

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 9
5288717

BETWEEN ROGER HURST
 Applicant

AND EAGLE EQUIPMENT
 LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: A Singh, Counsel for Applicant
 S Hood, Counsel for Respondent

Investigation Meeting: 10 August 2010 at Hamilton

Submissions Received: 25 August 2010 for Applicant
 17 September for Respondent

Determination: 12 January 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The employment of Mr Hurst was terminated on 4th September 2009 on the ground of redundancy. He claims that the dismissal was unjustified and that he was not treated in a fair and reasonable manner. Mr Hurst also claims that his employer, Eagle Equipment Limited (“EEL”) breached his employment agreement because he was not paid commission for a number of equipment sales that he says that he instigated and hence was entitled to be paid for. Conversely, EEL says that the dismissal of Mr Hurst was justified and that Mr Hurst does not have a contractual entitlement to the monies he is claiming. While the Authority believes that it is now mutually accepted that the commission claims are contractually based and not a personal grievance claim, arguably part of which would be out of date, for reasons of completeness I record that I find that the commission claims being pursued by Mr

Hurst are contractually based claims and hence there are no issues to be addressed under s114 of the Employment Relations Act 2000 (“the Act”) in regard to an out-of-time personal grievance.

[2] The respondent raises a counterclaim against Mr Hurst. EEL alleges that the failure of Mr Hurst to claim commission payments when they fell due, constitutes a breach of the employment agreement and the duty of good faith. EEL asks the Authority to award penalties against Mr Hurst pursuant to sections 133 and 134 of the Act; and damages pursuant to s162 of the Act for losses suffered as a result of Mr Hurst’s actions. In particular, the cost of investigating Mr Hurst’s “latent and unsubstantiated commission claim.”

Background Facts and Evidence

[3] Eagle Equipment Limited is a Hamilton based company that is largely involved in selling a variety of heavy duty machinery or equipment. At the time of the termination of his employment Mr Hurst was employed as the Bay of Plenty/King Country Territory Manager. He commenced his employment with EEL in November 2001. Mr Hurst was one of several territory managers employed by the company. The respective territory for each manager was, apparently, defined on a territory map compiled by EEL to ensure that each territory manager knew where their business would originate from. It is commonly accepted that among other things, the role of Mr Hurst was to initiate and complete sales as well as develop and maintain relationships with current or prospective customers. Mr Hurst was paid a base salary, and commission on sales on the basis of 1% of the purchase price (exclusive of GST) for machines valued at more than \$50,000, or a flat rate of \$500 for sales valued at \$50,000 or less.

A. The Commission Claims

[4] It appears that until February 2005 the relationship between the parties was satisfactory but then an issue arose regarding how Mr Hurst was presenting his claims for commission payments. The evidence of Ms Anne Purnell, the Human Resources Manager for the Porter Group,¹ is that Mr Hurst was “storing up” his claims rather than submitting them upon the payment entitlement being due. The situation was

¹ The Porter Group is the parent company of Eagle Equipment Limited.

explained to Mr Hurst in a letter to him dated 28th February 2005. The author of the letter was Mr Hurst's direct manager, Mr Bryan Heapy, Branch Manager, Central and Lower North Island. The pertinent content is:

Roger given our statutory obligations and accounting and audit requirements I regret that we can no longer accommodate your wishes in respect to deferring payment of commissions. Under the circumstances I ask that you submit all outstanding commission claims on or before Monday 28th February 2005 and at the end of each pay week thereafter. I will follow this matter up with you before that date.

[5] At the time that the commission payments issue arose it seems that Mr Hurst and Mr Heapy were discussing the overall terms and conditions of employment that would apply for Mr Hurst. It is difficult to determine the actual basis for these discussions but a document has been produced that appears to be an applicable employment agreement, albeit the copy before the Authority is not signed. Nonetheless, Mr Hurst accepts that he probably did sign a copy. There is some indication that the discussions that were taking place related to this document, as evidenced at clause 2.1 of it.

The parties acknowledge that the Employee is an existing employ [sic] of the Employer and that this document constitutes a new contract reflecting some changes in the designated territory and remuneration provisions.

Then at clause 3.1:

This Employment Agreement is an individual employment agreement entered into under the Employment Relations Act 2000. This employment shall commence on **17th January 2005** and shall continue until either party terminates the agreement in accordance with the terms of this agreement. The clauses in this agreement may be varied or updated by agreement between the parties at any time.

[6] At clause 7 there are provisions relating to the annual salary to be paid to Mr Hurst; \$30,000. Then relevant to his claims is:

In addition the Employer will pay commission at the following rates:

- (i) in respect to **completed sales** of all new machines at the rate of 1%, of the GST exclusive price, less the value of any trade ins and accessories eg buckets, ROPs etc.
- (ii) In respect to **completed sales** of used machines at the rate of 1%, of the GST exclusive price, or \$500, which ever is the higher, less the value of any trade-ins and accessories.

Commission will be paid on **all completed sales** and will be paid with the Employee's fortnightly pay. [Emphasis added.]

[7] There are two further clauses that appear to have some relevance. Firstly, clause 14.1 – **Variation of Agreement**:

The parties may vary this agreement, provided that no variation shall be effective or binding on either party unless it is in writing and signed by both parties.

Then at clause 14.2:

Each party acknowledges that this agreement contains the whole and entire agreement between the parties as to the subject matter of this agreement.

Just exactly what the “subject matter” of this agreement refers to has not been explained and this clause appears to be at worst, meaningless, or at best, ambiguous and open to a variety of interpretations and hence it is difficult to put any weight on it at all.

[8] Then there is a handwritten note from Mr Hurst to Mr Heapy. It is undated but it seems that it was most probably received by Mr Heapy on Friday 25 February 2005.

