

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 388/07
AEA 731/05

BETWEEN GARY STONE
 Applicant

AND VILLAGES OF NEW ZEALAND
 (PAKURANGA) LIMITED
 First Respondent

Member of Authority: Vicki Campbell

Representatives: Paul Barrowclough for Applicant
 Alan Stuart for Respondent

Investigation Meeting 12 and 13 June and 12 July 2007 at Auckland

Submissions Received: 9 August 2007 from Applicant
 9 August 2007 from Respondent

Determination: 11 December 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Gary Stone was engaged by Villages of New Zealand (Pakuranga) Limited (VONZ) as a sales person on a part time basis from 15 August 2001 to 27 September 2001. From September 2001 Mr Stone was engaged on a full-time basis. He resigned his employment on 26 March 2003.

[2] Mr Stone claims various amounts are due to him for commission payments not paid during the tenure of his employment together with deductions he says were unlawfully made by VONZ for the installation of net curtains. Section 157 of the Employment Relations Act 2000 empowers the Authority to resolve employment relationship problems according to the substantive merits of the case, without regard to technicalities. Pursuant to that section, I have treated this aspect of Mr Stone's claims as a claim for arrears of wages, albeit Mr Stone has couched the claim as one of an unjustified action by the respondent causing disadvantage.

[3] VONZ denies the allegations by Mr Stone and says all commission payments due to him have been paid.

[4] Further, Mr Stone says VONZ pursued a course of conduct with the deliberate and dominant purpose of coercing him to resign from his employment. Alternatively, he says VONZ conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them.

[5] VONZ owns and operates a retirement village in Pakuranga. Units and apartments within the village are sold to elderly clients who purchase a licence to occupy for their lifetime. Residents also pay a weekly fee for the maintenance and management of the property. At the time this employment relationship problem arose VONZ was owned and managed by Mr Erin Murphy ("Erin Murphy") and his son, Mr Kevin Murphy ("Mr Murphy"). Mr Murphy is the maintenance and marketing manager for the Village and was the person to whom Mr Stone reported throughout his employment.

[6] It was common ground at the investigation meeting that at the outset of his employment Mr Stone erroneously believed he was a contractor to VONZ. In reliance on this misapprehension, Mr Stone had received prior approval from the Inland Revenue Department to pay withholding tax and he created and produced invoices to VONZ for payment. At the investigation meeting Mr Murphy confirmed that at all times during Mr Stone's engagement with VONZ he was an employee.

[7] The nature of Mr Stone's principal claim is that his resignation ought to be regarded as a constructive dismissal and that his dismissal was unjustifiable. In deciding whether the circumstances of this case gave rise to a constructive dismissal I am guided by the principles enunciated by the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168.

[8] Further, following the approach of the Court in its recent decision *Gorrie Fuel (SI) Ltd v Gittoes*, unreported, 8 November 2007, Couch J, CC21/07, if I find that this was a constructive dismissal, I must then determine whether it was justifiable. This employment relationship problem arose prior to the enactment of s.103A of the Employment Relations Act 2000 therefore if I find that this was a constructive dismissal, whether it was justifiable must be determined in accordance with the test in *W & H Newspapers Ltd v Oram* [2001] 3 NZLR CA 29.

[9] The Court of Appeal, in that decision, held that if a fair and reasonable employer is able to view the conduct disclosed by its investigation as deeply impairing of the basic trust and confidence essential to the employment relationship, dismissal will be within a range of disciplinary measures available to the employer for it to choose from.

[10] In determining the merits of this application, I have considered the following issues: -

- (a) Are any monies due to Mr Stone with regard to the outstanding and unpaid commission payments?
- (b) In relation to the constructive dismissal claim, was there a breach of duty by VONZ to Mr Stone?
- (c) If so, was there a substantial risk of resignation reasonably foreseeable, having regard to the seriousness of the breach?
- (d) If so, did Mr Stone actually resign as a result of that breach?
- (e) If Mr Stone was constructively dismissed, were the actions of VONZ within the range of responses available to an employer acting fairly and reasonably?

Credibility

[11] Credibility of both Mr Murphy and Mr Stone was at issue in this matter. Neither witness came across as being entirely credible. In particular Mr Stone came very close to deceiving the Authority by not disclosing when questioned, the events leading to his new employment with St John Ambulance. I was not at all satisfied with Mr Stone's evidence in this regard and required him to furnish further evidence in the form of a supplementary statement setting out the sequence of events leading to his acceptance of his new job.

[12] I also found much of Mr Murphy's evidence to be self serving and unreliable. Given the difficulties in the reliability of the evidence I have determined each issue with regard to the documentation and on the balance of probability.

Commission Payments Claim

[13] There was no dispute that Mr Stone was paid on a "commission only" basis. No written employment agreement was available for Mr Stone prior to taking up his role. After making several unsuccessful enquiries regarding the whereabouts of his employment agreement, on 30 November 2001 Mr Stone wrote to Mr

Murphy outlining his understanding of the relationship at that time. Mr Stone wrote:

As an employment contract is not available at the present time, please confirm the following by signing at the bottom of the page.

