

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2025] NZERA 675
3250300

BETWEEN KERRY WEBB
Applicant

AND KEITH ANDREWS TRUCKS
LIMITED
Respondent

Member of Authority: Peter Fuiava

Representatives: David Fleming, counsel for the Applicant
Charlotte Parkill and Sally Togher, counsel for the
Respondent

Investigation Meeting: 13 – 14 May 2025 in Auckland and by audio-visual link

Submissions and information received: 23 May and 4 June 2025 from the Applicant
23 May, 4 June and 10 September 2025 from the
Respondent

Determination: 23 October 2025

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] This employment problem primarily concerns a dispute about commission earnings which Kerry Webb a former sales representative for Keith Andrews Trucks (KAT or the company) has requested the Authority to investigate and determine. He also seeks a penalty under the Wages Protection Act 1983 for a breach relating to his individual employment agreement (IEA) and remedies for unjustified disadvantage grievances arising from the last period of his employment.

[2] KAT denies Mr Webb's claims in their entirety and has lodged in response a counterclaim that asserts that he failed to properly document the sale of four Mercedes trucks which caused loss to the company and reputational damage with a now former customer.

How has the Authority investigated?

[3] Mr Webb's case consisted of witness statements from himself and his partner Sue McLaughlin and former KAT dealer principal Kevin Curran. As Mr Curran lives outside Auckland, leave was granted for him to attend the investigation meeting remotely by audio-visual link (AVL).

[4] For KAT, witness statements from its then chief executive officer, Kurtis Andrews, former general manager of sales and customer experience, Kathleen Schluter, now former brand manager James Hudson-Owen, and current sales manager northern, Wesley Gielink, were provided. As Mr Hudson-Owen also lives outside Auckland, leave was granted for him to attend the investigation meeting by AVL as well. There were no audio or visual issues of note with Mr Curran or Mr Hudson-Owen's connection to the investigation meeting.

[5] All witnesses answered questions under oath or affirmation from me and the parties' representatives. 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.

What were the issues?

[6] The issues requiring investigation and determination were:

- (a) There is a dispute concerning commission earnings to resolve.
- (b) Was Mr Webb unjustifiably disadvantaged during the last period of his employment?
- (c) Mr Webb seeks a penalty for a breach of his IEA.
- (d) Has Mr Webb breached KAT's commission structure regarding unauthorised sales?
- (e) KAT seeks a declaration that Mr Webb breached the terms of his IEA for which it seeks a penalty.

What are the relevant facts?

[7] Mr Webb was employed by KAT as a sales representative from 19 June 2019 until he resigned on 24 March 2023 with four weeks' notice making 20 April 2023 his

last day of employment. According to KAT's website, the company is the largest independent commercial vehicle dealership in New Zealand that specialises in the sale and servicing of FUSO, Mercedes-Benz and Freightliner trucks, vans and buses. The company has several branches including Hamilton and Auckland where Mr Webb has previously worked. He worked at its Hamilton dealership from 2019 until he was formally transferred to the company's Auckland store on 1 January 2021.

[8] Mr Webb's IEA (signed 15 May 2019) required him to be paid a core salary of \$60,000 (gross) per annum which was effectively a retainer because approximately 80 percent of his income came from commissions on the trucks he sold.

[9] Schedule 3 of the IEA set out Mr Webb's initial commission structure (the previous commission structure) which was a percentage of KAT's retained profit margin on a sale. Depending on the number of units (trucks) Mr Webb sold during a calendar year, three different percentage categories could apply in calculating the commission to be paid. The previous commission structure relevantly stated:¹

Commissions will be paid in the last week of the month following the invoice date. In the event of dismissal, the employee shall forfeit and shall not be paid any commissions or bonus, which may be owing at the time of the dismissal.