This note begins:

I agree to your offer but seek the following minor variations.

There follows a reference to footwear, telephone matters, and then relevant to the matters before the Authority; the following:

All inquiries [sic] from “my area” to HQ to be passed on to me. Failure to do so will result in commission being paid anyway.

And then: Commission on all instigated sales to be paid.

Mr Hurst also asked for a monthly “print out” of machines sold in his area.

[9] Mr Heapy replied to Mr Hurst via a comprehensive letter dated 28th February 2005. Addressed were the matters of footwear and telephone issues. Then Mr Heapy informs:

3. **It is the company’s policy that all calls from a prospective customer will be referred to the Territory Manager in whose area the customer resides.** There are business relationships which are managed by the Directors eg Renner Group where the customer deals direct with the Director. These relationships will continue and enquiry from these customers will not be referred to you or any other Territory Manager. You are free to develop your own relationship with such customers and if you secure the order then you will be paid the commission. [Emphasis added.]

Then further:

8. Your sales area is as defined by the map which has recently been supplied to you. This includes some but not all of the Coromandel and King Country. **You will receive commission for sales instigated by you within this designated area.** There is always the potential for dispute but it is impossible to document all potential circumstances which may lead to a dispute but all Territory Managers should refer the matter to the Branch Manager if they

consider there is a potential for a dispute. In the event of their [sic] being a dispute as to payment of commission then I shall arbitrate on this given the circumstances involved in the specific case. This will involve discussions with all parties including the customer. [Emphasis added.]

In regard to the print out sought by Mr Hurst, Mr Heapy informed that the “our system” did not allow for this. Mr Hurst was advised to keep sales records and it was suggested that he may wish to maintain a spread sheet showing machines sold, customer name, date sold and dates of subsequent follow ups. “If you wish I can arrange for you to be shown how to do this.” There is no evidence that Mr Hurst took up the suggestion or availed himself of the offer made by Mr Heapy.

[10] Mr Heapy then addressed a further matter that is relevant to issues before the Authority; thus:

The perennial issue of Corporate clients with a Purchasing Officer based outside the Territory where a machine is sold will be addressed over time. The issue is on the table. Again the variables here are numerous and it is impossible to document for all circumstances. **If you instigate and complete the sale then you will be deemed to have made the sale and paid a commission regardless where the Head Office is located.** Other circumstances will be dealt with on a case by case basis and it would be advisable to clarify the issue of commission and your involvement in the sale at the time. You cannot expect to be paid a commission if you had nothing to do with the sale and hadn’t called on the client to instigate the sale. [Emphasis added.]

[11] Mr Heapy concludes his letter on the basis that he hoped:

[“... this now draws the matter to a conclusion. These issues do not need to be included in the actual agreement.”

It appears that the “actual agreement” being alluded to is the employment contract referred to above.

And then:

I would remind you that you have unclaimed commissions. I have previously written to you stating that you must put a claim in for these commissions by Monday 28th February. I have also given you a verbal reminder of this requirement. At [sic] time of writing this letter I do not appear to have received a claim from you in respect to outstanding commissions. I will now proceed to ascertain what commissions are due to you and make payment accordingly. **You can assist this process by making a formal claim before this process is complete.** [Emphasis added.]

[12] The evidence of Mr Hurst is that he approached Mr Heapy “at the time” and raised the issues; “regarding the breaches of my employment agreement.”² Mr Hurst says that the response of Mr Heapy was that; “he didn’t want to get into a “shit fight”

² The Authority understands this to be a reference to the claim for commission payments.

with me.” There is also a letter to Mr Heapy dated 31st May 2005, from a barrister acting for Mr Hurst, raising a personal grievance and suggesting:

Alternatively you may wish to reconsider the approach taken with my client in respect of the contractual changes imposed on him over the past 2 months.

While the “contractual changes” referred to have not been entirely clarified, the Authority understands that this relates to the commission payments that Mr Hurst alleges he is entitled to. Ms Purnell’s evidence is that the matter progressed to mediation but was not resolved. Apparently, Mr Heapy left the employment of EEL in July 2007.

The employment agreement and the letter of 28th February 2005

[13] It is appropriate to record at this point that a submission for EEL is that the provisions of clauses 14.1 and 14.2 of the employment agreement apply and that the content of the letter of 28th February 2005 (the letter), did not form part of the terms and conditions of Mr Hurst’s employment agreement. Given my earlier observations regarding clause 14.2 there is little more that can be said about it. In regard to clause 14.1, it is submitted for EEL that while the parties are able to vary the employment agreement, a variation is not binding “unless it is in writing and signed by both parties.” EEL say that the letter was not signed by Mr Hurst hence the provisions set out in paragraphs 3 and 8 of the letter, which Mr Hurst relies on, are not binding.

[14] But I do not accept that this is so as it seems to me that Mr Heapy intended that paragraphs 3 and 8 of the letter would be applicable to Mr Hurst; and having responded to the concerns expressed by Mr Hurst in his note of 25th February 2005, states: [“... this now draws the matter to a conclusion.” Mr Heapy also appears to have waived clause 14.1 of the employment agreement in that he writes: “These issues do not need to be included in the agreement.” In summary, given the propositions advanced by Mr Heapy, I conclude that Mr Hurst was reasonably entitled to rely on the undertakings given by Mr Heapy as being binding on both parties. Furthermore, EEL appears to rely on other provisions of the letter to argue against some of Mr Hurst’s commissions claims; for example: the term in paragraph 3 of the letter relating to the “business relationships which are managed by the Directors.” Given that I have found that the provisions of the letter are binding on both parties, it is appropriate to analyse the validity (or otherwise) of the commission claims advanced by Mr Hurst.

