on all future monthly invoices for that client. We called this the "trail" commission. I had built up a strong client base where trail commissions were paid to me every month.

The effect of this was that I was receiving about \$20,000.00 a month (on average) in commission earnings which in some months came to about 80% of my total income for the month. These earnings were the outcome of my very successful sales results which were of benefit to me and my employer.

I was not involved in the calculation of my months commissions. The Recon accounts person also transferred to Allied. I understood that she collated the full information for all my invoices for the month. It was the practice to have the sales rep's code on every invoice for that rep's sales and for the month just finished. Once she completed that she passed the full invoice information to Malcolm and he made all the checks he needed to make and eventually signed off the commission calculation for the previous month. This practice was followed both during my Recon employment [sic] with Allied.

[22] Mr Jones' commission payments for October, November and December 2021 were \$21,234.32, \$19,497.59 and \$24,657.29 respectively. The commission payments were reduced after December 2021. Both Mr Jones and Mr Malcolm say the reductions were without consultation.

[23] Mr Jones' commission payment that should have been paid in January was \$15,129.45 (for commission earned in December 2021), the February payment was \$12,769.45 (paid in three payments of \$6,631.31, \$3,983.60 and \$2,154.54), the March payment was \$8,779.34 (in two payments of \$3,995.00 and \$4,784.36), March was \$2975.46 and April and May 2022 no commission was paid.

[24] Most of these payments were also made much later than the closest pay date to the 15th of the month as stipulated in the IEA. The January payment (for commission

earned in December) was made to Mr Jones on 2 February 2022, his February payment was made in three payments on 16 February, 2 March and 13 April 2022. The March payments were made on 16 March, and 13 April. The April payment (for March sales) was made on 27 April. No commission was paid to Mr Jones in May for April sales. AIL did not dispute the timings of these payments.

[25] Mr Jones says he is owed \$42,477.70 in under paid commission that he should have been paid for six months from December 2021 to the end of his employment at AIL in May 2022.

The emails between the parties, Mr Malcolm, Mr McDowell and Ms Hunt

[26] Most of the communications between AIL and Mr Jones, Ms Hunt and Mr Malcolm were by email. Mr Malcolm and Ms Hunt, with reference to Mr Jones where necessary, communicated with Mr Black and Chris McDowell, General Manager Operations, about calculating Mr Jones' commission. Mr Jones said he was unaware of how his commission was calculated for the purposes of payment. He knew which products he sold qualified for which type of commission.

[27] Mr Malcolm confirmed that Mr Jones did not have access to all the information used to calculate commission, that was normal practice and that he and Ms Hunt had the detailed knowledge of how the commission payments were calculated. Mr Malcolm explained that as a security precaution Recon did not keep a single client list. All client information was held in cloud-based software that was password protected and Mr Jones had never had access or the ability to download bulk client files. That continued to be the case at AIL.

[28] Up until the November commission calculation Ms Hunt would export data from Work Flow Max (WFM) and Xero and populate the spreadsheet with that data. The spreadsheet contained a formula that calculated Mr Jones' commission from the previous months sales. Mr Malcolm reviewed the spreadsheet for accuracy including Ms Hunt's workings and the totals before signing it off each month and approving the payments. In September, October and November Mr Malcolm approved Mr Jones' commission payment in the same way he had at Recon and forwarded these to Mr McDowall and payroll for payment.

[29] After Ms Hunt emailed Mr Black the commission report for Mr Jones' December 2021 sales, she and Mr Malcolm were not involved in calculating Mr Jones'

commission from that point. They were aware Mr Black had a lot of questions and the emails show Mr Malcolm and Ms Hunt providing information about the steps they took to calculate Mr Jones' commission to Mr Black and Mr McDowell on more than one occasion.

[30] Mr Malcom was first aware in January 2022 that Mr Jones was not being paid his commission for his December sales and says this happened with no reason being given and no consultation on making the change.

[31] The emails were ongoing and on 31 January 2022, Mr Malcolm enquired on Mr Jones' behalf when Mr Jones could expect his next commission payment for January (for December sales) as it was almost two weeks overdue. Mr Black indicated by the end of that week but arranged for a payment of \$5,000.00 to be made to Mr Jones until Mr Black had decided how much commission would be paid. Mr Jones did not receive the balance of his December commission payment until February 2022.