[10] On 1 January 2022, the previous commission structure was replaced with a new commission structure (the new commission structure) which reduced the number of units that needed to be sold in order for a salesperson to move up to a higher percentage category which had increased for two of the three different percentage categories. The new commission structure relevantly stated (emphasis added):

COMPANY POLICY

ALL SALES

- Must comply with the Sales Process ... and all relevant information is supplied.
- Vehicles to be paid for prior to delivery (cash for keys). The only exceptions are those with pre-arranged account terms as per the KAT Policy to determine the appropriate deposit required for Vehicle Sale Agreements.
- In the event that a salesperson ceases his employment, *any unsettled commissions will be reviewed on a case-by-case basis* prior to the last day of employment to determine basis for settlement.

¹ IEA, Schedule 3.

...

All information contained within this "Sales Department Commission Structure" will be reviewed annually, can be subject to change from time to time and supersedes all past commission structures. In the event of a dispute, the final decision will be at the discretion of the Managing Director.

[11] KAT sales staff including Mr Webb were consulted about the new commission structure before it came into effect. Both he and his support witness, Mr Curran, signed the new commission structure on 14 December 2021 confirming their acceptance of its terms and conditions.

[12] One of the issues for Mr Webb is the point where it can be said that a sale has taken place for a sales commission to become payable. He contends that under both commission structures, commission became payable once a customer or purchaser signed what is known as a vehicle offer and sales agreement (VOSA) and the vehicle electronically entered into KAT's 'sold screen'. The company does not agree and says that the signing of the VOSA was just the beginning of a much longer sales process that was not completed until the truck was fully paid for and delivered to the customer. Only then was commission payable by the company.

The Freightliner conference

[13] The lead up to Mr Webb's resignation began when he attended a Freightliner sales conference in Australia in February 2023 with other members of KAT's staff which included sales manager central Damian O'Hara and then sales representative Mr Gielink.

[14] On 7 February 2023, Mr O'Hara emailed KAT's general manager for sales and customer experience Ms Schluter, and alleged that at the sales conference, Mr Webb had asked him how he was finding her as his new boss. When Mr O'Hara answered positively, it appeared to him that this was not the answer Mr Webb was looking for and the conversation changed to 'small talk'.

[15] Mr O'Hara further stated in his email that he felt uncomfortable with the conversation and struggled to discuss business with Mr Webb who did not seem to be 'engaged'. Mr O'Hara found this disappointing given they were at a conference and that he was enjoying the opportunity meeting with the New Zealand and Australian teams while also expanding his knowledge of the Freightliner brand.

[16] On 14 February 2023, Mark Pitham, national fleet sales manager for Freightliner, emailed Ms Schluter a written complaint about Mr Webb arising from the same sales conference. Mr Pitham stated that Mr Webb had made him very aware that he was not overly happy with the Freightliner brand and in particular with the lack of options surrounding an exhaust discharge design that he had seen on the display model in the car park. However, Mr Pitham stated that had Mr Webb 'bothered to check his facts' which he had not, he would have realised that his understanding of the 'specs' was in fact wrong.

[17] Mr Pitham went on to say that Mr Webb continued this point of contention 'ad nausea through dinner' and had made 'some rather snide digs' at the Freightliner brand along the way. It also appeared that he had a very negative attitude and seemed to be coercing another member of staff to join him in his 'negativity'. This was a 'huge disappointment' for Mr Pitham who described Mr Webb as a 'toxic force' who could drag down his KAT colleagues and the company with him.

[18] On 27 February 2023, Mr Webb was called into a meeting with Ms Schluter, who took notes. Also attending the meeting with Ms Schluter was Mr Gielink. The purpose of the meeting was to discuss the email that Ms Schluter had received from Mr Pitham regarding Mr Webb's behaviour at the Freightliner conference. During that meeting, Mr Webb was also provided with a copy of Mr Pitham's email and was asked for his comment. It was agreed that they would have a further meeting on Wednesday 1 March 2023.

