

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 95
3206939

BETWEEN YIPING CHEN
Applicant

AND ARMSTRONG PRESTIGE LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Applicant in person
Laura Briffett, counsel for Respondent

Investigation Meeting: 21 June 2024

Submissions received: 24 July 2024 from the Applicant
26 July 2024 from the Respondent

Final information received: 20 November 2024

Determination: 20 February 2025

DETERMINATION OF THE AUTHORITY

[1] The Applicant, Ms Chen was employed as a Mercedes-Benz Sales Consultant by the respondent, AP to sell luxury cars. She received a salary and commission on vehicle sales she made. She signed an individual employment agreement (IEA). She commenced her employment on 3 December 2018 and resigned on 14 September 2019. Her final day of employment was 11 October 2019.

[2] Ms Chen did not lodge claims in the Authority against AP until 22 December 2022. Her claim (amended after I sought more clarity) included that she was unjustifiably constructively dismissed, disadvantaged in her employment. She claimed she had been underpaid during her

employment including an alleged shortfall or non-payment of commission on car sales and because she was verbally promised a salary above what she received. She included that she was not able to take work breaks. Ms Chen claimed various remedies.

[3] In a preliminary investigation process I determined that only one of the several grievances that Ms Chen initially lodged in the Authority had been raised within time¹ leaving a single constructive dismissal grievance for investigation based on allegations that commission payments were consistently not paid correctly and information about them not communicated.

[4] AP denies all remaining substantive claims and says of the constructive dismissal claim that Ms Chen communicated that she resigned due to childcare issues and to pursue a career in real estate. It says it has completed a number of audits of Ms Chen's commission payments since Ms Chen first raised matters through a then representative with AP in early 2020. It says it picked up a correction after these proceedings were lodged in relation to an aspect of commission not picked up by Ms Chen and paid this to her in September 2023. This was it says an error from around the April 2019 time when the commission payment structure changed. AP denies Ms Chen's claims that she worked without breaks or was promised a guaranteed income above the guaranteed retainer in her IEA of \$40,000.00. It says that commission paid in addition to the base salary was in relation to how many cars Ms Chen sold each month.

The Authority's investigation

[5] I determined the preliminary matter, as explained above, on 16 February 2024.

[6] When the Authority sought to have a phone conference call on or about 19 February 2024 to progress the substantive claims remaining, Ms Chen indicated that she needed time to complete study commitments and said that she was obtaining legal representation. A third phone conference call then occurred on 6 March 2024 to better define the remaining issues for investigation and set up a timetable to complete the substantive investigation. Ms Chen's newly instructed representative and AP's counsel attended. My subsequent directions the same day clarified a timetable for evidence and set out the remaining issues that were agreed as those to be investigated.²

¹ *Chen v Armstrong Prestige Limited* [2024] NZERA 91; Employment Relations Act 2000, ss114 and 115.

² Directions of the Authority, March 2024 at [3].

[7] On 13 May 2024 Ms Chen indicated she was no longer instructing her representative and asked for an extension for the previously directed time to lodge her evidence. This was granted with an amended time for the respondent to respond. Briefs of evidence were lodged and served by the parties.

[8] A substantive investigation meeting was held on 21 June 2024. On oath or affirmation, I heard evidence from all witnesses. Ms Chen continued to represent herself, AP by counsel.

[9] On 18 June 2024, two days before the investigation meeting, Ms Chen emailed the Authority asking what she needed to do to 'add' a third party as a second respondent. I heard from the parties at the commencement of the investigation meeting about this and decided not to join this third party because I considered I did not have any basis to do so.

[10] I timetabled for written submissions from the parties due primarily to the lack of time to hear oral submissions. I also considered this would be a fairer step for Ms Chen as an unrepresented party who seemed unprepared to respond to AP counsel's already provided (as previously directed) written synopsis of submissions. I timetabled for Ms Chen to respond to these written submissions and then for a written right of reply for AP.

[11] I also asked for more information at the end of the Investigation Meeting from the parties and outlined this in a subsequent communication on 24 June 2024. Most of this was in relation to claims about commission on specific vehicles. Ms Chen's oral evidence at the Investigation Meeting was accompanied by handing me material to further answer my questions about reasons she claimed further commission on certain vehicles. AP undertook to check and respond to this information which includes some briefly worded material that the Authority had translated from Mandarin that Ms Chen said were her communications with a car customer about selling a car. I also requested two pages of more readable material from part of the evidence provided by AP (the two schedules from the employment agreement that recorded two different commission structures). Parties were given the opportunity to make any further comment they wanted to about this further information in their submissions.

[12] Ms Chen then asked for an extension of time to lodge her written submissions, this was granted. The last written submissions were then received 'in reply' from AP counsel on 26 July 2024, an extension also being granted to AP for this.

[13] In October 2024 when considering in more detail some of the material before me as I undertook to complete the task of completing a determination I requested further information from the parties. I received this from the respondent on 5 November 2024 from AP and from Ms Chen on 19 November 2024. I then further reserved my determination.

[14] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination states findings and conclusions necessary to resolve this matter and does not include reference to all evidence and submissions.

Preliminary issues

Interest claimed on part of claim resolved

[15] I am satisfied based on emails before me and then hearing from the parties at the investigation meeting that they resolved a part of Ms Chen's claims by way of a nett payment that Ms Chen accepted and was paid to her but expressed by AP as being without any admission of liability. This removed two linked issues for investigation³. Ms Chen then sought at the investigation meeting a nominal payment of interest on this nett amount paid to her. Ms Chen appeared to still consider that the payment represented admission of liability and expressed that she variously wanted 'compensation, penalties and interest' awarded against AP for this liability, but then confirmed to me at the investigation meeting that it was just interest that she wanted to be paid to her.

[16] After the investigation meeting, Ms Chen's written submission included that AP in settling this matter had 'implied liability' and repeated a claim for interest and a penalty relating to this part of her claim alongside multiple other penalties not previously claimed in the Authority.

[17] Accordingly, I have not further investigated this part of Ms Chen's claim for interest or other remedies based on my view that this matter was settled with no admission of liability. I accept the submission for AP that I cannot now consider further 'remedies' including interest because I have not made any findings on the substantive matter of liability.