[32] Mr Malcolm says by February Mr Jones was owed significant amounts in commission payments. Mr Malcolm became so concerned about the position Mr Jones was in and the impact on him both financially and personally that Mr Malcolm paid Mr Jones' commission personally.

[33] Mr Black explained in his evidence how the issue of Mr Jones' commission payments came to his attention. When AIL purchased Recon it was not given access to any historical employment information but at the time he assessed the cost of commission payments for sales representatives by reviewing the profit and loss statements for the two years prior to the purchase. This showed average commissions paid to be \$250,000.00. There were three sales people in total. Mr Black anticipated the average commission amount would be split between three people so the amount Mr Jones was earning appeared to be an anomaly to Mr Black.

[34] At some point Mr Black also became further concerned when overall company turnover dropped but Mr Jones' commission payments stayed the same. To his mind, Mr Jones' commission payments should have fluctuated with a decrease in overall turnover and he set about trying to understand Mr Jones' commission payments.

[35] It was established at the investigation meeting there were issues to do with AIL moving from one software product to a different one (Xero to Reckon) and difficulties that AIL had in accessing information from Recon after access to WFM ended. Mr

Malcolm's evidence was that all the information Recon was to provide when AIL purchased Recon, was provided. Mr Black says it never was and says Mr Malcolm and Mr Jones refused to provide it to him when he was looking at Mr Jones' commission calculations.

[36] On 4 February 2022, Mr Black communicated for the first time that he was making changes to Mr Jones' commission calculation. Mr Jones was to submit a new monthly report of completed sales for December and January and then each month to send Mr Black a spreadsheet of what was sold. Mr Black stated in his email dated 4 February to Mr Jones:

Each month please send me a spreadsheet of what you sold, I will then be able to quickly verify this with WFM and Reckon, and make payment within a tight timeframe. By keeping track of your sales personally it is unlikely we will miss anything and have a delay like we have for January.

[37] Ms Hunt was asked to explain several times how she calculated Mr Jones' commission and provided the detail in writing each time she was asked. She pointed out after Mr Black switched to having Mr Jones create a new spreadsheet of sales that Mr Jones would not have access to WFM or Xero (which was replaced by Reckon). The point being the data Mr Black was planning to rely on was not complete.

[38] On 22 April, Mr McDowall emailed Mr Malcolm in relation to AIL's proposal to have Mr Jones sign a new IEA. The proposal was a higher base salary with a different commission structure. Mr McDowall says he had discussed moving to a new IEA in early April with Mr Jones for two reasons. Firstly, to have alignment in all sales roles and remuneration packages across the business and secondly to find a mutually agreeable remuneration package for Mr Jones. His evidence was that it was important for AIL that Mr Jones' terms and conditions be in line with other sales representatives at AIL.

[39] Also on 22 April, Mr Jones was advised in writing AIL had a different interpretation of Mr Jones' IEA and that the IEA was "inadequate" and not suitable. Mr Jones was invited to discuss either a new agreement or an amendment to his existing IEA. This was one of the few communications from AIL to Mr Jones about his commission.

[40] Mr Black's email on 27 April show he has made up his mind:

Thanks Pete, from my end we have made clear our position which is to apply the 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 outline 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 or relevant.

We can then meet and discuss alternative views. To be clear this is a commission/wage dispute not an employment dispute. The company position is that you are and 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.

[41] Mr Jones responded pointing out that if WFM was checked he was clearly listed as the account manager for recent sales Mr Black had highlighted in red saying they were not in Mr Jones' data base according to his code. He also said the commission structure was clear. The ongoing monitoring revenue was also clear in that it lasted for the life of the customer.

[42] The emails show Mr Black firstly trying to understand the commission clauses in Mr Jones' IEA, and then adopting his own interpretation and making changes to how the commission was calculated. Mr Black made changes without proper reference to Mr Jones, without access to Recon's historical commission calculation information and without access to some of the databases from which Ms Hunt would extract data to put into the spreadsheet that contained the commission calculation.

[43] On 28 April, Mr Black's email to payroll shows AIL was no longer going to pay trail commission from income prior to AIL purchasing Recon:

Hi Norm as attached please pay Peter the 10% of the monitoring also attached. This is incorrect but until I get the data on how much monitoring was in place prior to Peter coming in during 2019 then I can't deduct that from this total. IE he won't get commission from any monitoring in place prior to his contract signing.