1. I was accepted for the position of Salesman at the Paukranga Park Village on Thursday 9 August 2001.
2. I started in a full time capacity on Thursday the 27th of September 2001.
3. Under the terms of my employment I am a self-employed contractor.
4. My remuneration is on a commission only basis and that the commission is calculated at 1.6% of the secured deposit value of the lifetime licence to occupy (plus GST) on any apartment or villa I conclude a sale on.
5. I will be required to invoice the Pakuranga Park Village for commission owing.
6. I will be required to fill in an IR330 for taxation purposes.

[my emphasis]

[14] As already mentioned, at the investigation meeting the parties acknowledged that Mr Stone was in fact, employed as an employee and not as a contractor, as set out in Mr Stone's letter. The letter provided a space for Mr Murphy to sign off acknowledging the respondent's acceptance of the terms set out by Mr Stone. Mr Murphy did not sign the letter, instead on 6 December 2001 he gave it back to Mr Stone, advising him that his real contract would be available shortly.

[15] Mr Murphy did not take issue with any of the points set out in Mr Stone's letter. In particular Mr Murphy did not advise him that Mr Stone was under any misapprehension in relation to the calculation of commission payments. The first time a possible reduction to the commission calculation was raised by Mr Murphy in a meeting on 11 October 2002, however, I am satisfied that the discussion in that meeting related only to one specific client, being Mr McKay.

[16] Despite further enquiries by Mr Stone to Erin Murphy the written employment agreement did not make an appearance until one year later on 7 November 2002. The written agreement provided for a reduction in the commission payment calculations to 0.8% where another employee undertakes attendances on an client.

[17] Clauses 6.3 and 6.4 of the 7 November 2002 draft employment agreement provides for commission payments in the following terms:

- 6.3 Where the Employee has undertaken all attendances to effect a sale of a licence to occupy the gross remuneration payable to the Employee is to equate to 1.6% of the deposit.

- 6.4 Where the Employee is principally responsible for the sale of licence to occupy a unit or an apartment but another salesperson or employee has also undertaken attendances in the course of the sale then the gross remuneration to be paid to the Employee is to equate to 0.8% of the deposit.

[18] The deposit referred to in clause 6 of the agreement refers to the **total** amount paid by a licensee in relation to the licence to occupy a unit. Mr Stone was concerned about the wording of clause 6.4 and raised these concerns with Mr Murphy when he returned his unsigned copy of the proposed agreement.

[19] Mr Stone says that clause 6.4 was the first notification he had received, that his commission of 1.6% could be reduced to 0.8%. I am satisfied that a reduction to 0.8% was raised by Mr Murphy on 11 October, however, I am also satisfied that this was raised in the context of the commission payable for the McKay sale and not in relation to commissions payable generally.

[20] In November 2002 Mr Stone raised his concerns with Mr Murphy that if another employee spent a little bit of time with a client he could lose up to 50% of his commission. Mr Murphy replied to Mr Stone on 7 February 2003 and advised him:

We have at your request deleted the reference to the term "principally responsible". We have in addition amended this clause so that it states the following:

"Where another salesperson or employee has undertaken attendances in the course of a sale then the gross remuneration payable to the employee is to equate to 0.8% of the deposit".

[21] Mr Murphy also clarified how reduction to 0.8% was to operate and advised Mr Stone:

To ensure this aspect of the contract is clearly understood we record:

1. The sales process incorporates all attendances upon a potential licensee until the full deposit is paid;
2. If you are not available to accommodate a potential licensee for any reason, including absence from work or a commitment to another potential licensee, another salesperson or employee will address the needs of the potential licensee either immediately or at the earliest opportunity.
3. Attendances by you in the course of a sales process that are of a minor nature will not result in an entitlement to remuneration. Similarly, attendance by another salesperson or other employee(s) in the course of a sales process that are of a minor nature will not result in a reduction of your entitlement to a commission.
4. As your employer we reserve the right to determine your commission entitlement on a case by case basis. In the course of determining your entitlement we will consider the contributions, if any, by other parties to the sales process. Should you disagree with any decision made in relation to your entitlement we will in the first instance and in good faith discuss and endeavour to resolve the issue. Should we be unable to find common ground you may pursue the dispute resolution procedures set out in the Second Schedule to the contract.

[22] Mr Stone refused to sign the amended employment agreement. Mr Stone was adamant at the investigation meeting that when he entered into the

relationship with Erin Murphy the agreed commission was 1.6% on all deposits made on lifetime licences to occupy any apartment or villa he concluded a sale on. He maintained that at no stage had he agreed to the commission being reduced to 0.8% where another employee was involved in the sale of the licence.

[23] Mr Murphy says that during the period of time Mr Stone was employed in a part-time capacity (August and September 2001) he had several conversations with Mr Stone about how they would deal with things including commissions once he commenced full-time work. It was common ground that Mr Stone and Mr Murphy discussed documentation, and implications of the licence to occupy, how deferred management fees worked, and refurbishment and villa modification issues. However, Mr Stone denies they discussed and reached agreement on deductions to commissions where another sales person was involved in the sale of a licence.