³ See above at note 2 at [3] b.& c.

Penalties claimed after the investigation meeting

[18] As noted above, I timetabled for the parties to provide further written submissions beyond the date of the investigation meeting in part because the time did not allow for oral submissions. I remained mindful that Ms Chen was unrepresented and appeared to me not fully prepared to respond on the day. Ms Chen in her subsequent written submissions included a list of penalty applications for a long list of statutory breaches asking that I award a total of \$220,000.00 in penalties⁴. It is submitted for AP that I disregard this list. I agree. Ms Chen did not bring applications for penalties within the 12 month time frame to do so.⁵ The statutory timeframe to commence penalty applications is strict with no statutory exceptions. The penalties relate to employment that ended with Ms Chen's resignation in 2019. Nothing should be taken from the fact that Ms Chen sought this list of penalties. This includes the above mentioned penalty sought for the matter I concluded above at [17] that the parties had settled prior to the Investigation Meeting.

Late matters claimed by Ms Chen

[19] It is submitted for AP that Ms Chen added for the first time in her written submissions matters not previously raised or were not matters that were included as those for investigation⁶ and that I should not consider these in my determination. I agree.

Issues

[20] The remaining issues for determination are:

- a. What commission payments applied to Ms Chen's employment based on what was agreed between the parties (taking the individual employment agreement (IEA) as a starting point)?
- b. Depending on the above, has Ms Chen been underpaid for any commission payments on car sales?

⁴ Contained in a section of Ms Chen's 'Applicant's Closing Submissions' dated 23 July 2024 at Paragraph 30 'Part B'.

⁵ Employment Relations Act 2000, s135(5).

⁶ See above at note 2 at [3].

- c. Has Ms Chen shown she is entitled to a remedy for not being granted breaks during her employment?
- d. Was Ms Chen underpaid according to being promised more earnings than those described in her IEA and if so does this result in her being awarded a monetary remedy for the loss up to the earnings promised as a breach of contract?
- e. Has Ms Chen shown that AP constructively dismissed her because she was consistently incorrectly paid commission on sales and not provided with accurate information related to payment of commission on sales in a manner that breached a term of her employment agreement, causing her to resign. If so, was it reasonably foreseeable to AP that this would happen? If so, was the dismissal unjustified and what if any remedies are to be ordered?
- f. Is party to contribute to the costs of the other?

What commission payments applied to Ms Chen's employment based on what was agreed between the parties (taking the individual employment agreement as a starting point)?

[21] Ms Chen claims that during her employment she was either not paid or underpaid commission owed on a series of vehicles. A list of those vehicles was included in Ms Chen's brief of evidence. AP has responded in detail to each vehicle commission arrears claimed in evidence presented through Ms Wilkins. I will consider each vehicle below as to whether there have been any breaches of contract in relation to commission payments and whether there is arrears owed as Ms Chen claims. First, I will set out the background to the dispute about commission payments, and then consider what the parties agreed would be the basis on which Ms Chen would be entitled to be paid commission payments. This will then assist me to consider the contractual breaches alleged by Ms Chen.

History of the commission payments dispute

[22] I accept that Ms Chen's unpaid commission claims were first brought to Ms Wilkins' attention in the letter from her representative on 8 January 2020. Ms Wilkins responded promptly on 20 January 2020 to the request from that representative to provide them with documented detail showing all cars sold and the corresponding commission paid to Ms Chen during her employment. Ms Wilkins says that at this stage AP 'compared' the payments to payroll records and believed they 'balanced.' A further letter was then received from Ms Chen's

representative. This occurred after some emailed messages from the representative requiring some further clarity about the terminology used and the application of commission calculations recorded in schedule 3 of the IEA and the subsequent schedule effective from 1 April 2019. Ms Wilkins responded to these emails and requests. Her communications show that she gave clear explanations. A fuller explanation about what details were behind Ms Chen's concerns about claimed unpaid commission was not received from Ms Chen through her representative until a letter dated 12 August 2020. Ms Wilkin's evidence is that she received it on 21 August 2020.

[23] The 12 August 2020 letter included that Ms Chen considered she should be paid an outstanding total of \$19,338.00 on commission on vehicles sold from January 2019 onwards. In the letter, \$10,000 of this claimed amount is simply described as being in relation to incorrect commission paid 'from April to September 2019' 'according to the new structure.'⁷ There was no detail provided as to reasoning in the letter but attached to the letter was a table of what I understand to have been Ms Chen's own calculations. In the above letter Ms Wilkins is asked by the representative to 'confirm that these underpayments are correct and owed' noting that further clarity can be provided around the 'figures'.

[24] Ms Wilkins not unreasonably sought further clarification on 26 August 2020 saying that before AP conducts a 'second reconciliation' it required clarity about the \$10,000 claimed as underpaid between April and September 2019, and about one vehicle listed as sold to a specific person that AP could find no details of. When she did not receive a response, Ms Wilkins followed up in an email dated 4 September 2020 to the representative who apologised in return email that day that it was his 'oversight' for the delay and replied he would 'get back to you in due course.' AP did not hear from the representative again with no explanation as to why. AP did not hear from Ms Chen again until she lodged multiple claims in the Authority including her unpaid commission issues on 22 December 2022. This was more than three years after the last contact from Ms Chen's representative promising further details for AP to check reasons why Ms Chen disputed her commission payments.

[25] Ms Chen's first statement of problem included that she alleged underpaid commission of \$19,000 during the time she worked for AP. The amended statement of problem repeated

⁷ That Ms Chen was concerned about commission payments after the structure changed is consistent with her communication with another representative, something she confirmed in further information requested by the Authority in November 2024.

this in the section 'relief sought' but continued not to provide any further clarity as to how this figure was arrived at and why. Ms Chen did not provide further information about this until her brief of evidence and then with some more clarity when I was able to ask her questions to help me better understand her evidence at the investigation meeting.

What was agreed to about how commission would be calculated and paid on car sales?

[26] There were two commission schemes operating during Ms Chen's employment contained in schedule 3 of Ms Chen's individual employment agreement (IEA) that I will call the 'first scheme' and the variation schedule 3 that Ms Chen signed on 23 April 2019 that applied from 1 April 2019 that I will call the 'second scheme'.