[44] On 10 May 2022, Mr Jones' representative wrote to AIL pointing out AIL had made unilateral changes to Mr Jones' IEA and if Mr Jones' commission payments would no longer be calculated using the historical method and were to be replaced with Mr Black's method, this was a radical change. It amounted to a serious breach of contract and had been implemented with no notice or consultation.

[45] The parties used mediation but were unsuccessful in resolving these issues.

[46] Mr Jones says he is owed \$42,577.70 in unpaid commission after Mr Black made unilateral changes to his commission payments including:

- excluding new client business from the calculation;
- reduced trail commission;
- instructed other employees to handle new sales in cases where the client was already on the client list;
- drafted a new IEA for Mr Jones that would significantly reduce the commission Mr Jones could earn.

[47] Mr Jones' evidence about the proposed new IEA with the new terms and conditions was that he was willing in principle if that was what was required to resolve the issues. However, if he agreed to a less favourable commission structure, he wanted to be paid all commission owing to him under his existing IEA and to continue receiving trail commission for ongoing monitoring.

[48] AIL was not willing to do that. Mr Jones says he could not survive on minimum wage plus greatly reduced commissions and says AIL's actions caused him considerable distress and financial problems. In the end he felt he was not going to be paid as agreed and was being put under pressure to agree to the lower commission rates proposed and with the reduction in his wages and AIL wanting to ignore his current terms and conditions and align him with other AIL employees, he felt he had no option but to resign.

[49] On 2 August 2022, a personal grievance was raised in writing by Mr Jones' representative including a claim for penalties for failing to pay wages and holiday pay and failing to provide an employment agreement.

Constructive dismissal

[50] Constructive dismissal refers to a situation where, as a result of an employer's action or inaction, an employee's job or workplace becomes untenable, and they are left with no option but to resign. The Court of Appeal in *Auckland Shop Employees v Woolworths (NZ) Ltd* set out three non-exhaustive categories of constructive dismissal:¹

¹ *Auckland Shop Employees v Woolworths (NZ) Ltd* [1985] 2 NZLR 372.

- (a) An employer gives the employee a choice between resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer leads an employee to resign.

[51] This matter falls in the third of these, the breach of duty category namely breaches of the duties of fair dealing and good faith. These duties require that employers will not without reasonable and proper cause conduct themselves in a manner that is likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. One is a statutory duty and the other an implied term of the employment agreement.²

[52] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* held that the correct approach is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer. In determining that matter all of the circumstances of the resignation have to be examined, not simply the communication of the resignation. The Authority needs to then assess whether the breach of duty by AIL was of sufficient seriousness to make resignation reasonably foreseeable.³

[53] Mr Jones has the burden of establishing his resignation was a constructive dismissal.

What was the reason for Mr Jones' resignation?

[54] Mr Jones says the way his commission was calculated during a long period of employment at Recon (approximately 13 years) and for three months after AIL purchased Recon was correct. His base wage did not change. While he did not know how the commission calculation worked, Ms Hunt and Mr Malcolm gave evidence that until Mr Black took over the calculation, specific data was entered into the spreadsheet which was used to calculate Mr Jones' monthly commission payments. Mr Jones had regularly received approximately \$20,000.00 in commission each month until Mr Black

² *Marlborough Harbour Board v Goulden* [1985] 2 NZLR (CA) at 383 and Employment Relations Act 2000, s 4.

³ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168.

changed the commission calculation, evident from the December commission payment for Mr Jones' sales in November 2021.

[55] It is clear the underlying cause of Mr Jones' resignation was the changes to how his commission was calculated which he said was in breach of his terms and conditions of employment and how AIL approached the matters. He was unable to resolve the disagreement about how his commission was calculated in a way that did not involve his wages being decreased.

[56] There were other actions by AIL that Mr Jones pointed to such as concerns sales were being diverted away from him including a claim for commission in the amount of \$7,000.00 and delaying his car having its sign writing updated that he viewed as steps taken to undermine his position further. I have found below there was insufficient information about these to take them into account.

[57] Knowing Mr Black intended to put in place a new IEA that would result in reduced wages, he formed the view Mr Black was acting unilaterally and unreasonably and had changed the commission entitlements he had enjoyed at Recon. Any changes were without Mr Jones' agreement.