The details of the commission claims

[15] The claims advanced by Mr Hurst in his *Statement of Problem* lacked sufficient detail for EEL to respond to. Following further interaction between the parties and the Authority, Mr Hurst has provided more details of his claims. Nonetheless, Ms Purnell says that she has conservatively spent “in excess” of 400 hours on investigating Mr Hurst’s claims. Ms Purnell says that she had great difficulty investigating Mr Hurst’s commission claim because of the number of claims he is making, the significant amount of time that has elapsed since the business transactions occurred, and because the information provided by Mr Hurst is “very limited and hard to follow.” I have to say that I concur with the sentiments expressed by Ms Purnell. I also accept that there is merit to Ms Purnell’s view that it is possible that the claims could have been resolved earlier (one way or another) if Mr Hurst’s claims had been presented with written details, as instructed by Mr Heapy in his letter of 28th February 2005.

[16] Mr Hurst has now provided some further details. Nonetheless, the Authority has had to adopt a rather painstaking approach to the investigation of Mr Hurst’s claims by extracting information from him via an examination of the details of each of the 21 claims being pursued. Mr Hurst bears the onus of proving that he has an entitlement to the respective monies that he alleges are due to him. This basic principal has been reiterated in a recent Employment Court judgment³:

The proper test when dealing with the standard of proof in civil cases is the balance of probabilities, the burden falling on the party asserting the right. This fundamental point was put at its clearest by Denning J (as he then was) in *Miller v Ministry of Pensions*.⁴ “If the evidence is such that the tribunal can say: “We think it more probable than not’, the burden is discharged, but if the probabilities are equal, it is not.”

[17] Firstly, there are 10 claims where Mr Hurst says that pursuant to paragraph 3 of the letter from Mr Heapy (28th February 2005), the identified customers were “prospective customers” residing in his area. Mr Hurst refers to the relevant extract from the letter being that;

It is the company’s policy that all calls from a prospective customer will be referred to the Territory Manager in whose area the customer resides.

³ *Postal Workers Union v New Zealand Post* (unreported) [2010] NZEMPPC136, 20 October 2010.

⁴ [1947] 2 All ER 372 at 374.

In relation to these 10 claims Mr Hurst says that he is entitled to a total sum of \$72,990 as unpaid commission. Mr Hurst alleges that these customers resided in his sales area and were not referred to him following an initial contact with EEL, hence he lost the sales and the associated commission. But there is another aspect to these claims in that Mr Hurst was required to have “instigated” the sales. The generally recognised meaning of the word *instigate* is to ‘bring about’ or ‘to do something’⁵ and in these circumstances it seems reasonable to conclude that Mr Hurst was required to “bring about” a completed sale in order to be paid a commission. This is certainly the commonly accepted principal that prevails in regard to most situations where sales people are paid commissions. Indeed, clause 7 of the employment agreement uses specific language in that commission is to be paid on “completed sales” albeit there is some ambiguity as to whom should complete the sale, given the content of Mr Heapy’s letter of 28th February 2005.

[18] In order to bring some structure to the investigation of these claims I have been required to examine each one separately. I then asked Mr Hurst to explain and justify the claim; then the response of EEL was sought. The outcome of this process is summarised into the two categories (clause 3 and clause 8) that Mr Hurst claims under relating to the letter of 28th February 2005; as follows:

Clause 3 claims

1. *Forest Park – Taupo*

Mr Hurst says that this claim relates to “various” machines sold between 2006 and 2008 to a total value of approximately \$6,000,000. He claims commission of \$60,000 (1%). Mr Hurst refers to his contact with a Mr Alan Shannon, who he says is the owner/director of a farm called Forest Park.⁶ He also mentions machinery being sold through a company: Bryan Clark Equipment Limited, and this company’s link with Porter Hire Equipment via a director of that company, Mr Neil Porter. Mr Hurst acknowledges that Mr Porter told him that he was to “stay away” from Mr Shannon. Apparently, the dealings with Mr Shannon, via Bryan Clark Equipment, were seen as director’s sales and therefore not something that Mr Hurst could be involved in. But in any event, apart from the mention of a “proposal” to sell “one new Hyundai R320LC - 7 (standard) excavator and two new Hyundai R500LC-7 (standard) excavators and

⁵ Concise Oxford English Dictionary

⁶ Exhibit “A” shows the business to most probably be Forest Park Holdings Limited.

one used Volvo Dump Truck” with a “financed” amount being \$1,567,438 or \$1,229,760 (depending on either option), in an incomplete letter dated 6th July 2006 (Exhibit “A”), which Mr Hurst says Mr Perry was the author of, he has not been able to produce any completed sales details of any tangible description whatsoever. EEL says that recent contact was made with Mr Shannon and he indicated that he had never met Mr Hurst. In regard to the rest of the claims made by Mr Hurst pertaining to Forest Park, there is not even the slightest inkling of what they are based on and I am left to conclude that for lack of proof the overall claim must fail.

2. *Stockaroo Station - Matamata*

Mr Hurst told the Authority that this station is located between Rotorua and Whakatane and an inquiry was made to EEL about a bulldozer. The customer subsequently purchased a Komatsu D53 bulldozer sometime in 2006 (a specific date is not provided) with an approximate value of \$75,000. Mr Hurst says that the sale was conducted by another EEL sales person, Mr Grant Hawke. Mr Hurst claims commission of \$750. There is no evidence that Mr Hurst was involved in the sale and he has not produced any evidence pertaining to the details of transaction. While EEL do not appear to dispute the sale, they say that Mr Hurst did not have any involvement with the transaction and hence is not entitled to a commission payment. Given the lack of evidence of any involvement at all by Mr Hurst in this sale, this claim must fail.