[19] A second meeting was held on 1 March 2023 in which Ms Schluter and Mr Gielink met with Mr Webb to talk further about what had happened. On that occasion Mr Webb provided Ms Schluter and Mr Gielink with a written response to Mr Pitham's complaint. It is not clear whether at this meeting Mr Webb was also provided with a copy of Mr O'Hara's email for comment.

[20] In his undated written response, Mr Webb denied that he was not interested in the Freightliner brand or that he was a toxic force on his colleagues. He further stated that his discussion with Mr Pitham was in private and not on public display and that he had since spoken with the two other KAT sales staff who were also at the conference who said that they had not heard anything coercive or negative from him. Mr Webb

stated that he was at KAT to sell both Mercedes-Benz and Freightliner trucks and that he did not have an issue with the Freightliner brand. His concern was with the New Zealand configuration that had been ordered and the price that he and other sales representatives were expected to sell at.

[21] Following the second meeting, KAT decided to commence a formal investigation process into Mr Pitham's complaint. On 20 March 2023, KAT's group manager of human resources, Annette Hayes, wrote to Mr Webb to invite him to an employment disciplinary meeting on Wednesday 20 March 2023. Ms Hayes' letter stated that the meeting would be an opportunity for further discussion about the complaint and to obtain from Mr Webb his "final feedback" before the company turned its mind to the question of his behaviour and whether it satisfied the serious misconduct criteria as outlined in his IEA. Particular reference was made to cl 20 and 28 of the IEA which state:

20. **Summary dismissal**

20.1 We may terminate your employment without notice in the event of serious misconduct which by way of example includes, but is not limited to:

...

(c) any serious or significant breach of the implied duty of fidelity; or

...

28. **Employee Obligations**

...

28.4 You shall carry out your duties well, faithfully and diligently, providing us with the full benefit of your experience and knowledge.

28.5 You shall use your best endeavours to promote, develop and extend our business interests and reputation and not do anything to its detriment.

...

[22] By letter dated 24 March 2023, Mr Webb wrote to Mr Gielink to inform him of his resignation from KAT and providing him with four weeks' notice.

[23] Mr Webb states that, at the time his resignation took effect, he was owed commission on 64 trucks he had sold but which had not yet been invoiced for. The total commission owing on these vehicles amounted to \$288,038.95 although Mr Webb

accepts that he should only be paid commission on vehicles that have been invoiced and paid for by the customer.

[24] KAT denies liability on unpaid commission (whatever the final amount may be) on the ground that a sales representative's responsibilities do not end at the time a VOSA is signed by a customer but continue until the vehicle has been delivered and paid for by the customer. In Mr Webb's case, having left the company, another sales representative would now need to take responsibility to complete the sales process to final invoice and handover.

[25] KAT paid Mr Webb commission on vehicles that were invoiced, paid for and delivered up to one month after his employment ended or to May 2023 which amounted to \$31,803.82. The company says that it discussed this commission payment and its calculation with Mr Webb. Mr Webb estimates that commission of \$256,235.13 remains outstanding and owing to him and says that the company failed to properly consult and negotiate with him during his four-week notice period about his commission pipeline. Nor during this period did the company arrange a proper handover of his work which may have averted some of problems with his paperwork that form the basis of its counterclaim.

[26] On 17 May 2023, Mr Webb raised a dispute with KAT about his commission earnings. He also raised personal grievances of unjustified disadvantage regarding its disciplinary process and the lack of consultation around his last commission payment and alleged inconsistent treatment with another member of staff who sold vans.

[27] On 22 June 2023, KAT responded to Mr Webb's concerns denying his personal grievance claims and stating that it did not accept that he was entitled to any further commission payments.

[28] On 11 September 2023, Mr Webb's statement of problem and application for removal to the Employment Court were lodged with the Authority. KAT's statement in reply was lodged on 6 October and a notice of opposition against removal was subsequently filed on 17 October 2023. By preliminary determination dated 6 June 2024, the application for removal was declined.