First scheme

[27] Beyond a retainer salary of \$40,000.00, Ms Chen could earn a further monthly commission to be paid 'on delivery of the vehicle to the customer who has paid'; 'fleet' vehicles sold attracted a flat commission rate of \$200.00 each; other vehicles new and used that were sold attracted commission based on a table depending on the number of vehicles sold in the applicable month being:

- 1- 4 vehicles - \$200.00 per unit
- 5-9 vehicles - \$300.00 per unit
- 10-14 vehicles - \$400.00 per unit
- 15+ vehicles - \$500.00 per unit

Second scheme applying from 1 April 2019

[28] Again, beyond a retainer salary of \$40,000.00 that did not change from the first scheme, monthly commission was to be paid on the number of vehicles 'paid for and delivered during the months.' The commission rate per vehicle sold per month was as follows:

- 1- 6 vehicles - 7% of gross profit on the sale on all units
- 7 – 15 vehicles -10% of gross profit on the sale on all units
- 16+ vehicles - 12% of gross profit on the sale on all units

[29] The second scheme includes more details in the ‘additional notes’ than the first scheme. These add that ‘wholesale’ vehicles do not attract commission; that the ‘gross profit’ will be calculated ‘on the GST exclusive gross profit on the vehicle, after taking into account any yard load, preparation and sales costs’; that ‘Qualifying Units (New and Used) ...are classified as both new, demonstrator and used vehicles sold.’ Vehicles not in these categories are paid at the minimum commission [\$250.00 per unit]; that no commission is payable on units delivered after an employee leaves.

[30] Neither commission scheme enabled a prediction of commission until the end of the month because both rely on the number of vehicles sold per month. Calculations therefore can reasonably be interpreted as retrospective. Ms Wilkinson says that the second scheme was put in place to incentivise selling vehicles without ‘discounts’ thrown in by the salesperson to get the sale across the line which in turn affects the gross profit on the vehicle. I found this evidence understandable from a commercial perspective. That this was a change to how the commission was to be calculated in the second scheme is referenced in the variation to Schedule 3 that Ms Chen signed with the definition of ‘gross profit’ being:

Gross Profit – The gross profit will be calculated using the GST exclusive gross profit on the vehicle, after taking into account any yard load, preparation, and costs.

[31] Those three descriptors above ‘yard load, preparation, and costs’ are not further defined in Schedule 3.

[32] Ms Chen raised (as I understood it for the first time) at the investigation meeting that she wanted to see AP’s business breakdown showing how they calculated ‘gross profit’ on vehicles. AP’s response to this was that this was business sensitive information. On further questioning my understanding of what Ms Chen was unhappy about was the change to deducting various ‘extras’ that a salesperson may include to get the deal over the line and how much was deducted for these. I return to this below.

[33] On the face of it the second scheme varies the way that the parties agreed commission would be calculated and more importantly the change from the flat rate paid per vehicle (except where a minimum rate applied still) to one where a graduated ‘percentage’ was paid according

to vehicle numbers sold in the month with a percentage of a 'gross profit' figure. That 'gross profit' figure may then not be clear until the tally up of costs and overheads (not outlined in details in the second scheme) was done for any extras such as the example given above by Ms Wilkins in her communication to Ms Chen's then representative in January 2020⁸ regarding (say) a towbar offered by the salesperson that added an extra cost that came off the gross profit figure under the second scheme.

Did Ms Chen agree to the second scheme?

[34] In the investigation meeting I asked Ms Chen why she signed the variation to her IEA being the Schedule 3 that included the second scheme if (as she says now) she did not agree with the way the commission payments would be calculated. Ms Chen's answer to me was that she struggled to understand written English. I find this answer inconsistent with her representations otherwise about her post graduate legal study in New Zealand and her former experience selling the same brand of luxury cars in an English speaking country before she worked for AP. I find that on balance AP could reasonably have relied on Ms Chen having agreed to both commission schemes and the descriptions carried in the consecutive schedules 3 in order to calculate the commission to be paid to her for car sales. I will now consider the commission payments that Ms Chen says she remains unpaid for.

Has Ms Chen been underpaid for any commission payments on car sales during her

Vehicle commissions disputed

[35] Ms Chen claims that during her employment with AP vehicles were sold by her and earned her more commission than what she was paid. I set out below the issues alongside each vehicle and make findings accordingly against each vehicle situation.

[36] I have anonymised third party, customer names and Registration Numbers (REGO) of all vehicles but if necessary the make and or model identifiers because this may be relevant to the status of the 'unit' that attracts commission or a certain level of commission.

⁸ Response email 21 January 2020 from Ms Wilkins to Ms Chen's representative, Respondent Bundle of Documents, AW12, page 128.

[37] Accordingly, I will follow alphabetically from 'Vehicle A' in the same order the vehicles appear in the summary table 'Annexure 1' to the Respondent Submissions dated 26 July 2024.

Vehicle A ('Valente' sold to a company)

[38] Ms Chen claimed in the table attached to the letter that her then representative sent to Ms Watkins on 21 August 2020 that she was owed \$500.00 for this sale. I accept several AP audits occurred after this due to Ms Wilkin's efforts. I found Ms Wilkins to be a plausible witness who was genuinely concerned to ensure that Ms Chen had been paid correctly. In her brief of evidence, Ms Chen now claims \$600.00 owing on this sale. When I asked her about this increase she gave oral evidence that she now claimed the extra \$100.00 on the basis that it was a commercial vehicle and Mr Mearns had verbally promised \$600.00 commission for commercial vehicles in January 2019. This is something I understand is colloquially called a 'bounty' to boost sales. I accept that this was not something Ms Chen had raised before, and Mr Mearns could not now reasonably have recalled this some five years on. I accept AP has since checked emails and can find nothing to support any 'bounty' offered to support this in January 2019.

[39] I find a lack of evidence before me to support there was a verbal promise to pay the greater commission of \$600.00 (an extra \$100.00 still owing). If this was genuinely Ms Chen's concern I find it likely that she would have raised this earlier. I do not find there is likely any further commission owing on this vehicle.