3. *Armstrong Helicopters - Tauranga*

Mr Hurst says that this claim for commission of \$1,200 goes back to 2006. EEL say it relates to a transaction in 2005. Mr Hurst refers to “this guy” making an enquiry about a machine but provides no evidence about who “this guy” was or of any involvement by Mr Hurst in a sales transaction. It is accepted by EEL that a machine was purchased but EEL says that Mr Hurst was not involved in the sale which was completed by Mr Grant Hawke. Mr Hurst has not produced any tangible evidence to support this claim and therefore it fails.

4. *BOP Piledriving - Tauranga*

Mr Hurst claims commission of \$1,200 for a sale that he alleges took place some time in 2005. Mr Hurst refers to a conversation that took place with Mr Heapy at some unspecified time whereby Mr Heapy told him he (Mr Hurst) would be paid commission for the alleged sale. But EEL says that they have no record of any such client and have gone as far as searching the Companies Office website but have found no reference to any such business, nor could any reference be found in Mr Hurst's diaries. Given that there is no evidence to support Mr Hurst's claim it must fail.

5. *Firth Concrete- Bay of Plenty*

Mr Hurst claims entitlement to a commission sum of \$3,660 for two sales in 2008 and 2009 respectively. The Head Office of Firth Concrete is in Hamilton and the sales were completed by Mr Hawke, as Hamilton is his area, and he obtained a signed contract via the purchasing officer at the Head Office. But Mr Hurst says that because the two machines were delivered to two sites (Tauranga and Taupo) in his sales area, he should be paid the commission. But EEL say that Mr Hawke had an established relationship with Firth Concrete and he completed the sales. Further, I note that Mr Heapy made it clear to Mr Hurst that regardless of which area the Head Office is located in, he was required to "*instigate and complete*" the sales of machinery to be delivered into his area to obtain the commission,. Given that there is no evidence that Mr Hurst was involved in the two sales in question, I find that there is no entitlement to the commission claimed.

6. *Regal Transport – Mount Maunganui*

Commission of \$1,830 is claimed for a sale in August 2004. EEL say that there is no such company as Regal Transport. Rather it is most probably Regal Haulage that Mr Hurst refers to. This is a Hamilton based company albeit a machine was sold and delivered to Mount Maunganui, which is in Mr Hurst's sales area. EEL say that the sale was completed by the son-in-law of a company director and Mr Hurst had no involvement hence he was not entitled to any commission. I accept that this is most probably so and the claim fails.

7. *Mark Seapins - Tauranga*

Commission of \$750 is claimed. Mr Hurst says that during a discussion with Mr Seapins some time in 2008, he became aware that a machine had been sold to Mr Seapins by EEL, and as this was in his sales area, he is entitled to commission. But

EEL have no knowledge of any such person. Mr Hurst has not produced any evidence of a sale that he instigated or was involved in and I find this claim has no validity.

8. *Adline Transport - Tauranga*

Mr Hurst claims \$500 commission on the sale of a roller in 2005 with an “unknown” value. EEL say that they have no record of this alleged client. Mr Hurst has not produced any tangible evidence of instigating a completed sale therefore his claim fails.

9. *Bayonne Construction - Tauranga*

The claim is for \$1,000 and apparently relates to two sales in 2006 for machinery of an “unknown” value. It seems that the sales relate to machinery that was sold through the Head Office of the purchaser but was delivered to Tauranga. But there is no evidence of Mr Hurst being involved in the sales and hence his claim fails.

10. *Corbett Road Quarry - Waihi*

The claim is for a total of \$2,100 for two alleged sales of machinery in 2007. But EEL have no record of any sales to this party and as Mr Hurst is unable to support his claim with any tangible evidence it must fail.

Clause 8 Claims

[19] The second category of claims that Mr Hurst has advanced are those that he says fall under clause 8 of the letter of 28th February 2005, albeit the previous analysis (above) also relates to “clause 8” in some respects. Effectively, Mr Hurst says that there are 11 sales that he “instigated” in his designated sales area but he was not paid the commission that he believes that he was entitled to. It is this category of sales that Mr Heapy seems to have recognised would have the “potential for dispute” and in the event of a dispute arising, Mr Heapy, as the Branch Manager, would arbitrate, taking into account the circumstances relating to specific cases. It seems that Mr Hurst was not satisfied with some of the decisions of Mr Heapy, but given that two of the claims arose from sales in 2004, it is difficult to understand why it has taken Mr Hurst so long to dispute these; particularly when he had a barrister involved in July 2005. Nonetheless, I have examined all of the 11 claims and my findings now follow.

(a) *Perry Lime – Te Kuiti*

This claim for commission of \$1,750 goes back to mid-2004⁷. Mr Hurst says that he gave a quote for a new Hyundai machine which was approved by Mr Neil Porter, a director of EEL. Mr Hurst says that he “might have” delivered the quote to Perry Lime along with some brochures. The evidence of Mr Hurst is that some time later the manager from the Perry Lime quarry came to the EEL sales yard and he discussed with Mr Hurst the comparison between a new and a used machine that was available. Mr Hurst says that Perry Lime subsequently purchased a new machine and that he duly “handed it over” along with a gift basket and a jacket and that photos were taken of the handover with Mr Hurst shaking hands with the manager of Perry Lime. Mr Hurst says that he later spoke to Mr Simon Porter, to the effect that the sale should be attributed to him. But Mr Porter told him that “the guys” at Perry Lime had never heard of Mr Hurst nor seen a quote. Mr Hurst says that he had the quote reprinted. EEL says that there is no record of a sale of the machine that Mr Hurst alludes to.