[24] It was common ground that the parties agreed at the outset of the employment relationship that no monies for commission earned during the initial period of employment up to and including 31 March 2002 would be paid to Mr Stone. Mr Stone sought this agreement because he was in dispute with his ex-wife about the amount of child care payments he should be making to support his children. Mr Stone set this arrangement up so that his recorded earnings to IRD for the 12 months ending 31 March 2002 would be minimal, with flow on consequences with regard to the amount of child support Mr Stone would then be required to make.

[25] This of course led to the situation whereby Mr Stone did not begin presenting invoices for payments until April 2002. Therefore the differences in perspective with regard to the calculation of the commission payments did not come to the fore until after the first invoices had been paid and was raised at a meeting on 11 October 2002. This was nearly 12 months after Mr Stone had confirmed in writing to VONZ his understanding of the agreed terms and conditions of employment.

[26] I am not satisfied that it was a term of Mr Stone's employment that he receive only 0.8% of the deposit in respect of sales of licences to occupy where more than one employee was involved in that sale.

[27] On 11 October 2002 Mr Murphy and Mr Stone met and the details of payments made to Mr Stone in relation to licences for Dawson and McKay were discussed. At that meeting VONZ raised for the first time, its understanding that

the agreement reached in regard to the calculation of commission was either 1.6% where Mr Stone had had full dealings with the licensee, or 0.8% for sales which involved the participation of other sales staff.

I find that the agreement between the parties was that set out in Mr Stone's letter dated 30 November 2001. That is, that Mr Stone would receive commission payments based on 1.6% of the deposit for all sales of licences he concluded a sale on.

Deduction of full commission in respect of the sale of the licence to occupy to Mr and Mrs Dawson

[28] Mr Stone claims the commission payment for the sale of a license to Mr Dawson was wrongly deducted from his commission payments. He claims reimbursement of the money deducted.

[29] On 6 June 2002 Mr Stone showed Mr Dawson a unit located at 4 Lodge Lane. File notes completed by Mr Stone, record that he spent approximately 15 minutes with Mr Dawson, who was in a hurry. Additional notes record that Mr Murphy spoke with Mr Dawson on Thursday 13 June who indicated he would like to sign up for 4 Lodge Lane.

[30] The record also shows that Mr Dawson completed a conditional agreement on 17 June 2002 with Mr Murphy and that apart from the initial 15 minutes on 6 June 2002, Mr Dawson did not have any further contact with Mr Stone.

[31] Even though his contact with Mr Dawson was minimal and Mr Murphy concluded the sale, Mr Stone issued an invoice for the commission directly to the accounts clerk without reference to Mr Murphy or authorisation for payment. This invoice was paid almost immediately and only came to Mr Murphy's attention a month or so later.

[32] On 11 October 2002 Mr Murphy advised Mr Stone he wanted Mr Stone to refund 100% of the commission paid out on the purchase made by Mr Dawson as Mr Murphy did not accept Mr Stone was predominantly responsible for the sale of the licence and therefore the commission payment had been incorrectly paid to Mr Stone.

[33] This discussion was followed up on 7 November 2002 when Mr Murphy wrote to Mr Stone and advised him, among other things, that a deduction for \$3,520, being the net amount paid to Mr Stone, would be made from a future commission payment.

[34] On 27 November 2002 Mr Stone advised Mr Murphy that he was seeking legal advice in relation to the request to pay back 100% of the commission relating to Mr Dawson. Mr Stone requested that the deduction for the Dawson commission not be made until they had had an opportunity to discuss the matter.

[35] Mr Murphy did not respond to this request and the commission was deducted on 15 December 2002.

[36] While the draft employment agreement provides expressly for deductions from remuneration payments pursuant to s5 of the Wages Protection Act 1983, Mr Stone has never signed the written agreement – therefore there is no express agreement for deductions to be made.

[37] However in order to resolve this aspect of Mr Stone's employment relationship problem, I am satisfied Mr Stone was wrongly paid in relation to the commission for this sale. It is clear from the documents and evidence produced to the Authority that Mr Stone did not conclude the Dawson sale. He was therefore never entitled to receive payment in respect of the sale to the Dawson's.

Mr Stone's claim in relation to the Dawson sale fails.

Is Mr Stone entitled to outstanding commission payments?

[38] Mr Stone claims he is entitled to full commission payments in respect of the licences to occupy 41 Centre Court (McKay), 6 Elsmore Crescent (Halliday), 46 Village Drive (Leathwick), 38 Elsmore Crescent (Thorne), 14 Village Drive (Taylor) and 25 Centre Court (Hutchinson).

41 Centre Court (McKay)

[39] Mr Mackay initially made contact with VONZ regarding a licence to occupy, from Britain, prior to Mr Stone's employment. I am satisfied from the documents produced to the Authority that Mr Murphy dealt with Mr Mackay at the initial stage of his enquiry.

[40] Mr Stone produced a large quantity of emails he had exchanged with Mr McKay in relation to the sale and purchase of the licence to occupy 41 Centre Court. The exchanges took place over a seven month period. However, most of

the emails were about operational issues, such as the removal of furniture and household effects from England to New Zealand.