[29] On 29 July 2024, Mr Webb filed his statement in reply to KAT's counterclaim in which the company alleged that he had sold four trucks to a (now) former customer in May 2022 that were not properly documented. Owing to the irregular way in which Mr Webb completed the VOSAs for these deals (two did not contain individual deal numbers and the remainder had duplicate deal numbers) the sales were outside of KAT's system until the customer informed the company in May 2023 that it had in fact purchased four trucks and not two.

[30] As KAT was unable to sell the trucks at the price Mr Webb had sold them because they had been underpriced, the customer threatened legal action but in the end opted to take its business elsewhere. KAT was able to cancel two of the four orders that were made, however, it was required to pay holding charges and interest on the two trucks that were manufactured and remained on its yard until these were eventually sold to another customer.

Whether Mr Webb is owed sales commission?

[31] The starting point in determining whether Mr Webb is due commissions on any trucks delivered after his employment ended is his IEA which specifies the terms under which commissions were to be paid by KAT. Schedule 3 of the IEA set out Mr Webb's rate of payment which comprised a core salary of \$60,000 (gross) per annum and a sales commission that was calculated on the basis of the number of vehicles sold in a calendar year and the relevant percentage category. It is common ground that commission was a percentage of the retained profit on a sale so if there was no profit, there was no commission.

[32] Mr Webb's IEA contained a variation clause that stated that it could be varied by the parties' mutual agreement in writing.² KAT submits that Mr Webb varied his IEA when he signed the new commission structure (see [11] above) evidencing his consent to its terms and conditions. As will become clear, I am not persuaded by that submission.

[33] The common bundle of documents provided to the Authority for its investigation contains two examples of a written variation to Mr Webb's IEA.³ These

² IEA, cl 35.

³ Joint Bundle, Volume One – General Bundle.

are in the form of letters dated 7 November 2019 and 14 December 2020 respectively which formally confirm amendments to Mr Webb's IEA with respect to his normal place of work at KAT's Hamilton and Auckland dealerships as noted above at [7].⁴

[34] The letters share the same subject line of "Re: Variations to Terms and Conditions of Employment" and further state that several terms and conditions to Mr Webb's employment contract "will change", that the variations will take effect on a particular date that was specified in the letter, that Mr Webb was required to acknowledge receipt of the letter and indicate his agreement to the proposed changes by signing the attached copy and returning it to KAT's human resources manager Ms Hayes. Finally, the letters advised Mr Webb that he should retain the top copy of the letter with his contract of employment and that he had the right to seek independent advice.

[35] In contrast, there is no similar covering letter with respect to the new commission structure which would have shown that it had been incorporated into Mr Webb's employment agreement as a variation. While the new commission structure is signed by KAT's managing director Aaron Smith and a number of other sales staff including Mr Gielink, Mr Curran and Mr Webb himself, there is an absence of wording in the new commission structure that makes it abundantly clear that its contents are now terms and conditions of his employment. If Mr Webb wanted to modify his own IEA in this way, I would have expected KAT to have issued him with a similar covering letter to what was provided to him earlier as noted above.

[36] However, no such letter exists and in the absence of that information I am not able to safely conclude that Mr Webb's IEA was varied to include the new commission structure as a term or condition of his employment. This leads me to conclude that the correct status of the new commission structure was that of an employment policy. This is evident from the text itself (see above at [10]) which refers to the new commission structure as a "Company Policy".

[37] As a general proposition, an employment policy is not expressly binding unless it is incorporated into the employment agreement.⁵ However, there is nothing in the

⁴ Joint Bundle, above at [3], pages 33 and 34.

⁵ *Cuttriss v Carter Holt Harvey Ltd* [2007] ERNZ 233 at [40].

policy document itself or Mr Webb's IEA that leads me to conclude that the new commission structure was expressly incorporated into the employment agreement.