I found the oral evidence of Mr Hurst to be persuasive in regard to the details relating to the circumstance surrounding the purported sale. But unfortunately, as with many of the claims made, Mr Hurst has not been able to provide any written details such as a copy of the quote and/or a sales and purchase agreement which establishes a sale in his name and hence I am unable to uphold this claim.

(b) *Sonny Thomas - Rotorua*

The claim is for commission of \$1,890 relating to an R290 machine that Mr Hurst says he gave a quote on relating to a sale in 2006, but the sales person in Rotorua (Wayne Ferguson), received the commission payment. EEL does not dispute Mr Hurst’s entitlement to commission on this sale but says that the sale took place in 2007. Quite simply, EEL says that Mr Hurst was paid the commission for a sale in 2007 albeit but no evidence of this has been produced. Given that there is a difference between the parties in regard to which year the sale took place (2006 or 2007) and the lack of tangible evidence from Mr Hurst relating to the specifics of this claim, I find the overall evidence to be inconclusive and the claim fails because of lack of proof.

(c) *Colin Maunder - Tauranga*

The claim is for commission of \$1,310 relating to a sale that Mr Hurst says took place in 2006 pertaining to a Hyundai machine. EEL says that there was a sale of a Hyundai machine to this customer in 2004 but this was made by another salesperson (Brent)

⁷ Mr Hurst says that the “approximate” value of the machine in question was \$175,000 but was unable to provide any details.

with no involvement by Mr Hurst. Mr Hurst has not produced any tangible evidence of an entitlement to this payment, hence it fails.

(d) *Pukeatua Contractors – Pukeatua*

The claim is for commission of \$650 relating to a sale that Mr Hurst alleges took place in 2005. EEL says that there was a sale to this customer in 2004. Mr Hurst accepts that this is “highly possible.” EEL also say that it was Brent that completed the sale. Mr Hurst has not produced any tangible evidence as to his entitlement to be paid the commission and the claim therefore fails.

(e) *Andrew Young - Rotorua*

The amount claimed is \$500 for commission on the sale of a scoop that went with a loader that was sold in 2006. EEL acknowledge the sale but say that the scoop was an attachment to the loader and that Mr Hurst was told this by Mr Heapy when the claim was originally made. Mr Hurst accepts that he was told by Mr Heapy that the two units went together “like a truck and trailer.” In the absence of any evidence to the contrary, such as past precedent or industry practice and given that Mr Heapy was the arbitrator in such matters, and there is no evidence to show that his decision was wrong, I am unable to determine that any entitlement is due to Mr Hurst.

(f) *Landscape for Lifestyle - Whakatane*

The claim is for commission totalling \$1,250.00 for two sales to this client in 2006. EEL say that there were two sales to this client in March 2005 and May 2005. In regard to the first sale (\$500 commission), Mr Hurst says that he spoke to the client and took trade-in equipment to the Hamilton yard to sell on behalf of the client. The client subsequently purchased a Hyundai machine from Grant Hawke. Mr Hurst says that when he approached Mr Heapy about payment of the commission, he was informed that the client did not want to deal with Mr Hurst and hence Mr Hawke completed the sale. Mr Hurst says that this is untrue and when he informed Mr Heapy he was told that Mr Heapy would reverse the commission and make payment to Mr Hurst, but this did not occur. EEL now acknowledge that while it was Mr Hawke who made the sale, it is accepted that Mr Hurst had some involvement and the company is prepared to pay Mr Hurst half of the commission (\$250). It is the order of the Authority that the sum of \$250 be paid to Mr Hurst.

The second claim (\$750) relates to the sale of a Hyundai machine. The client required the loader to lift pallets weighing 1200kg. The technical material showed the loader could lift 1400kg. But unfortunately, while this lift weight was achievable with the standard loader, it was not able to lift the required weight at the end of the loader when it had pallet forks fitted to it. Hence in practical terms, the loader was not suitable for the client's requirements. The outcome was that to satisfy the client, EEL took a loss on the sale and as a result Mr Hurst did not receive any commission.

But I conclude that Mr Hurst was entitled to rely on the technical data available to him and he acted in good faith whilst advising the client as to the lifting capacity of the machine, and he completed the sale on that basis. While EEL say that there was a lack of attention to detail on the part of Mr Hurst that caused a loss on the sale, this proposition is inconclusive. I find that Mr Hurst acted in good faith in reliance on the technical data available to him and that he should be paid the commission accordingly. ELL is directed to pay to Mr Hurst 1% commission on the established value of the machine in question.⁸

(g) *Magnum Construction – Te Kauwhata*

This claim is for \$1,120 as commission for the sale of a grader that Mr Hurst says he initiated in 2006. EEL acknowledge that Mr Hurst's diaries confirm that he did have contact with this client then but the sale was made by Grant Hawke in July 2007. EEL also say that the client is based at Te Kauwhata which is in Mr Hawke's sales area but the business works on contracts in various locations. As there is no tangible evidence to suggest that Mr Hurst had any real involvement in arriving at a completed sale, the claim fails.

(h) *Ohiwa Contractors - Whakatane*

The claim is for \$1,120 for commission on a sale in 2005. It appears that Mr Heapy received the initial enquiry and the client's needs closely matched a machine that Mr Hawke's company, Hawke Contractors, was selling. For this reason, Mr Heapy referred the inquiry to Mr Hawke on the basis that there would not be a commission paid for a sale from Mr Hawke's business. A sale duly occurred. EEL say that Mr Hurst was informed of the enquiry and the reason for the referral to Mr Hawke. In the event that the client didn't buy a machine from Mr Hawke's business then Mr Hurst

⁸ Unfortunately, all of the sales values provided by Mr Hurst are approximate and I am unable to ascertain whether the amount claimed (\$750) is correct.

would be free to attempt to provide another machine. Also, Mr Hurst could build a relationship with the client with an eye to future business. EEL believe that Mr Hurst never made any future contact. I conclude that it was reasonable for EEL to act as they did and that there was no entitlement to a commission for Mr Hurst.