[41] Mr Mackay signed the requisite "application to purchase" and on 2 June 2002 Mr Stone invoiced VONZ in the amount of \$4,464.00 less WHT being 1.6% of the deposit.

[42] Having reviewed the evidence on this point, I am satisfied it is more likely than not that Mr Stone and Mr Murphy had discussed the McKay situation separately in late 2001 and had reached an agreement independent of their contractual agreement in relation to the payment of commission for the McKay sale. The agreement was that Mr Stone would receive 0.8% of the commission due on the sale of a licence to Mr McKay. I am supported in my conclusion by Mr Stone's own evidence where he acknowledged that this arrangement, with regard to the McKay's, was agreed to at the commencement of his employment.

[43] Mr Stone raised his invoice for 1.6% of the sale price and presented this directly to accounts for payment without first seeking authorisation from Mr Murphy. The full payment was made, I find incorrectly. Mr Stone was aware when he submitted the invoice that he was only entitled to receive 0.8% of the sale price and not the full 1.6%. The matter was rectified when Mr Murphy discovered the overpayment in October and after he had raised the matter with Mr Stone who agreed to the matter being rectified. I am satisfied Mr Stone has received his full entitlement for the commission due in respect of this sale.

6 Elsmore Crescent (Halliday)

[44] Ms Halliday entered into a contract for a licence to occupy on 24 January 2003. Mr Stone was paid 0.8% of the deposit by way of commission

[45] I am satisfied that it is more likely than not that Mr Murphy had one contact with Ms Halliday in relation to the sale of her licence to occupy. In comparison to the time spent by Mr Stone his attendance was of a minor nature. The documents produced to the Authority show that the sale on the licence to occupy was completed by Mr Stone. A payment of \$1,920.00 remains outstanding in respect of this sale.

46 Village Drive (Leathwick)

[46] Mr Leathwick signed a contract to purchase a licence to occupy a unit on 5 February 2003. Mr Stone invoiced VONZ for 1.6% of the deposit on 3 April 2003.

Mr Murphy told me at the investigation meeting that Ms Moran spent two hours with the Leathwicks. However, Ms Moran's own evidence contradicted Mr Murphy's evidence when she told me she spent one hour with the clients. After further questioning at the investigation meeting, it became apparent that Ms Moran spent about half an hour with the Leathwicks.

[47] I am satisfied Mr Stone was primarily responsible for the sale of a licence to the Leathwicks and that he concluded the sale. A payment of \$2,480.00 remains outstanding in respect of this sale.

38 Elsmore Crescent (Thorne)

[48] Mrs Thorne signed a contract to purchase a licence to occupy a unit on 7 February 2003. On 10 February 2003 Mr Stone gave Mr Murphy a handwritten note confirming Mrs Thorne was taking 38 Elsmore Crescent and outlined her specific interior design requirements. I am satisfied Mr Stone concluded the sale on this licence to occupy. A payment of \$2,040.00 remains outstanding in respect of this sale.

14 Village Drive (Taylor)

[49] Mr Taylor signed a contract to purchase the licence to occupy on 21 February 2003. I am satisfied Mr Stone concluded this sale. A payment of \$1,880.00 remains outstanding in respect of this sale.

25 Centre Court (Hutchinson)

[50] Mr Hutchinson signed a contract to purchase a licence to occupy on 6 March 2003. Mr Stone forwarded documents for signing to the Hutchinson's solicitors on 5 March 2003. Mr Stone has signed a receipt for the payment of the deposit on 6 March 2003. I am satisfied Mr Stone concluded this sale. A payment of \$2,000 remains outstanding in respect of this sale.

The Villages of New Zealand (Pakuranga) Limited is ordered to reimburse to Mr Stone an amount of \$10,320.00 gross as outstanding commission payments due in respect of the licences to occupy for 41 Centre Court (McKay), 6 Elsmore Crescent (Halliday), 46 Village Drive (Leathwick), 38 Elsmore Crescent (Thorne), 14 Village Drive (Taylor) and 25 Centre Court (Hutchinson).

Was the respondent entitled to make deductions from commissions in respect of the cost of net curtains installed in 5 units and amounting to \$2,101.60

[51] Mr Stone claims that deductions made in relation to the supply of net curtains to license holders were unlawful. He claims reimbursement of the monies deducted.

[52] Mr Stone was advised by Mr Murphy at the commencement of his employment that VONZ would install net curtains free of charge, but not drapes. An arrangement was in place with a contractor to provide these curtains and referrals were made to this contractor by Mr Stone. It was up to the new occupant to discuss and agree on the curtains to be supplied. Mr Stone told me he did not negotiate with any clients regarding the installation of net curtains. He says he simply advised clients they were available if clients wanted them.

[53] I am satisfied Mr Stone himself, never authorised the installation of net curtains nor did he provide any instructions to the contractor about the installation of net curtains. Mr Stone says, and I accept, that on 14 February 2003, Mr Murphy advised him, for the first time, that net curtains would no longer be provided for new residents, but that any offers already in the pipe-line would be honoured.