[58] There was a point Mr Jones says the overall position became untenable for him financially when it was clear Mr Black was not going to change his mind. His representative had corresponded on more than one occasion with AIL and mediation was unsuccessful.

[59] The reason for Mr Jones' resignation was the changes made to his commission payments.

Was Mr Jones' resignation caused by a breach of duty by AIL?

The duties of fair dealing and good faith

[60] AIL had a duty to deal with Mr Jones in good faith and be active and constructive in maintaining a productive employment relationship when dealing with its concerns about how his commission was calculated. There is also an implied duty on employers to be fair and reasonable. Other implied duties such as the duty not to damage the relationship of confidence and trust between employee and employer stem from that overriding duty.

[61] Mr Jones' evidence was the way he had been paid at Recon was unilaterally changed to his detriment and this was supported by Mr Malcolm and Ms Hunt. The spreadsheet containing the commission formula had been created by one of Recon's former directors and used for many years.

[62] AIL did not deny this was the case but adopted the view Recon had incorrectly calculated commission. Mr Black's evidence was that he was frustrated at every step by Mr Jones, Mr Malcom and Ms Hunt and he lost trust in Mr Malcolm and Ms Hunt which is why he started to deal with the issue directly and formulated the new calculation method.

[63] Mr Black said he repeatedly asked for Recon's historic data and his evidence at the investigation meeting was this was never provided. However, there could never be an obligation on Mr Jones to provide information that was connected with the sale and purchase of the business, and for which it appears Mr Jones never had access to or at least not to all of it. Mr Black was responsible for his own due diligence.

[64] In any event Mr Jones' position was that his wages should not have changed given he was employed by AIL on the same terms and conditions he had enjoyed at Recon. The offer letter expressly stated Mr Jones' rate of pay would remain unchanged.

[65] AIL's argument that Recon had made errors or mistakes in calculating Mr Jones' commission only takes it so far. It is evident AIL reached conclusions and made decisions about Mr Jones' commission calculations between December 2021 and May 2022 based on what AIL had in front of it and it did this without any historical data from Recon. Mr Black himself appears to agree AIL did not have the information it required when he gave his evidence about Mr Malcolm and Mr Jones refusing to provide him with the historical commission documents or the data he requested.

[66] Mr Black's email on 28 April is problematic for AIL in two ways. It shows an intention to end all trail commission from monitoring income prior to 20 September 2021 which was inconsistent with Mr Jones' terms and conditions of employment with AIL.

[67] Secondly even if AIL was able to show clearly what the mistakes it alleged Recon had historically been making with Mr Jones' commission calculation, the wording of the IEA means it was unlikely Mr Jones trail commission prior to employment at AIL could be ended. Employment had transferred to AIL on the existing

terms and conditions and Mr Jones had 13 years of product sales with Recon that included trail commission.

[68] On 22 April, Mr McDowall's email set out AIL's intention to align Mr Jones' terms and conditions to bring them in line with other sales representatives at AIL. That email is also problematic for AIL because it shows after all the discussions about Mr Jones' commission calculation, AIL's intention was to align Mr Jones' commission structure with other sales employees at AIL. With many years employment at Recon, that involved trail commission that had built up over the years, it was likely Mr Jones' commission payments would be greater than others. Unless AIL could reach agreement with Mr Jones about any new terms and conditions, alignment with other AIL sales staff was not an option open to AIL.

[69] Also relevant is the lack of communication. While Mr Black, Ms Hunt and Mr Malcolm were communicating by email from December onwards about the calculations, there was never a clear communication from AIL to Mr Jones telling him his wages were going to decrease and why. Mr Jones was aware Mr Black was seeking to understand Mr Jones' commission payments but there is no point at which it can be said there was a clear communication from AIL that the commission calculation was going to change, with full reasons, prior to making the changes. Mr Jones says he was first notified his commission calculation was changing when he received the email on 4 February. By that stage his commission payments for December had only just been paid and January remained unpaid.

[70] In the face of significant wage reductions and the late payment of Mr Jones wages, it was reasonable for him to form the view there had been insufficient communication with him about what the concerns were, what errors had been identified and how those were to be remedied. There were a lot of emails but with only a handful copying in Mr Jones and those that were sent to Mr Jones directly were after decisions had already been made.