Vehicles B, C, D sold in January 2019

[40] Ms Chen claims these vehicles sold by her in January 2019 were commercial vehicles and also attracted the 'bounty' verbally offered by Mr Mearns on 'commercial' vehicles that month. She says these were all commercial vehicles. She did raise this as the shortfall paid on these vehicle commissions in January 2020 through her then representative but gave no explanation to AP until her brief of evidence in 2024. AP says its audit shows that vehicle C was not a commercial vehicle and was legitimately paid at \$400.00 commission under the first scheme according to the number of cars sold that month. I accept this as correct based on AP's documentary evidenced before me.

[41] AP says that similar to the claim regarding vehicle A, it could not find any email evidence showing there was a 'bounty' offered of \$600.00 paid that month for commercial

vehicles which I understand it does not dispute vehicles B and D were. There is no assistance to be had at Schedule 3 (first scheme) which is the best evidence I have to show me what was contractually agreed as to payment of commission for commercial vehicles sold. Schedule 3 is silent about this. I do not find Ms Chen's claims are supported by sufficient evidence beyond schedule 3 for the first scheme to show me she was contractually entitled to a further \$200.00 extra for Vehicles B and D. I do not find the commission shortfall claimed is owed to Ms Chen on vehicles B, C and D.

Vehicle E

[42] Ms Chen says this car attracted a bounty of an extra \$200.00 that she was not paid. AP has provided an email from February 2019 that shows Ms Mearns had in fact offered this bounty for specific type of vehicles being 'X Class'. The vehicle sold by Ms Chen was a 'sprinter' which was not the 'X Class' to which the bounty of an extra \$200.00 applied. I am not satisfied Ms Chen would have been confused by this. I accept this vehicle was not underpaid by \$200.00 as claimed.

Vehicles F, G, H

[43] Ms Chen claims for these cars that she should have been paid an extra \$100.00 commission on each sale rather than the \$300.00 each she was paid. I am satisfied that records show there was a mistake made for the five vehicles which came under the first scheme which operated a flat rate per vehicle deepening on the number sold. Five were in the bracket attracting \$300.00 per unit. Ms Chen was mistakenly paid \$200.00 per unit. This was corrected.⁹ I do not find anything further is owed.

Vehicle I

[44] Ms Chen claims she was unpaid for any commission on this vehicle. AP records show that the vehicle was a 2015 car. AP has provided the VIN¹⁰ evidence to show it then was registered under a different registration number. I accept AP has shown further record in February 2019 that under the new registration number Ms Chen was paid correctly for this being a car at the agreed commission rate under the first schedule that month: \$300.00. I do not find anything further is owed.

⁹ Payslip page 167 of the bundle of documents.

¹⁰ Vehicle Identification Number

Vehicle J

[45] AP says that this vehicle has been referred to wrongly by Ms Chen via the registration and tracking the VIN. Commission was paid but was also caught in an error paying \$200.00 for the month it was sold, rather than \$300.00. I accept the evidence that this was then corrected¹¹.

Vehicle K

[46] AP says that it could not initially find this vehicle in its system and then did so. Ms Chen claims this vehicle was one she was owed commission for. I accept that AP found the paperwork for the sale, and it evidences that another salesperson was credited to the sale. I prefer AP's evidence here. I accept it had a hierarchy of steps when approving sales and commission. Ms Chen when pressed appeared to consider because she had done the earlier work she should get commission for the sale. She explained in her oral evidence when pressed that she felt it was 'just unfair' that another salesperson got the sale because the customer was her friend's friend. The commission structure she agreed to does not appear to support this. Ms Chen has shown nothing to support some lack of honesty by another sales person. I do not find Ms Chen is owed money for commission on this vehicle.

Vehicle L

[47] I accept the evidence of AP that this was one of the five vehicles referred to above (*F, G & H*) and for the same reason I accept an error was corrected for the commission rate. I do not find there remains money owed for commission on this vehicle.

Vehicle M

[48] Ms Chen says that she was not paid \$300.00 commission for selling this car. AP's documentary evidence supports this vehicle was sold on 2 April 2019 and commission was paid but as part of 'catch up payments'.¹² I do not find there is further money owing on commission for this vehicle.

¹¹ Payslip, page 181 of the bundle of documents.

¹² Documentation page showing rectification in April 2019, page 72 of the bundle of documents.

Vehicle N

[49] Ms Chen says she sold this vehicle to [a named customer] and remained unpaid for \$300.00 commission on the sale. AP says that the vehicle sales invoice supports that this vehicle was sold to a company of which the person named by Ms Chen was the director. In her oral evidence she says she followed up with the customer in her 'system'. The salesperson showing on AP paperwork was not Ms Chen. The invoice notes that it was a 'wholesale deal'. AP points me to the second scheme Ms Chen agreed to for commission payments in April 2019 which excludes wholesale vehicles from commission payments. I prefer AP's evidence supported by the invoice evidence. Ms Chen provided nothing to the contrary to support she sold the vehicle. I do not find any commission is owed to Ms Chen on this vehicle.

Vehicle O

[50] Ms Chen claims she is owed \$300.00 commission on the sale of this vehicle. AP says it has checked the deal pack and that it shows it was sold by another salesperson. AP further checked the system it has and could see that the deal was originally led by a different salesperson but no where does it record Ms Chen's involvement. This was a sale occurring in April 2019. I am satisfied by the evidence from AP provided that Ms Chen is not owed commission on this vehicle sale.

Vehicles P-U (six vehicles)

[51] Ms Chen claims a total of \$2,617.00 as underpaid commission on these six vehicles. An email trail provided by AP supports corrections to accord with the new commission scheme which meant Ms Chen was paid additional payments of \$2,100.00 gross to account for this. I do not find there is further commission owed.

Vehicles V and W

[52] Ms Chen claims these vehicles were underpaid for commission and that she sold them in April 2019. I accept that AP has provided documentation showing that these vehicles were sold in May 2019 (I note that commission under both schemes became payable upon delivery and payment by the customer). I accept the evidence of AP that it has shown commission paid on these vehicles in May 2019. I do not find further commission due to Ms Chen.