[54] On 24 February 2003 Erin Murphy met with Mr Stone and advised him that Mr Murphy had told him in late 2002 that net curtains would no longer be provided. Mr Stone informed Erin Murphy that his information was incorrect and that Mr Murphy had advised him only ten days earlier of the change in policy.

[55] Following that conversation VONZ deducted amounts for net curtains from Mr Stone's commission payments in the amount of \$2,101.60. Mr Murphy conceded at the investigation meeting that there was no agreement to make any deductions for the installation of curtains and that Mr Stone was unhappy about it, but he made the deductions anyway.

[56] I am satisfied it is more likely than not, that Mr Murphy did not issue any instructions to Mr Stone prior to 14 February 2003 that net curtains were no longer to be provided free to new occupants.

[57] Further, section 5 of the Wages Protection Act 1983 requires an express agreement for any deductions made from wages or salary payments. I am satisfied there was no express agreement between the parties for any deductions to be made from Mr Stone's remuneration. It follows that all deductions from Mr Stone's commission payments without that express entitlement to do so, are unlawful.

The Villages of New Zealand (Pakuranga) Limited is ordered to reimburse Mr Stone the amount of \$2,101.60 gross in respect of the unlawful deductions for net curtains.

Constructive Dismissal Claim

Was Mr Stone's resignation caused by a breach of duty?

[58] Both parties owe to each other a duty of good faith. That duty is imposed on the parties by section 4 of the Employment Relations Act 2000. The duty of good faith is wider in scope than the implied mutual obligation of trust and confidence.

[59] The basis of Mr Stone's claim for constructive dismissal is that he resigned as a result of a breach of duty on the part of VONZ and/or VONZ embarked on a course of conduct, the objective of which, was to force him to resign (see *Auckland Shop Employees Union v Woolworth's (NZ) Ltd* [1985] 2 NZLR 372).

[60] The conduct amounting to a breach must impinge on the relationship in the sense that looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. (*Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20; [1997] 3 All ER 1 (CA).

[61] Mr Stone relies on the respondent's actions in relation to the underpayment of commissions due and the unlawful deductions to support his claim that the degree of trust and confidence he was reasonably entitled to have in his employer had been affected to such a degree that the employment relationship had been destroyed.

[62] Further, Mr Stone says the following actions also contributed significantly:

- Late payment for commissions earned;
- Interference in Mr Stone's primary sales function by Mr Mr Murphy and Ms Mary Moran;
- That meetings held on 11 October 2002 and 24 February 2003 were procedurally and substantively unjustified disciplinary processes; and
- Issues relating to a meeting about business cards on 17 October 2002

Issues relating to purchase of business cards

[63] Mr Stone was critical of Mr Murphy for “rebuking” him for arranging his own business cards in November 2001. Mr Stone relayed this incident to me to support his claim for constructive dismissal.

[64] Mr Stone told me he ordered his own cards after repeated requests had failed to produce a result. He says that when he spoke to the printer and made arrangements for the cards he told the printer if there was a problem or there was a problem with the payment for the business cards, he would pay for them. Mr Stone acknowledged at the investigation meeting that he had no authority to enter into arrangements on behalf of VONZ.

[65] I find Mr Stone’s actions in ordering business cards when he was aware VONZ had already received proofs but had not confirmed the proofs with the printer, and with no reference back to his employer, to constitute a breach of his obligations to act in good faith. Mr Murphy’s “rebuking” of Mr Stone for his actions seems reasonable in all the circumstances.

Late payment for commissions

[66] Mr Stone was paid commission only. It was common ground that the agreement in regard to commission payments was that Mr Stone would receive payments of commissions on the pay day following submission of his invoice. Murphy accepts that he paid some commission payments late. However, regular commission payments did not commence until after April 2002 pursuant to a request from Mr Stone that he not receive commission payments until that time.

[67] I am satisfied that some, but not all, commission payments were paid outside the agreed timeframe, and that this issue was raised by Mr Stone in December 2002 and March 2003.

[68] I find that the late payments of commissions were a breach of the employment agreement between the parties.

Interference in the sales role

[69] Mr Stone says Mr Murphy and Ms Mary Moran acted to undermine his sales record and to prevent him from earning his potential. Mr Stone told me that from about September 2002 he noticed his sales leads had dropped away.

[70] It was common ground at the investigation meeting that both Mr Stone and Mr Murphy were involved in the sale of licenses. It was also not disputed that Mr Stone was employed as the principal sales person as a result of Mr Murphy’s

desire to move away from sales and focus on other areas of the business. Mr Murphy acknowledged at the investigation meeting that he passed referrals onto Mr Stone.

[71] Ms Mary Moran is the weekend receptionist at VONZ and assisted both Mr Murphy and Mr Stone in respect of their sales. At the investigation meeting Ms Moran told me that when she worked on the weekend she, was also responsible for sales.

[72] Ms Moran says she was employed in 1993 in the VONZ show home before being brought into the reception area and had undertaken a sales course. Ms Moran says that if Mr Stone was in his office she would put calls through to him but if he was not there she handle any enquiries herself.