[71] In answering a question from the Authority seeking to clarify when Mr Jones was told there would be a change to his wage payments, Mr Black answered there was not really a change. That is consistent with his position this is not a case where a different interpretation of the IEA was adopted, but rather AIL simply correctly interpreted the IEA and for that reason there is no breach of contract.

[72] AIL's position, that it was reasonable to make the changes it did, when it did, because it was correct and Recon had been wrong is not sustainable. AIL was in breach of the IEA between the parties when it failed to pay Mr Jones' wages correctly and substituted a new method to calculate commission. It had agreed to pay Mr Jones in the same manner, and on the same rates he enjoyed at Recon.

[73] Noting Mr Jones did not agree to any changes, and insufficient information was given to him to allow for meaningful consultation, AIL's actions were also a breach the duty of fair dealing and a breach of the statutory good faith obligations in the Act. Employers are under an obligation to act in good faith which includes to be active and constructive in maintaining a productive employment relationship. Consultation was required by s 4 of the Act before any changes could be made because making a decision that will result in a significant reduction in wages is likely to have an adverse effect on the continuation of an employees' employment.

[74] I do not accept the assertion the personal relationship that existed between Ms Hunt and Mr Jones is relevant. To the extent it was being suggested there was dishonesty on Ms Hunt's part, there was no evidence of that. While it may not be prudent from a business perspective, I have found above Mr Black did not have access to Mr Jones' historic commission calculation information from Recon so was not in a position to conclude there were errors in the way Mr Jones' commission was being calculated.

[75] There was insufficient evidence to be satisfied AIL was deliberately diverting customers away from Mr Jones. There were some changes being made at AIL after the merger and Mr Jones claim can only be based on matters that impact on his existing terms and conditions.

[76] AIL's actions fell short of what a fair and reasonable employer could have done in the circumstances and these failures breached the duty of good faith and the implied duty not to seriously damage and destroy the trust and confidence inherent in an employment relationship. Failure to pay wages was also a fundamental breach of the IEA between the parties and these breaches caused Mr Jones to resign.

Were the breaches so serious that resignation was reasonably foreseeable?

[77] In the circumstances of the breaches above I accept Mr Jones' evidence that remaining in the workplace became untenable once it became evident AIL was

unwilling to reconsider its position. This is especially so when the outcome of AIL's decision making was a significant reduction in Mr Jones' wages.

[78] Mr Jones' representative engaged with AIL on Mr Jones' behalf. Mediation was unsuccessful and it was clear AIL wanted to reduce Mr Jones' commission to bring his wages in line with other AIL employees. The new draft IEA contained considerably less favourable terms and conditions to his existing one.

[79] Mr Jones believed there had been a significant unilateral variation of the terms and conditions of his IEA, and that AIL, if it wished to continue his employment, desired that he be on new terms with regard to his commission structure. It was open to Mr Jones to form that view.

[80] AIL submitted that even if it was decided the contract had been repudiated by AIL that Mr Jones' actions by remaining in employment for six months before deciding to resign is strong evidence there was no repudiation and it was not so serious or foreseeable Mr Jones would resign.

[81] I do not accept that submission. Failure to pay wages is a fundamental breach of an employment agreement that has been sufficient for a finding of constructive dismissal on more than one occasion by the Authority and the Court. Mr Jones's evidence was that he wished to resolve Mr Black's concerns once he was aware there were concerns. I accept Mr Jones evidence and his emails support that position. However, Mr Jones was not willing to forgo the terms and conditions he transferred across to AIL on and he was entitled to rely on the IEA in that regard.

[82] Given Mr Jones had communicated his position, as had Mr Malcolm and Ms Hunt on Mr Jones' behalf and that reduction to Mr Jones' commission payments amounts to unilateral variation of terms and conditions, this was sufficiently serious that a person in Mr Jones' position would not be prepared to work given the reduction in wages. In these circumstances it was reasonably foreseeable Mr Jones would resign.

[83] I also do not accept the submission from AIL that Mr Jones lacked credibility or that he had a fixed and unreasonable view of the facts and took no steps to personally test if what Mr Malcom and Ms Hunt were telling him was actually correct, or that his assertion he lacked the skills to understand how commission was calculated lacked credibility.

[84] The evidence was that sales representatives did not have full access to the data required to populate the spreadsheet and there were business reasons for this.

Was the constructive dismissal justified?