Vehicle X, Y, Z and BB

[53] Ms Chen says she is owed for commission on these four vehicles. AP has referred me to the second commission scheme and how it calculated what was paid by percentage of gross profit on these vehicles. I prefer the evidence of AP that nothing further is owed to Ms Chen for commission on these vehicles.

Vehicles AA and CC

[54] Ms Chen claims vehicle AA commission payment should have been paid at \$300.00 and not the \$250.00 minimum payment as paid to her. In her oral evidence Ms Chen claimed that Mr Mearns promised this extra payment. He denied this and noted that no one would be paid a minimum rate of \$300.00 which was contrary to the second scheme that referred to \$250.00. I have nothing before me to support this claim made for the first time in oral evidence. I accept AP has likely paid this commission correctly and there is nothing further to be paid to Ms Chen. The same reasoning applies to vehicle CC.

Summary of findings as to commission on vehicles

[55] Standing back from the above I find that of the vehicles that Ms Chen detailed as being either unpaid or short on commission, AP incorrectly paid Ms Chen commission on vehicles sold up to April 2019. I do not find further commission payments are owed to Ms Chen as claimed.

Has Ms Chen shown she is entitled to a remedy for not being granted breaks during her employment?

[56] Ms Chen's claim for not receiving breaks was described in her amended statement of problem as not receiving a break every two hours during her shifts with 'barely enough time for lunch'. In her brief of evidence for these substantive proceedings Ms Chen recorded that she did not have any 'rest breaks' and 'barely had meal breaks'. She refers to AP not recording time in the sales department unlike other employees working in the dealership.

[57] AP says that time is not recorded in the sales department because employees are salaried. I accept that there were no clock in and out times for breaks for Ms Chen working as a salesperson, in the sales department. That can be a risk taken by an employer if employees work long hours and end up not getting reimbursed to the level of minimum wage if (say) they are

unsuccessful at selling cars to a level commensurate with overall taxable earnings that would meet the minimum wage per every hour they worked.

[58] I accept as plausible the evidence of Mr Buchanan who described a relaxed attitude to salespeople who were trusted to take breaks and that this was explained to all new employees. He recalled Ms Chen needing to go away from the workplace to feed her young child. Mr Mearns also gave evidence to support this. Ms Chen claimed this was a 'lie' during the investigation meeting or that she could not recall this happening. Mr Buchanan recalled these breaks being longer than a usual break but that no issue was raised with this because 'alot of us' had 'young families'.

[59] AP in its submissions points to Ms Chen accepting in cross examination the various text messaging before me that shows that she sent Mr Buchanan text messages to let him know she was taking a break. Mr Buchanan's responses confirm her breaks as being allowed. AP also points to Ms Chen's answers in cross examination where she would not accept that having the opportunity to go out and get her lunch could be considered a lunch break. AP submits this is an unreasonable position to take. I agree that going out to get one's lunch could reasonably be considered part of a break from work.

[60] The IEA includes the following at clause 5.2.

Rest periods and meal breaks shall be regarded as agreed but shall be consistent with the service requirements of our business determined by us.

[61] There are statutory provisions regarding breaks for employees.¹³ They are detailed and serve as the default position in the event the parties to the employment have not agreed 'on the times at which the employee is to take rest breaks and meal breaks during the employee's work period.' This agreement can be contained in an IEA and Ms Chen's contains the above which is nonspecific about the timing of breaks agreed to.

[62] Compensatory remedies for breaches of statutory break provisions are only available for those in industries where exemptions to breaks apply¹⁴. Otherwise, the matter becomes one

¹³ Employment Relations Act 2000, Part 6D.

¹⁴ Employment Relations Act 2000, s 69ZEB relating to s69ZEA.

where a penalty can be applied for¹⁵. It is submitted for AP that Ms Chen did not apply for a penalty under the appropriate provision. I agree. I note that Ms Chen applied for a \$20,000.00 penalty for 'failure to provide rest and meal breaks' but not until after the investigation meeting in her written submissions. I have referred to this above. I have already found that the application for a penalty is well outside the statutory timeframe. Even if it had been included when Ms Chen lodged her claims in January 2022 the time frame had already expired by then.

[63] I do not find that I have sufficient evidence to show Ms Chen did not take breaks during her working days and Ms Chen has not shown she is entitled to a remedy for not having breaks when working for AP. To that extent I make no declaration that AP has breached any statutory provision about breaks. Already noted above, the application for a penalty would have come too late to have been considered.

Was Ms Chen underpaid according to being verbally promised more earnings than those described in her IEA and if so does this result in her being awarded a monetary remedy for the loss up to the earnings promised?

[64] Ms Chen's evidence is that she earned a total of \$46,200.00 in total from 3 December 2018 to the end of employment on 11 October 2019. She calculates proportionally on her 44.5 weeks of employment as a \$65,050.00 shortfall based on the promise she says was made to her to earn annually a salary of \$130,000.00 gross earnings. I accept the submission for AP that Ms Chen's total earnings for the period of her employment were in fact higher than she has put forward. I accept the documentary evidence and pay records show a total figure of \$65,210.00 plus arrears paid to her in September 2023 bringing a total payment to \$66,964.61. I also accept AP's position that there was no contractual entitlement to be paid \$130,000.00 gross salary unless that was the total arrived at after earning commissions on selling a certain number of vehicles each month. I accept this for the following reasons:

- a. Schedule 3 of Ms Chen's IEA reflecting the first scheme (the first Schedule 3) includes under 'potential earnings' a 'base salary' figure of \$40,000.00' and a 'variable portion' as '\$90,000' totalling '\$130,000.00', a total described as 'Target earnings before other benefits'. The further benefits are referred to as '\$10,000.00' for 'motor

¹⁵ Employment Relations Act 2000, s69ZF.

vehicle (estimate)' which I understand was the use of a company vehicle, and 'kiwi saver' if opted into. A total 'target remuneration' is then described as \$145,900.00 with the words under this stating:

Based on selling 15 cars per month
Kiwi saver for those who choose to opt in

b. Commission calculations follow the above in tabulated form (with examples) and are headed 'Factors of Bonus Structure' based on monthly commission payments for vehicle sales based on 'new and used units delivered during the month'. I refer to these in more detail above when considering the claims relating specifically to payment of commission.