[73] Mr Stone claims that his sales leads reduced because Ms Moran was marketing Mr Murphy as the contact person by putting his business cards on brochures being sent out to prospective clients. Ms Moran acknowledged that she promoted Mr Murphy, because he was her boss but that she was only required to assist Mr Stone, not promote him. Indeed, at the investigation meeting, and in contradiction to her previous evidence, Ms Moran told me it was not her job to pass enquiries onto Mr Stone.

[74] I found Ms Moran's evidence unconvincing and unreliable. In answer to questions at the investigation meeting she acknowledged that Mr Stone was the primary salesperson, and that she only assisted with enquiries if Mr Stone was not available. It was not disputed that Mr Stone worked at the Village most weekends as well as during the week and was generally available on his mobile phone if potential purchasers attended the Village and requested information.

[75] It was common ground that there was a sales diary held at reception which recorded appointment times for potential clients visiting the village and was to be used by both Mr Stone and Mr Murphy with respect to appointments they had on any one day. It was also common ground that Mr Stone seldom made use of the diary.

[76] A feature of the concerns relayed to Mr Stone throughout his employment was his refusal to enter his appointments and other information in the company diary. I accept Ms Moran and/or Mr Murphy were not always aware that Mr Stone had been dealing with particular clients because the information was not freely available.

[77] Having heard from both parties on this issue, a review of the records provided to the Authority showing the total sales of licences between 2001 and March 2003 shows that Mr Stone completed 65% of all the sales concluded during that period.

[78] Mr Stone was the primary sales person for VONZ. Mr Murphy was looking to extricate himself from that role which is why Mr Stone was appointed. Mr Stone relied on referrals from enquiries which might then turn into a sale for him for which he could receive commission payments as his sole source of income. I am satisfied that on the whole and taking an overall view of the actions of all the parties involved, there were sales leads which were not referred to Mr Stone in situations where they ought to have been. This impacted on Mr Stone's ability to earn income and caused him to be disadvantaged in his employment.

[79] Having made that finding however, I must say that Mr Stone did not help himself over his refusal to utilise the sales diary system and his unwillingness to allow Ms Moran to make appointment bookings for him. I accept the evidence from the respondent witnesses that at times Mr Stone was difficult to contact and his whereabouts was unknown.

Employment Relationship from October 2002 to March 2003

[80] As already set out earlier in this determination, Mr Murphy met with Mr Stone on 11 October 2002 where the two men discussed the invoices presented by Mr Stone relating to the sale of licenses for McKay and Dawson. Mr Murphy told me that as far as he was concerned the way Mr Stone went about presenting the invoices by going directly to the accounts clerk and requesting payment without authorisation from him or any reference to him was deceitful. With the exception of those two specific invoices Mr Stone had always sought prior approval for payment. Mr Murphy followed up his conversation by writing to Mr Stone and setting out his understanding of the conversation including advising Mr Stone:

We wish it very clearly understood that all arrangements for payment of remuneration to you are to be concluded with the writer. If you present a direction to another employee to attend to a payment of remuneration to you we will treat that action as an act of serious misconduct and your employment will be a risk of immediate termination.

[81] Mr Stone says this letter constituted a warning and was unjustifiable. Mr Stone says the meeting was not carried out in accordance with procedural fairness requirements. Having reviewed the letter, I do not agree. The letter sets out the discussion Mr Murphy held with Mr Stone on 11 October, but is more

akin to advice about how similar situations will be dealt with in the future, rather than putting Mr Stone's employment in jeopardy.

[82] Mr Stone did not contest the letter at the time as being an unjustified warning and I understand he raises it now, in the context of the overall behaviour of the respondent and in support of his claim for constructive dismissal.

[83] In November and December 2002 Mr Stone set up non-genuine sales enquires. Mr Stone says he did this because he was concerned his sales leads were diminishing. Mr Stone had three of his friends and/or family make contact with VONZ during weekends in November and December. Each caller requested a copy of an information pack which was duly sent to them. However, instead of Mr Stone's business card being attached and the referral passed onto him, Mr Murphy's card was attached to each pack. At the investigation meeting Ms Moran was unable to tell me why she had not referred the calls to Mr Stone, and she was very critical of Mr Stone's actions in setting up the calls.

[84] Sometime before 20 January 2003 Mr Stone applied for a job with St John Ambulance. In a supplementary statement provided to the Authority Mr Stone says that he enjoyed his job but that Mr Murphy's behaviour toward him had made him very unhappy and distressed. For this reason he sought alternative employment.

[85] Further, Mr Stone says that he hoped the issues he had raised would be resolved so that he could continue his employment, but that seemed increasingly unlikely.

[86] On 19 January 2003 Mr Stone wrote to the respondent setting out explanations to issues raised verbally by Mr Murphy the previous week, in respect of his appointment setting and timekeeping. In addition to his explanations Mr Stone writes:

The attitude you are displaying towards me is intolerable and causing me unnecessary distress in my employment, I do not accept that my conduct is anything but totally professional.

I am now aware that for at least the last three months Mary Moran has been forwarding to you sales enquiries that have come in on the weekend. This has occurred even when I am sitting in my office when the enquiries come in.