[85] Mr Jones was entitled to be paid commission in accordance with the terms and conditions of his IEA. It was clear Mr Black formed a view based on limited information. Mr Jones' commission payments were delayed and then reduced, and the draft IEA signalled Mr Black's intentions.

[86] Applying the test of justification in s 103A of the Act, on an objective basis, AIL's conduct at or about the time of the dismissal, given the fact wages were significantly reduced with limited communication and no meaningful consultation in respect of the reasons for the changes, is not how a fair and reasonable employer could have acted in all the circumstances.

[87] AIL has not justified its actions and Mr Jones has made out his claim for constructive dismissal.

Disadvantage claim

[88] Mr Jones also made a separate claim that he was unjustifiably disadvantaged by AIL failing to consult with him about the changes it proposed to make to his commission payments. Lack of consultation is one of the fundamental reasons for the finding Mr Jones was constructively dismissed and formed part of the reason for his resignation. Given the disadvantage claim is based largely on the same facts as the constructive dismissal, I have not addressed it as a separate claim.

AIL's counterclaims

[89] AIL claims reimbursement of the cost of computer analysis totalling \$4,979.50 and provided an invoice and report from Incident Response Solutions. AIL says Mr Jones deleted the contents of his work email and all items from the deleted items inbox from his work computer and left the computer in an unstable state.⁴

⁴ Statement in reply, paragraphs [34] – [39].

[90] Mr Jones gave evidence he deleted personal emails and photos from his laptop but client information was stored in the cloud. In any event he says he left his laptop at work and did not have access to it after he resigned on 27 May 2022.

[91] AIL's submissions refer to the loss of "data" caused by Mr Jones. The report from Incident Response Solutions states limited files were located on the computer which it says are consistent with the operating system on the device being reinstalled, but I note the claim by AIL is in relation to emails not work data.

[92] The attempted reinstallation is recorded in the examiners report as taking place on 30 July 2022 which is after Mr Jones resigned and left the computer at work. There was insufficient evidence to show Mr Jones was responsible for deleting emails which is claimed or leaving the lap top in an unstable state.

[93] The second counterclaim for overpaid trail commission must fail given I have found above Mr Jones was entitled to be paid commission in the same way he had been paid commission at Recon.

[94] The third counterclaim also fails. There were no non-solicitation, non-competition or post-employment obligations in Mr Jones' IEA, other than the confidentiality clauses. There was no evidence Mr Jones had breached his obligation of confidentiality or any other obligation towards AIL that means he is liable to reimburse AIL for clients from Recon that are no longer AIL clients.

Remedies

Compensation

[95] Mr Jones' seeks compensation for humiliation, loss of dignity and injury to feelings caused by his grievance in the amount of \$30,000.00. His evidence was that by May 2022, he was exhausted over not receiving payment for his commissions and then being given a clear indication from AIL it did not intend to comply with the terms and conditions of the IEA. This had a direct impact on him in that it undermined trust he had in his employer and caused stress and anxiety.

[96] The reduction in his wages without notice and the late payment of his wages caused financial stress. Mr Jones wanted to resolve the issues and was supportive of AIL but he got to a point he could not cope any more. Having been in the security industry for a lengthy period I accept Mr Jones suffered loss of dignity and injury to his

feelings once it became clear AIL would not honour the terms of the agreement between the parties.

[97] Given my findings above, considering the finding of unjustified dismissal by way of constructive dismissal and the stress and injury to feelings experienced by Mr Jones, I consider an appropriate award under s 123(1)(c)(i) of the Act to be in the amount of \$20,000.00.⁵

Lost wages

[98] Mr Jones seeks three months lost wages. The Act permits reimbursement to the employee of lost wages in an amount that is the lesser of the sum equal to lost remuneration or to three months ordinary time remuneration. Mr Jones' employment ended on 16 May 2022.

[99] AIL submitted Mr Jones had an obligation to mitigate his loss by seeking alternative employment and to establish this by producing evidence of attempts to actively seek employment.

[100] Mr Jones gave evidence of the steps he took to set up a business to move into given he was losing trust and confidence in AIL. I note Mr Jones' Inland Revenue (IR) record of earning shows no income from wages or the new company Mr Jones was involved in over the three months after his employment ended at AIL.