(i) *Murray Wastney - Tauranga*

The claim is for \$500 for a machine that Mr Hurst say that he initiated the sale of and that subsequently took place in 2007. But EEL say the sale was completed by Mr Hawke in May 2006 and there is no record of Mr Hurst's involvement. While EEL say that there is no legal obligation to do so, they are prepared to pay Mr Hurst 30% of the commission in acknowledgement that Mr Hurst "may" have contributed to the sale. The evidence before the Authority is inconclusive as to any entitlement due to Mr Hurst. However, I accept that EEL attempted to make some movement towards resolving matters with Mr Hurst and therefore I would not wish to deprive him of an offer made in good faith, albeit he has rejected it. I record that EEL have agreed to pay to Mr Hurst the sum of \$150.00 and an order for this to occur now follows.

(j) *Robert Vetich - Rotorua*

Mr Hurst claims the sum of \$1,200 for a sale that he says took place in 2008. EEL say that they have no record of any such person nor have they found any such entity via a search of the Companies Office register. The evidence of Mr Hurst is vague and inconclusive as to the identity of who the purported sale was made to and in the absence of any probative evidence this claim fails.

(k) *Coastline Logging - Whakatane*

This was the last sales proposal that Mr Hurst was progressing before the termination of his employment in August 2009. This is also the only sale for which a sales and purchase agreement and tax invoice showing the amount of the sale has been produced. Mr Hurst claims the sum of \$3,170 based on 1% of a sales value of \$317,000. However, according to the tax invoice for the machine, which was delivered in May 2010, the pre-GST value of the sale is \$246,650 and 1% of this sum is \$2,466. EEL have paid the salesperson that completed the sale a commission payment of \$2,457.00. But in acknowledgement of Mr Hurst's involvement in the eventual sale, EEL has offered him 50% of this amount - being \$1,228.50 - which he has rejected. The evidence is that Mr Hurst had progressed this transaction to an

extent that a commission of more than 50% seems appropriate. I conclude that 75% is more reasonable in the circumstances. Therefore, EEL is directed to pay to Mr Hurst a part commission payment of \$1,849.50.

Summary of the determination of the commission claims.

[20] For the reasons set out above, largely due to insufficient proof, the claims of Mr Hurst have mostly failed. Unfortunately, Mr Hurst's recollection was, in substance, vague. And where, in some instances, his oral evidence appeared reasonably credible, he was unable to produce tangible evidence such as quotes, sales invoices, signed sales agreements, or collaborative evidence from other parties. While I suspect that in some instances, Mr Hurst may have been disadvantaged by not being based at the Hamilton office (as compared with Mr Hawke), the evidence does not support any of the allegations that Mr Hurst made in regard to Mr Hawke being given favourable treatment. In the event, with some reasonably minor exceptions, the monies due to Mr Hurst are largely those which Mr Hurst was offered by EEL in order to settle matters with him. It is regrettable that considerable time and resources have been expended by the parties (and the Authority) on claims that faced considerable difficulty due to the passing of time and the lack of tangible evidence.

[21] As set out above, EEL is directed to carry out the following actions as set out in paragraph [19] of this determination as follows:

(a) Claim (f) (*Landscape for Lifestyle - Whakatane*)

EEL is to pay to Mr Hurst the sum of \$250 commission as previously offered to him. Further, EEL is to pay to Mr Hurst a commission based on 1% of the agreed sales value (exclusive of GST) of the Hyundai loader in question that was sold to this customer in May 2005.

(b) Claim (i) (*Murray Wastney - Tauranga*)

EEL is to pay to Mr Hurst a commission payment of \$150.00.

(c) Claim (k) (*Coastline Logging*)

EEL is to pay Mr Hurst a commission payment of \$1,849.50

B. The Claim of Unjustified Dismissal

[22] The position of Mr Hurst was made redundant. He ceased his employment on 4th September 2009. Mr Hurst says that his dismissal on the ground of redundancy was unjustified and the manner in which it was implemented was a breach of good faith pursuant to section 4 of the Employment Relations Act 2000 (“the Act”).

[23] It is commonly accepted that that on 17th August 2009, Mr Hurst attended a meeting with Ms Purnell and Mr Darren Ralph, the Sales and Marketing Manager for EEL. It is also commonly agreed that Mr Hurst was given a letter dated 17th August 2009. The letter, headed “Proposed Restructuring BOP Sales Area” informed Mr Hurst, in essence, that:

- (a) There has been a downturn in the economy which is affecting the sales in the Bay of Plenty area.
- (b) In the financial year ending June 2009, the sales figures were “down” to the previous year and that as this had been the trend for the past twelve months, the company did not see any improvement in the immediate future.
- (b) It was proposed to disestablish Mr Hurst’s position and that his area would be “managed” by Mr Ralph.
- (c) That a further meeting would take place on 19th August 2009 to discuss the proposal further and that any ideas that Mr Hurst may have for restructuring would be discussed “and then we will make some decisions on the outcome.”
- (d) That as the next meeting could affect his position in the company he was invited to seek advice and bring along a support person.
- (e) Sales figures for Mr Hurst’s sales area for the months July 2008 to June 2009 were attached to the letter revealing the ongoing reduction in income that had occurred.