Since you are blaming my conduct for causing you to handle sales calls you don't want to handle (because you say I am not available), please explain why the weekend receptionist is forwarding sales enquiries to you when I am available.

[87] On 21 January 2003 Mr Stone was invited to and did attend an interview at St John Ambulance for the position he had previously applied for. This was followed up by a second interview on 23 January 2003. Mr Stone's diary indicates that while he attended work in the morning of 23 January 2003, he records that he went home on sick leave. In his supplementary statement Mr Stone states:

Around that period of time I was experiencing headaches, nausea and stomach upsets due to the distress I was experiencing as a result of the manner in which the respondent was treating me in my employment.

[88] There is no evidence to indicate, given the serious medical symptoms described by Mr Stone, that he attended his doctor. Neither did he consider the symptoms so serious that he should delay the interview at St John Ambulance.

[89] On that same day (23 January 2003) Mr Stone wrote a second comprehensive letter to Mr Murphy in which he sets out complaints about the lack of referrals being given to him and provides his supporting evidence by way of the results of the pretext sales calls made the previous November and December.

[90] In his letter Mr Stone notes that he had an upset stomach on the morning of 21 January 2003 and did not arrive at work until 11.30am (this was the same day he had his interview with St John Ambulance). Mr Stone describes issues relating to incorrect information as to his availability being passed onto potential purchasers and complains:

...once again you have interfered in my duties. Again this conduct is causing me distress in my workplace.

...

These matters I have outlined above have caused me considerable concern and distress. It is unfair and unreasonable that I am being prevented from undertaking sales enquiries and therefore losing commissions. I therefore ask that you and Mary Moran stop interfering with my job in the manner described and let me conduct the full range of my sales work unhindered.

[91] Mr Stone was offered employment with St John Ambulance on 3 February 2003. On 10 February 2003 Mr Murphy wrote to Mr Stone acknowledging receipt of the two letters and advising that the issues were of concern and warranted a considered response. He undertook to discuss the situation with Ms Moran and provide a full written response within the following two weeks.

[92] I do not know when Mr Stone advised St John that he was accepting the offer of employment. However, he signed an employment agreement on 27 February 2003. I agree with submissions made on behalf of VONZ that it is

unlikely St John would have waited for three weeks for a prospective employee to verbally acknowledge acceptance of a verbal offer.

[93] Given that he signed the contract on 27 February, I have concluded it is more likely than not that Mr Stone accepted the verbal offer on 3 February and during the ensuing three weeks the written documentation was provided and Mr Stone signed off the agreement. It was common ground that Mr Stone, although he had formally accepted new employment with St John Ambulance by the end of February 2003, did not tender his resignation until 26 March 2003.

[94] Therefore when Mr Murphy wrote his letter on 10 February 2003 he did so without the knowledge that Mr Stone was intending to leave his employment and was taking steps to formalise a new employment relationship.

[95] As set out earlier in this determination, on 14 February 2003 Mr Stone met with Mr Murphy where the two men talked about the net curtains and the fact that they would no longer be offered for free.

[96] On 24 February 2003 Mr Stone was invited to attend a meeting with Erin Murphy. Mr Stone says Erin Murphy was loud and aggressive in the meeting and he told Mr Stone that Mr Murphy had told him in late 2002 that net curtains would no longer be provided and that he must stop promising clients that they would get net curtains. As already set out earlier in this determination I am satisfied Mr Stone told Erin Murphy that his information was incorrect and that Mr Murphy had advised him only ten days earlier of the change in policy.

[97] Mr Stone says Erin Murphy then raised a number of issues which Mr Stone had outlined in his letter dated 23 January 2003 and he proceeded to respond to Mr Stone in an unfriendly and angry tone interspersed with swearing and exclamations of disbelief. Mr Stone says the meeting was disciplinary in nature but lacked any procedural fairness.

[98] Sadly, Erin Murphy passed away in 2005 and was not available to give evidence. Mr Murphy disputes the meeting was disciplinary in nature and says his father was simply letting Mr Stone know how angry he was.

[99] I am satisfied it is more likely than not that during the 24 February 2003 meeting Erin Murphy displayed angry and emotional behaviours. However, I find that the meeting was not disciplinary in nature, no warnings were issued or any other disciplinary action taken against Mr Stone. Nevertheless, the tone of the

meeting was not what one expects in an employment setting and for that the respondent must take responsibility.

[100]On 10 March 2003 Mr Stone commenced a period of two weeks sick leave. Mr Murphy's uncontested evidence is that Mr Stone made contact with Mr Murphy while he was on sick leave and advised him that his sick leave was as a result of having the flu.