c. The final paragraph in 'Schedule 3' includes that all payments are expressed in gross; that AP can alter the commission structure without consultation (the named 'Second Schedule' of the IEA inconsistently refers to the commission structure being subject to change after consultation with the employee); that it applies to the 2019 financial year (1 April 2018 – 31 March 2019); that AP can claim back overpayments of commissions and then *-Your target earnings are by no means a guarantee. Your only guaranteed income is your retainer.*¹⁶

d. As could reasonably be expected from the above, AP then promulgated a revised commission structure - the second scheme - effective from April 2019 to the end of the financial year in 2020, the subsequent financial year commencing during Ms Chen's employment period. The second scheme as also noted above is reflected in the varied Schedule Ms Chen signed on 23 April 2019 (the second Schedule 3). As noted in more detail above, the second scheme in the second Schedule 3 changed the way commission was calculated but it retained the 'base salary' as \$40,000,00 reduced the 'Variable Portion' to \$72,000.00 but included a minimum commission for vehicle sales added as \$250.00. The wording was retained as noted above from the first Schedule 3 being that *-Your target earnings are by no means a guarantee. Your only guaranteed income is your retainer*¹⁷.

¹⁶ Italics added for emphasis.

¹⁷ Italics added for emphasis.

e. Again, while Ms Chen says she wasn't happy with the second scheme in Schedule 3 she signed it on 23 April 2019. AP submits that Ms Chen's claim is not credible¹⁸ that she did not understand the written English wording in either Schedule 3 about her understanding of the guaranteed earnings being recorded as the \$40,000.00 retainer. I agree with that submission. Ms Chen accepted in cross examination that she understood she could have sought advice and did not do so. In cross examination she accepted that her CV contains a statement that she is fluent in English. As already noted, Ms Chen has referred to completing a post graduate university law study in New Zealand, in her brief of evidence she refers to herself as a 'master of laws student'. I find Ms Chen could have reasonably understood or taken steps to understand before signing how the commission payments were targeted earnings based on vehicles she sold and that this was obviously unknown until the vehicles were actually sold and that her only guaranteed earnings were the \$40,000.00 'base salary'.

g. The above is inconsistent with Ms Chen's claim that Mr Mearns verbally guaranteed her an income of \$130,000.00. Mr Mearns' evidence is that Ms Chen was employed on a 'base salary' with the 'opportunity to earn an unlimited amount of commission'. He recalls telling Ms Chen this when he interviewed her. He recalls telling her it involved hard work and potential to earn 'a lot' and that he said something like it probably wouldn't be worth doing if she was only going to earn \$100,000.' Mr Mearns evidence is that he did not tell Ms Chen she was guaranteed \$130,000.00. I accept this as likely.

[65] Considering the above, I do not find that Ms Chen has shown that she is contractually entitled to be reimbursed for an underpayment because she was 'promised' a guaranteed contractual salary of \$130,00.00 gross per year.

Has Ms Chen shown that AP constructively dismissed her because she was consistently incorrectly paid commission on sales and not provided with accurate information related to payment of commission on sales in a manner that breached a term of her employment agreement, causing her to resign. If so, was it reasonably foreseeable to AP that this would happen? If so, was the dismissal unjustified and what if any remedies are to be ordered?

¹⁸ Oral evidence when answering my questions at the investigation meeting.

[66] The Court of Appeal¹⁹ has listed three non-exhaustive situations where constructive dismissal might occur:

- Where the employee is given a choice of resignation or dismissal
- Where the employer has followed a course of conduct with the deliberate and dominant purpose or coercing an employee to resign
- Where a breach of duty by the employer leads a worker to resign

[67] The Court of Appeal²⁰ has held that the correct approach in determining a constructive dismissal where there is an apparent resignation is to determine whether the resignation was caused by the breach of duty on the part of the employer considering all the circumstances of the resignation. Secondly, to ask whether the breach of duty is of sufficient seriousness that a substantial risk of resignation was *reasonably foreseeable*.

[68] The Employment Court²¹ has considered the situation where an employer may be saying it does not intend to terminate the relationship but has breached a fundamental aspect of it:

Because of the nature of a constructive dismissal, it may be that the employer does not intend the employment relationship to end and may, as here, so advise the employee. But if the employer in doing so acts in continued fundamental breach of the contract or evinces an intention not to be bound by the fundamental aspects of it, that may nevertheless give the employee grounds to treat the position as a constructive dismissal even though it may appear to be the antithesis of an actual dismissal.

[69] As I understand Ms Chen's claim and relying to some extent on my ability to reframe what is before me under s 160(3) of the Act, she says that AP continued not to provide her with correct payments of commission or information to work this out. I interpret this as claiming two things, ongoing conduct (actually breaching what was agreed in relation to commission payments on a regular basis) and a breach of the employer's statutory duty of good faith to be active and constructive in establishing and maintaining a productive employment relationship

¹⁹ Cooke J in *Auckland Shop Employees Union v Woolworths (New Zealand) Limited* (1985) 2 NZLR372 (CA) at 374 following an approach previously taken in the former Arbitration Court in NZ.

²⁰ *Auckland Electric Power Board v Auckland Provincial District Local Authority Officers IUOW Inc* (1994) 2 NZLR 415 (CA) at 419 later endorsed in *Business Distributors Ltd v Patel* (2001) 1 ERNZ 124 (CA).

²¹ *Hwang v Boyne Co Ltd (t/a Goodday Newspaper)* (2004) 2 ERNZ 412 (EmpC) at (23)

in which the parties are, among other things, responsive and communicative.²² While Ms Chen's submission appears to conflate other breaches into her submissions about why she resigned I remain focused on the grievance I am investigating as made clear in my Preliminary Determination²³ and the Notice of Directions²⁴ to the parties.