[24] A further meeting took place on 19th August 2009. The evidence of Ms Purnell is that as Mr Hurst did not have a support person or representative with him she offered to defer the meeting to enable him to have someone with him, but he declined this. The common evidence is that Mr Hurst presented several proposals as an alternative to disestablishing his position:

- (i) He would become a commission only salesman but retain employee status on a retainer and be provided with a vehicle, office and cell phone; or
- (ii) His position would be reduced to a part-time role; or

- (iii) He would sell EEL equipment through his own company for a higher commission rate.

It was agreed that EEL would consider these proposals and a further meeting would take place on 21st August 2009.

[25] At the meeting on 21st August⁹ Ms Purnell responded to the proposals advanced by Mr Hurst at the previous meeting and he was informed that none of them were acceptable to EEL for various reasons. Mr Hurst was advised that his position would be redundant as of 4th September 2009. The evidence of Ms Purnell (collaborated by Mr Ralph) is that she then gave Mr Hurst a letter confirming the decision that had been made. Mr Hurst says that he never received any written confirmation that his position had been made redundant. But I conclude that it is more probable that he is mistaken about this and I prefer the evidence of Ms Purnell and Mr Ralph on this matter. Indeed, the evidence of Mr Ralph (under cross-examination by Ms Singh) was that the letter was read to Mr Hurst at the meeting on 21st August 2009.

[26] The letter from Ms Purnell to Mr Hurst opens by thanking Mr Hurst for meeting on August 17th and 20th to discuss the proposed restructuring. In actual fact the parties agree that the second meeting was on 19th August 2009. The inclusion of the “20th” appears to be a mistake but nothing rests on this. Mr Hurst is then informed that:

We have listened to and taken into account your input and proposals you put forward, the main ones being.

- 1) That the position become a part time position
- 2) That you become a contractor.

After giving these proposal [sic] due consideration, and reviewing your sales for the past financial year, and projections for the future, we have decided these proposals are not acceptable.

We have taken into account your view that the forestry industry is not going through a recession and business is “fizzing” however the sales do not reflect this and your area is not just forestry.

Therefore we will be disestablishing the position of BOP Sales Person as such [sic] are giving you two weeks [sic] paid notice as of August 21.¹⁰

We would like to thank you for your services during the time you have worked for our Company and regret that due to the current economic situation we do sometimes have to make a business decision such as this.

⁹ The evidence of Ms Purnell is that the meeting lasted 1.5 to 2 hours.

¹⁰ The employment agreement (clause 12) provides for a two week notice period.

[27] Mr Hurst ceased his employment on 4th September 2009. The evidence of Mr Ralph is that he subsequently called upon Mr Grant Hawke and Mr Roger Peterson to assist him with servicing clients in the Bay of Plenty area and a letter was sent to customers notifying that Mr Hawke would be the new sales representative for the area, and that Mr Ralph could also be contacted, if clients so wished. This letter is undated but Mr Ralph says that it was sent to customers in the week commencing 1st September 2009.

Analysis and Conclusions

[28] Mr Hurst says that the termination of his employment on the ground of redundancy was unjustified. Firstly, he says that the decision to make his position redundant was not genuine. Essentially, it is submitted for Mr Hurst that the work was still available and as there were three Territory Managers in total, then a process should have been adopted whereby Mr Hurst, Mr Pederson and Mr Hawke should have been required to apply for the two remaining positions; where the latter two men were the incumbents. Collateral to this argument, it is also submitted for Mr Hurst that there was not a fair and reasonable selection process. Then, going to the process adopted by EEL, Mr Hurst says that he never received a final letter advising him of the outcome of the consultation process and/or written notification of the termination of his employment.

[29] It is now well established that the statutory test provided by s 103A of the Act applies to redundancy dismissals.¹¹ The Authority is required to determine, on an objective basis, whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances. The investigation of the Authority includes an examination firstly, of the genuineness of the redundancy and then the procedural fairness; bearing in mind that in *Simpsons Farms* Chief Judge Colgan held that:

So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s103A.¹²

¹¹ *Simpsons Farms Ltd v Aberhart* [2006] 1 ERNZ 825.

¹² See also the judgment of the Court of Appeal in *G N Hale and Son Ltd v Wellington Caretakers etc IUOW* [1990] 2 NZILR 1079 at pp. 1084 and 1086.

[30] Turning firstly to Mr Hurst's employment agreement. There are specific terms pertaining to redundancy at clause 11. At subclause 11.1 is a definition of redundancy:

Redundancy is a situation where the position of employment of an employee is or will become surplus to the requirements of the Employer's business.

Following, at subclause 11.2, is the process to be followed in the event of a potential redundancy:

In the event the Employer considers that the Employee's position of employment could be affected by redundancy or could be made redundant, the Employer shall, except in exceptional circumstances, consult with the Employee regarding the possibility of redundancy and, before a decision to proceed with the redundancy is made, whether there are alternatives to dismissal (such as redeployment to another role). In the course of this consultation the Employer shall provide to the Employee sufficient information to enable understanding and meaningful consultation, and shall consider the views of the Employee with an open mind before making a decision as to whether to make the Employee's position of employment redundant. Nothing in this clause limits the legal rights and obligations of the parties.

This provision is consistent with the statutory requirements of s4(1A)(c) of the Act.

Was the redundancy of Mr Hurst's position genuine?