[38] Even so, an employment policy could still find its way into an employment agreement as an implied term. However the threshold for implied terms is high.⁶ I accept that the new commission structure, which came into effect on 1 January 2022, had operated for the last 15-and-a-half months of Mr Webb's four years of employment. Throughout this period, the new commission structure dictated the calculation of his commissions which appears on its face to have been more financially generous to the sales staff giving them a greater "slice of the pie" as Mr Andrews' said at the investigation meeting. This was because the number of units (or trucks) that needed to be sold before sales staff could move up to a higher percentage category had reduced and the commissions payable in two of the three percentage categories had increased.

[39] While Mr Webb has financially benefited from the new commission structure being one of KAT's top performers, this does not mean that the new commission structure can be incorporated into his IEA through the back door of an implied term. Spanning some five to six pages, the document is not so obvious that it 'goes without saying' and as the commission structure can be reviewed and be subject to change by the company, this mutability does not sit well with the conspicuousness of an implied term.

[40] In any case, an implied term should not contradict the express terms of the parties' contract.⁷ KAT relies on the new commission structure to preclude payment of any further sales commission to Mr Webb on the basis that any "unsettled commissions" once he leaves are to be reviewed on a "case-by-case basis" (see [10] above). However, such a review is contrary to Schedule 3 of Mr Webb's IEA (at [9] above) which merely says that commissions will be paid in the last week of the month following the invoice date, and that in the event of dismissal (which did not apply to Mr Webb who resigned) any unpaid commission or bonus would be forfeited.

⁶ *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85 at [116] and *Vulcan Steel Ltd v Manufacturing & Construction Workers Union* (2022) 18 NZELR 789 at [90]-[91].

⁷ *Cuttriss v Carter Holt Harvey Ltd*, above n 5, at [47]-[48].

[41] If the new commission structure cannot be incorporated either as an express or an implied term, it must sit outside the parties' agreement. I have also considered whether by conduct the parties have mutually agreed to the new commission structure and its operation. However, the implications of the new commission structure does not truly manifest until the last four weeks of Mr Webb's employment and only then does it become apparent that there is a clear disconnect between the 'case-by-case' review provision as it applies to unsettled commissions and the actual wording of Mr Webb's IEA.

Conclusion on Commission dispute

[42] The new commission structure was never expressly incorporated into Mr Webb's employment agreement as a mutually-agreed variation under cl 35 of the IEA. Nor as an employment policy was it expressly or impliedly incorporated into the employment agreement either. It must follow that KAT's decision to limit Mr Webb's commissions to only those truck sales that concluded one month after his employment ended was a breach of his IEA.

Whether Mr Webb was unjustifiably disadvantaged in the last period of his employment?

Unjustified disadvantage arising from Commission payments

[43] KAT's action to limit Mr Webb's commissions to one-month after his employment ended also gives rise to an unjustified disadvantage but double recovery for claims that are based on the same set of factual circumstances is generally not permissible as a party cannot be expected to be compensated more than once for the same loss. Despite this, it is likely that the final amount of unpaid commission payable to Mr Webb (once this is known) will, in any case, be greater than any reasonable compensation award that can be made under s 123(1)(c)(i) of the Act.

Unjustified disadvantage in respect of the disciplinary process

[44] Mr Webb alleges that the complaint made against him by Mr O'Hara was solicited because Ms Hayes' letter of 20 March 2023 inviting Mr Webb to a disciplinary meeting (see [21] above) mentioned that the company had "reached out" to Mr O'Hara to gain his perception of any conversations or concerns during the Freightliner conference (the invitation letter).

[45] When considering justification, I am required to consider whether the employer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.⁸

[46] Although Mr Ohara's email of 7 February predates Mr Pitham's email of 14 February 2023 by one week, the invitation letter does not read that the company approached Mr O'Hara first. While Mr O'Hara's email is first in time, its tone and level of seriousness is markedly different to Mr Pitham, the national fleet sales manager for Freightliner who did not shy away from letting Ms Schluter know of Mr Webb's poor behaviour at his company's sales conference in February 2023.