[70] I have not found the claims by Ms Chen made out in relation to her saying there remains outstanding money owed to her for commission payment shortfalls. AP made arrears payments to Ms Chen in two separate payments in May 2019 for a short fall of \$100.00 commission rate per vehicle (10 vehicles) across February and March 2019. Later auditing also identified a further shortfall of \$559.02 was owed to her (25 August 2020) and then in January 2023 a further audit result by AP showed that a vehicle previously not identified as sold by Ms Chen should have been attributed to sales by Ms Chen in April 2019. This then pushed her number of cars sold that month up to a higher amount owing for all vehicles sold that month. This resulted in an amount owing of \$1,734.31. This was eventually paid to Ms Chen in September 2023. AP says the delay was due to Ms Chen not providing her bank details to AP. I have nothing else before me to explain the delay. I am satisfied it was paid.

[71] I find that problems with payment of Ms Chen's commission occurred in February, March and April 2019 of Ms Chen's employment and were reconciled in May 2019 and then after Ms Chen's employment ended for further errors occurring at the same time in April 2019. Ms Chen resigned on 14 September 2019. She had continued to work from May 2019 through a further four months during which time I have not found she has shown her payments for commission were incorrect on the cars she sold, and I have no evidence of further communications about this.

[72] My finding that the issue of commissions payment being unpaid or underpaid to Ms Chen on a *consistent* basis as not being the reason for her resignation is not altered by considering retrospective issues with commission payments found by AP in audits after Ms Chen left her employment. These centred around April 2019 and not after. To repeat, firstly, there was a vehicle Ms Chen had said she had sold, and AP took until January 2023²⁵ to identify

²² Employment Relations Act 2000, s4(1A)(b).

²³ Above at note 1.

²⁴ Above at note 2.

²⁵ Set out in an email dated 12 January 2023 from AP financial controller to Ms Wilkins regarding a further audit of Ms Chen's commission payments

this as correct for April 2019. This made other vehicles sold in April 2019 earn more commission. The arrears was paid to Ms Chen in September 2023 (\$1,7834.31). The second was an underpayment discovered by the AP financial controller audit in August 2023 due to what the controller found was incorrect application of the second scheme applying from that time (April 2019).

Was there a lack of communication from AP with Ms Chen about how her commission was calculated?

[73] Ms Chen claims to have had numerous discussions about her commission payments with AP. She has not produced evidence of this beyond saying it. It is difficult to investigate such discussions from such a distance of time something that has been in Ms Chen's hands particularly when she appeared to have considered this was something important to have raised as far back as January 2020 through her then representative but with little or no detail about those discussions. I accept that in response to Ms Chen's challenges about her commission payments Ms Wilkins undertook searches of AP's email traffic between Ms Chen and her managers and internal discussions with for example payroll and her managers. I found Ms Wilkins a plausible and detailed witness who appears to have done significant work to audit records and try to find out what may have happened. I accept the email search has likely resulted in only finding emails showing Ms Chen contacted the AP payroll manager in late March 2019 about her 'January/February' and again in April 2019 about her commission payments.

[74] The above payroll emails refer Ms Chen's questions about her 'January/February' commission breakdown to Ms Chen's then manager to 'have a chat' with Ms Chen, and also to Mr Buchanan to 'have a chat' with Ms Chen about her queries. Mr Buchanan says he went through emails and could find nothing to show Ms Chen raised issues with him about commission payments with him directly during her employment. The above email shows AP payroll referred a query to him in April 2019.

[75] Mr Mearns does not recall a 'high number of queries about [Ms Chen's] commission'. He recalls minor 'discrepancies' that he sorted quickly. I have no evidence before me about any verbal discussions, or record of these, but according to payment records²⁶ Ms Chen was

²⁶ Showing on the spreadsheet produced by Ms Wilkin's in her evidence at AW5 page 65, of Respondent Bundle of Documents, 13 June 2024.

underpaid for a total of 10 vehicles she sold across March and April 2019 (\$100.00 short on each vehicle). AP's records show that these underpayments were reconciled by payments to Ms Chen on 17 May 2019 and on 31 May 2019. This shows me some likely response to queries that Ms Chen in may have made about commission payments at this time. As noted above, beyond April, I have not found Ms Chen has shown there were likely incorrect commission payments.

[76] I also note that Ms Chen appeared to have been sent monthly standard emails from the AP Payroll Manager attaching details of her monthly commission breakdown. These emails are dated each month of May, June, July and August 2019. I am not convinced that her claim not to have been provided information about how to work out commission payments is plausible. The vehicles Ms Chen has disputed about commission payments have been resolved largely by reference to the commission structures she agreed to in her IEA and a balancing of disputes about whether Ms Chen finished the sale as the end salespersons, or was offered extra payment on commission above that in the applicable commission scheme.

[77] Mr Mearns does not recall a 'high number of queries about [Ms Chen's] commission'. He recalls minor 'discrepancies' that he sorted quickly. He recalls that 'later in her employment' Ms Chen told him she was unhappy with her earnings. He says he told her that with more focus [on sales] the earnings would improve. He and Mr Buchanan both refer to Ms Chen needing to have time away from work or taking time off for childcare issues and being granted annual leave. I have been provided various examples of these requests and records show leave taken. I accept the evidence from AP as likely that weekend work enabled a salesperson to achieve more sales. Mr Mearns' evidence includes that because Ms Chen had problems with childcare on weekends she said that she was unable to work these days to have the opportunity to sell more cars. I do not understand Ms Chen refutes that she had childcare issues or if she does the emails before me show that she did, particularly evidenced towards the end of her employment.

[78] Mr Mearns refers to monthly 'scoreboards' with the sales team and that he would email them each day during the sale months to which commission is calculated. Mr Mearns explains that if any salesperson had an issue about how to record sales (they need to record their lead in the system to start the process towards getting commission on an eventual sale) they could bring the issue up straight away. He describes setting sale targets for sales team members and would raise issues when looking back each month to the number of cars sold. He describes

running prizes for sales to 'keep things fun'. He described offering higher commission rates (promotions) with the CEO's permission to move cars he wanted to get sold. Ms Chen also refers to this and I have already referred to these 'bounties.' I accept Ms Chen was part of the sales team to which these communications were likely sent.