[31] I conclude that the redundancy was genuine. In reaching this conclusion I note that EEL undertook an analysis of the sales figures for the sales territory covered by Mr Hurst. This analysis was provided to Mr Hurst at the first consultation meeting with him on 17th August 2009. It revealed a substantial loss of revenue due to the prevailing economic climate with no foreseeable improvement. It is submitted for Mr Hurst that EEL should have gone further and included the other two sales territories covered by Mr Hawke and Mr Pederson, and implemented a competitive process whereby the three men applied for the two sales positions that were available. But there is no sound basis for that proposition. This was not a situation whereby the company was involved in an overall restructure whereby all sales positions were affected and/or new positions were created. There is no evidence of any revenue (or other issues) in regard to the sales positions occupied by Mr Hawke and Mr Peterson that required a review of their positions. The evidence presented to the Authority is that it was only the sales territory covered by Mr Hurst that showed a substantial drop in revenue and that this led the company to assess the viability and retention of his position. Upon the evidence produced to the Authority, I conclude that EEL were entitled to take fair and reasonable steps to; in the words of Cooke P in *Hale*:

[... make [the] business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a

right to continued employment if the business can be run more efficiently without him.

And:

The personal grievance procedures of the Labour Relations Act [Employment Relations Act], and in particular the existence of remedies for unjustifiable dismissal, should not be treated as derogating from the rights of employers to make management decisions genuinely on such grounds. Nor would it be right for the Labour Court [Authority] to substitute its own opinion as to the wisdom or expediency of the employer's decision. When a dismissal is based on redundancy, it is the good faith of that basis and the fairness of the procedure followed that may fall to be examined on a complaint of unjustified dismissal.

[32] I am satisfied that as a fair and reasonable employer, in the circumstances of the economic downturn faced by EEL and its apparent affect on the revenue emanating from the sales territory covered by Mr Hurst, the company were entitled to make the business more efficient and reduce its overall costs in the manner that EEL did. It follows that I find that the redundancy of Mr Hurst's position was genuine.

Was the redundancy procedurally unfair or unreasonable?

[33] It is the view of Mr Hurst that the redundancy was not procedurally fair and reasonable. In support of this view, Mr Hurst says firstly, that he never received a final letter advising him of the outcome of the consideration by EEL of his proposals to avoid the redundancy. As expressed earlier in this determination,¹³ I prefer the evidence of Ms Purnell and Mr Ralph and conclude that it is more probable than not that Mr Hurst did receive a letter (on 21st August 2009) confirming his redundancy. Mr Hurst also says that his redundancy was "predetermined" but I do not accept that this is so. Rather, I find that having analysed the situation, EEL consulted with Mr Hurst in compliance with:

- (a) his employment agreement, and
- (b) s4(1A)(c) of the Act; and
- (c) common law precedent.¹⁴

[34] Mr Hurst acknowledges that he was given an opportunity to present alternative proposals to redundancy and that EEL gave due consideration to these. The oral evidence of Mr Hurst is that subsequent to the confirmation of the loss of his employment, he spoke to Mr Pederson. Mr Hurst says that Mr Pederson informed him

¹³ Para [25].

¹⁴ For example; *Simpsons Farms Ltd v Aberhart* [2006] 1 ERNZ 825.

that he knew that Mr Hurst would be redundant and that part of Mr Hurst's sales area would now become the responsibility of Mr Peterson. This evidence is not corroborated at all and I find it to be inconclusive as to both time-frame and accuracy. But in any event it does not seem unreasonable, that as part of the overall initial process, that other staff would be consulted as to the feasibility of any anticipated proposal. On the weight of the evidence before the Authority I can find nothing that indicates that the redundancy of Mr Hurst's position was procedurally flawed. On the contrary, I conclude that EEL met their contractual and statutory obligations to Mr Hurst in an appropriate and justified manner.

Determination of the Claims of Mr Hurst

[35] (a) As set out above (para [21]), EEL is to pay to Mr Hurst the total sum of \$2,249.50 (\$1,849.50 + \$250 + \$150). In addition to this sum, EEL is to pay to Mr Hurst a sum equivalent to 1% of the agreed sales value (exclusive of GST) of the Hyundai loader sold to Landscape for Lifestyle in 2005.

(b) I find that the dismissal of Mr Hurst on the ground of redundancy was substantively and procedurally justified and he does not have a personal grievance.

Determination of the Counterclaims from EEL

[36] EEL alleges that the failure of Mr Hurst to claim commission payments when they fell due constitutes a breach of the employment agreement and the duty of good faith by Mr Hurst. EEL asks the Authority to award penalties against Mr Hurst pursuant to sections 133 and 134 of the Act and damages pursuant to s162 of the Act for losses suffered as a result of Mr Hurst's actions, in particular, the cost of investigating Mr Hurst's "latent and unsubstantiated commission claim."

[37] There is no doubt that Mr Hurst was inexcusably lax in regard to presenting some of his purported commission entitlement claims when instructed to do so by Mr Heapy back in February 2005, and then again when he had a barrister involved in May 2005. I also accept that the manner in which Mr Hurst presented his claims to

EEL (and the Authority) is most unsatisfactory and it is commendable that Ms Purcell went to the trouble that she did to ascertain if there was any validity to any of Mr Hurst's claims, particularly given the lack of any helpful or constructive application on his part. While I can also accept that EEL (via Ms Purcell) has expended considerable time in investigating Mr Hurst's claims and that this must have been a most frustrating exercise, I do not accept that the actions (or inactions) of Mr Hurst constitute a breach of his employment agreement; nor has there been a breach of good faith for which a penalty is available. It follows that the counterclaims of EEL cannot be upheld.

Costs: Costs are reserved. The parties are invited to resolve this matter if they can taking into account the relatively low level of success achieved by Mr Hurst and the payments that were offered to him by EEL prior to the investigation meeting. In the event that the parties are unable to resolve the matter of costs, Mr Hurst has 28 days from the date of this determination to file and serve costs submissions. EEL have a further 14 days to respond.

K J Anderson
Member of the Employment Relations Authority