[47] In his email, Mr Pitham stated that it would be "remiss" of him if he did not let her know of his observations of Mr Webb's behaviour which was on "public display" at the sales conference. The national sales manager called Mr Webb out for his "snide digs" and negativity at the Freightliner brand which were "in fact wrong" and him being a "toxic force" to his colleagues.

[48] Any fair and reasonable employer receiving a complaint from an important customer would have done what Ms Schluter did which was to engage in a preliminary inquiry into Mr Webb's conduct to determine whether the allegations had any merit and whether a formal disciplinary process was necessary. This was not a "witch hunt" as Mr Webb contends.

[49] It was further submitted that Mr Webb was disadvantaged by being told in the invitation letter that KAT was giving him the opportunity to provide his "final feedback" before a decision was made on whether his conduct constituted serious misconduct which could lead to sanctions up to and including "summary dismissal".

[50] However, KAT was precluded from going any further with its investigation because Mr Webb chose to resign which was a matter for him. Being a mature and experienced sales representative, I find that he was not disadvantaged by the words "final feedback" or "summary dismissal" in KAT's invitation letter. Whether Mr Webb's actions at the sales conference would have resulted in his ultimate dismissal for

⁸ The Act, s 103A(2).

serious misconduct is unlikely but I accept that not wanting to risk losing his unpaid commissions, Mr Webb chose to resign of his own accord.

Where to from here in assessing quantum of unpaid Commissions?

[51] Much time was spent at the investigation meeting on determining when a sale was said to have been made for sales commission to become payable. Mr Webb's position is that even if a vehicle is sold at a later date, the sale is complete once a VOSA is concluded between the salesperson and the customer and the vehicle entered into KAT's 'sold screen'. The company takes a different position and says that commissions are 'unsettled' until a vehicle is paid for and delivered to the customer. It further says that Mr Webb is not entitled to any commission that have settled after his employment ended, except to the extent determined by KAT.

[52] For the reasons given above, I do not agree with the company's position. Mr Webb is entitled to more commission than a month's worth of sales post the employment relationship. It was Mr Andrews' evidence that of the 64 vehicles sold by Mr Webb, 17 have been cancelled, 18 have already been paid commission on and 5 have still not been invoiced and delivered and may still fall through. Based on these numbers, there are 24 other vehicle sales unaccounted for which Mr Webb could potentially be paid commission on.

[53] In a recent decision from the Authority: *Renner v Manawatu Motors 1970 Limited* whose facts are similar to the present case,⁹ it was found that the applicant, Mr Renner, was entitled to commission on sales he instigated prior to the termination of his employment but which were completed after his employment ended.¹⁰ The Authority granted the parties the opportunity to work out and agree between themselves what commission was due to Mr Renner and if agreement could not be reached, reserved leave to return to the Authority which would then hear evidence on quantum and issue a determination accordingly.

[54] My preliminary views on the calculus of commission to Mr Webb is that there will be swings and roundabouts owing to the effluxion of time and work done by others. This may mean a sliding scale is adopted that recognises the decreasing contribution of

⁹ *Renner v Manawatu Motors 1970 Limited* [2025] NZERA 6.

¹⁰ At [52].

Mr Webb's work and the increasing contribution of others the longer a sale takes to completion. The parties may also wish to factor in the quantum of KAT's counterclaim for alleged losses (if any) which remain somewhat nebulous and difficult to pin down notwithstanding Mr Andrews' evidence.

Orders

[55] I direct counsel in this matter to work together with their clients and agree within the next 30 working days on the amount of outstanding commission payable to Mr Webb. If a direction to mediation would assist, it will be granted on application. A consent determination can also be issued if required. However, if matters remain unresolved after this period, leave is granted for the matter to revert to the Authority for a determination on quantum with respect to Mr Webb's claim and KAT's counterclaim.

Costs

[56] Costs are reserved.

Peter Fuiava
Member of the Employment Relations Authority