[101] I accept reimbursement is appropriate in these circumstances where there has been an unjustified dismissal and the loss is a consequence of that. With reference to taking steps to set up his own business, I am satisfied it was reasonable for Mr Jones to recommence work when he did, and that direct evidence of the steps taken to find work are not required.⁶

[102] Reference was also made in the submissions from AIL to AC Act compensation that appear in Mr Jones' IR record. I was not made aware of any issue that would mean Mr Jones was not available for work in July. I also note the principle discussed in *Judea Tavern* that there should be no deduction from a calculation of lost remuneration for payments such as AC Act payments.⁷ That would also apply in this case.

⁵ *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [162]

⁶ *Keighran v Kensington Tavern Ltd* [2024] NZEmpC 28 at [67].

⁷ *Judea Tavern Ltd v Jesson* NZEmpC 82 at [40]

[103] An award for 13 weeks lost wages is appropriate.

Notice period

[104] AIL deducted \$3052.80 from Mr Jones' final pay because Mr Jones did not work out his four week notice period. No submission was made by AIL on this point.

[105] To the extent this could be considered a specific deduction under the general deduction clause in the IEA, that would not be permitted under the Wages Protection Act 1983.⁸ Mr Jones is entitled to reimbursement of that amount under s 131 of the Act for a default in payment to an employee of any wages or other money payable by an employer to an employee under an employment agreement.

Wage and holiday arrears

[106] Given the findings above Mr Jones is entitled to be paid his outstanding commission calculated in accordance with how his commission was calculated at Recon in the amount of \$42,477.70.

[107] Because it has been determined Mr Jones' commission payments were not calculated in accordance with the terms and conditions of his employment, Mr Jones' annual holiday entitlement will need to be recalculated by the parties taking into account the correct commission amounts based on gross earnings and in accordance with the IEA and the terms and conditions of the transfer of employment from Recon to AIL.

Penalties

[108] Although I have made a finding of breach of good faith, a penalty for this was not claimed by Mr Jones. A penalty was sought for breach of the employment agreement for failing to pay wages and failing to provide wage and time records.

[109] Section 134(1) of the Act provides that the Authority may award a penalty for breach of an employment agreement. However, before awarding a penalty for such a breach there would generally need to be a particular reason for a penalty on top of compensation to the employee. I decline to order a penalty on top of compensation

⁸ Wages Protection Act 1983, s 5(1A).

because the underlying reason for the dismissal was tied closely to non-payment of wages which is also the basis for penalty sought.

[110] A penalty was also sought for failure to provide the wage and time records. These were provided after the investigation meeting and were the reason the parties were asked to lodge a joint memorandum on remedies before submissions were lodged.

[111] Noting the records were provided eventually I decline to award a penalty for these. However, should AIL fail to provide wage and time records in the future this can be taken into account as one of the factors in s 133A of the Act that the Authority may have regard to when determining an amount of penalty.

Contribution

[112] Under s 124 of the Act, contribution to the situation that gave rise to the personal grievance must be considered. I have found above AIL was not entitled to change the way Mr Jones' commission was paid. The reason for the dismissal was the resulting significant decrease in Mr Jones' wages without consultation or sufficient information to identify whether the calculation was incorrect. Mr Jones' took steps to resolve the issue including by requesting mediation. In these circumstances, he has not contributed to the personal grievance.

Summary of orders

[113] Allied Investments Limited is ordered to pay Peter Jones within 28 days of this determination:

- (a) Compensation for humiliation, loss of dignity, and injury to feelings in the amount of \$20,000.00;
- (b) Lost wages in an amount equivalent to 13 weeks lost wages;
- (c) Commission payments in the amount of \$42,477.70;
- (d) Reimbursement of the deduction unlawfully made from Mr Jones annual holiday entitlement in the amount of \$3,052.80;
- (e) Annual holiday and public holiday arrears in an amount calculated based on gross earnings and in accordance with the IEA and the terms and conditions of the transfer of employment from Recon to AIL.

[114] Leave is reserved for the parties to return to the Authority if they cannot agree on quantum of lost wages, annual and public holiday arrears.

Non-publication

[115] A non-publication order under clause 10 (1) of schedule 2 of the Employment Relations Act 2000 (the Act) was made prohibiting publication of the sale and purchase agreement between Allied Investments Limited and Recon Security Limited.

Costs

[116] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[117] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Jones may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Allied Investments Limited will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[118] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁹

Sarah Kennedy-Martin
Member of the Employment

⁹ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1