[79] Ms Chen explained in the investigation meeting her concern about wanting to know how the 'gross profit' base line in the second scheme was calculated and not having this information. I have no evidence she raised this as an issue before this. I note again the wording in the second Schedule 3 which includes that gross profit as being calculated using the "GST exclusive gross profit on the vehicle, after considering any 'yard load', 'preparation' and 'costs'." Mr Mearns explained these three things to me as extras that may have been agreed to be put into the car by the salesperson as well as grooming, registration, and other overhead yard costs. The second Schedule 3 may well have been worded more clearly by explaining these things. Ms Chen's concerns raised at the Investigation Meeting centred on arguing that she should have been provided the AP business accounts as to how the gross profit margins are worked out as well as challenging that the level of some costs taken off the 'gross profit.' In other words, as I understood Ms Chen's evidence, she argued that the costs were unreasonable per se for the items. Again, this was something not raised before as part of her challenges since 2020 about commission. The difficulty then for Ms Chen is that she has not provided evidence of continuing to ask about these things during her employment. She signed and in my finding was able to agree to the second scheme that bases commission rates on 'gross profit' as a starting point. It is then difficult for me to find that there was a breach by AP due to lack of communication about her commission that was serious enough that AP ought to have foreseen that Ms Chen would resign because of it. Overall, I prefer the evidence of the AP managers that they were likely communicative to Ms Chen in relation to queries about any commission payments, corrections were made. I accept the submission for AP that without anything contrary before me that Ms Chen did not challenge those corrections at the time.

Resignation reasons

[80] I note further that while a resignation may not necessarily state the real reason an employee may have resigned but later may be accepted as supporting a constructive dismissal, Mr Mearns says he was 'very surprised' to be told that Ms Chen was claiming she resigned because of commission payments being incorrect. I found Mr Mearns' a plausible and straight

forward witness. He describes part of his job as Dealer Principal to ensure everyone was paid correctly and he had no reason not to sort any issues out. I accept this as likely and consistent with my conclusions above.

[81] Mr Mearns recalls Ms Chen telling him before she resigned about her thoughts about going into Real Estate and him explaining to her the long hours involved from his recalled experience observing some of his own family members having been in the industry. Ms Chen does not deny explaining to Mr Mearns that she was thinking about Real Estate and having a discussion like this. In the end Ms Chen went to study law at university after her resignation.

[82] Mr Mearns emailed other managers at AP on the day Ms Chen resigned (14 September 2019) explaining Ms Chen had resigned on 'good terms' citing her childcare issues and that she was making a move into Real Estate. Mr Mearns' email to wider staff on 16 September 2024 explained Ms Chen had resigned and was moving to Real Estate. These emails are close to the time of resignation and support the employer's understanding of Ms Chen's stated reasons for resigning at the time. Ms Chen's message to Mr Mearns on 28 September 2019 also refers to childcare issues at the weekend being a reason why she resigned also saying that a caregiver was no longer available.

[83] Ms Chen resigned on 14 September 2019 with the following to Mr Mearns:

Please accept this as a formal notice of my resignation from my position as Sales Consultant at Armstrong Prestige Christchurch. My last day of employment will be 11th October but if I could leave earlier I will appreciate that. Thank you again for the opportunity and I wish you and Armstrong Prestige all the best for the future.

[84] I agree with the submission for AP that it is difficult to reconcile the conversation Ms Chen had with Mr Mearns, and the sentiment in this resignation letter with Ms Chen feeling she had to resign because her commission payments were consistently incorrect, and consistently she did not have sufficient information provided to work them out.

[85] Standing back from the above, I find it likely that Ms Chen's concern was that she was not earning as much money in her AP vehicle sales job as she would have liked. I find it unreasonable that she considered she was guaranteed wages that could only have resulted in 15 cars sold per month. I accept Ms Wilkin's evidence based on AP records and that Ms Chen's best month selling cars was 11 cars. She also did not work a full year. I accept the earnings based on AP records supported by emails show what I accept must have been a difficult situation for Ms Chen with childcare. I find it likely this would have impacted her ability to operate in the type of sales environment that she had agreed to work in, an environment that Ms Chen was not new to. I find a likelihood that Ms Chen was simply not selling as many cars as what might have resulted in more earnings. Even then, as above, I accept the evidence of AP that her calculations were incorrect about her earnings, and they were in fact more than what she has calculated in her claims. Whether Ms Chen's reduced opportunity to make sales was due to her having childcare issues seemed to touch a raw nerve in the investigation meeting with Ms Chen. I accept this was a likely genuine emotion and reaction. However, I find a likelihood based on emails before me that she did have childcare issues towards the end of her employment in relation to working weekends. This all may have been something that could have been resolved with a better discussion with her employer, but I can only surmise about this as a potentially different outcome to this employment relationship problem.

[86] I do not find that issues with commission payments and alleged non communication about them were the reason for the resignation to an extent that AP had seriously breached its employer obligation of good faith to Ms Chen to communicate²⁷ and or to pay her contractual commission entitlements on a regular basis. It could not have reasonable foreseen that she would resign because of this.

[87] In summary, I do not find Ms Chen has shown she was constructively dismissed and as such have not had to decide about justification of any dismissal or remedies claimed from this.

Summary of outcome

[88] For the above reasons the claims in these proceedings against Armstrong Prestige Limited are summarised as follows:

²⁷ Employment Relations Act 2000, s4(1A).

- a. Yiping Chen's personal grievance that she was constructively unjustifiably dismissed by Armstrong Prestige Limited is not successful.
- b. Yiping Chen's claims that she is contractually owed arrears in commission payments by Armstrong Prestige Limited are not successful.
- c. Yiping Chen's claim that she is to be paid by Armstrong Prestige Limited the shortfall up to a 'promised' salary of \$130,000.00 gross is not successful.
- d. Yiping Chen's claim for a remedy from Armstrong Prestige Limited for not receiving breaks is not successful.
- e. The application for a penalty against Armstrong for the above at d. has not been considered because it is outside of the time frame to bring the application.
- f. The application for all penalties referred to by Ms Chen in her submissions have not been considered because as above they are outside of the time frame to bring such applications.

Costs

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

[90] If the parties are unable to resolve costs, and an Authority determination on costs is needed, AP 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 Ms Chen will then have 14 days to lodge any reply.

[91] 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.²⁸

Antoinette Baker
Member of the Employment Relations Authority

²⁸ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1