[101]On 24 March 2003 the VONZ Board formally responded to Mr Stone's letters of 19 and 23 January 2003. The letter is a comprehensive response to each of the points raised by Mr Stone. The letter reiterates Mr Murphy's concerns about Mr Stone's setting of appointments and timeframes for meeting with clients. The letter also confirms concerns raised by Mr Murphy about Mr Stone's availability. The letter responds to Mr Stone's specific complaints relating to potential purchasers who had not been referred to him as a potential sale for follow up. The Board's response also included reference to the fact that Mr Stone did not utilise the sales diary and this made it difficult for reception staff and/or Mr Murphy to know where Mr Stone was and whether he was contactable. In relation to the sales calls Mr Stone set up in November and December 2002 Mr Kasper writes:

We are astonished by your advice that you fabricated sales enquiry and in the course of so doing deliberately misled the Village staff and wasted Village resources. We have no hesitation in advising that we consider those actions to constitute serious misconduct and had it not been for the need to thoroughly investigate other allegations we would immediately upon receipt of your letter of 23 January 2001 (sic) have called a meeting with you to discuss the future of your employment.

[102]In conclusion Mr Kasper on behalf of the Board writes:

We were initially very concerned by the content of your letters. As a consequence of our enquiry we now hold concerns in relation to the validity of your allegations and your conduct. We suggest we meet with you to discuss these issues. We may choose to have legal representation at this meeting and suggest you may also wish to bring a legal representative or support person. Please liaise with the writer to arrange a convenient time for this meeting.

[103]Mr Stone says that when he received the letter from the Board he was astonished at its contents. In his statement to the Authority Mr Stone denies all of the issues raised by Mr Kasper in his letter and also disputes the majority of the contents of the letter. Mr Stone states:

I believe that the final two paragraphs of Mr. Kasper's letter, under the subheadings "Arranged Enquiry" and "Conclusion" indicate that the Village Board of Directors had no intention of discussing my concerns in a procedurally correct manner but instead intended to dismiss me from my employment.

[104]I don't agree with Mr Stone's perception of the letter. It seems clear on its face that the Board did wish to meet, not only to discuss Mr Stone's concerns but also to address some of its own. Mr Stone relies on the reference to serious misconduct and the pretext calls to support his understanding that the Board were intent on dismissing him.

[105]Mr Stone resigned from his employment on 26 March 2003 while he was on leave. In his letter of resignation Mr Stone repeats many of the issues he had previously raised in his correspondence dated 19 and 23 January 2003. Mr Stone advised Mr Murphy that he could no longer work in the environment that existed at VONZ, and that he had already cleared his office of all his personal effects.

[106]If Mr Stone's evidence is to be accepted he wrote his letter of resignation on 26, but did not receive the letter from the VONZ Board until 28 March. Therefore the letter from the Board did not influence Mr Stone's decision to resign. Not forgetting that Mr Stone was already contractually obligated to commence new employment on 31 March 2003.

Determination

[107]I find on the balance of probabilities that VONZ breached its duty to treat Mr Stone fairly and reasonable as a result of the unlawful deductions, underpayments of commissions and the failure of Ms Moran and Mr Murphy to ensure all sales leads were provided to Mr Stone for follow up. These actions also constitute a breach of the employers statutory duty of good faith to Mr Stone.

[108]I find the breach to be so serious that it was reasonably foreseeable Mr Stone would resign from his employment.

[109]This takes me to the third limb of the test for constructive dismissal, that is whether or not the breach was the cause of the resignation. As set out earlier neither Mr Murphy nor Mr Stone impressed me as reliable witnesses. I have therefore resorted to examining the timeframe and sequence of events to attempt to establish, on balance, what the cause of Mr Stone's resignation was.

[110]The 19 January 2003 letter Mr Stone wrote to Mr Murphy predominantly deals with issues relating to Mr Murphy's previous discussions with Mr Stone about his timekeeping and appointments. Mr Stone advises Mr Murphy that he is aware that sales calls are being referred to Mr Murphy and not him in circumstances when he was actually sitting in his office. Mr Stone does not

advise Mr Murphy how he knows, however, the pretext sales calls were initiated in November and December 2002.

[111]In Mr Stone's second letter of 23 January 2003 he confirms the pretext sales enquiries all requested a brochure to be forwarded to them. All calls were on either a Saturday or a Sunday (not during the week when someone other than Ms Moran was working).

[112]Mr Stone is critical of Ms Moran, first of all, for sending a brochure and not referring the enquiry to him, and secondly, for not including his business card on the brochure that was sent out.

[113]Mr Stone's criticism of Ms Moran in respect of not handing the call to him is hardly reasonable. Mr Stone's himself, says each enquiry only requested a brochure. There is no evidence that any of the callers asked to speak to anyone. Ms Moran did as she was asked.

[114]Mr Stone's second criticism regarding the failure to put his business card on brochures that was sent out has more strength. At the investigation meeting Ms Moran told me that she did not have a stock of Mr Stone's business cards. It had never occurred to her to have a stock as she had always only ever put Mr Murphy's card on information she went out to potential clients.

[115]Having employed Mr Stone in the capacity of salesperson it was then contingent on VONZ to take steps to ensure potential clients were able to contact him in respect of future enquiries. I am satisfied this failure was one reason why Mr Stone was seeking alternative employment, but was not the whole reason. Mr Stone was unhappy with Mr Murphy's criticism of his timekeeping and appointment making. These points were made in Mr Stone's letters of 19 and 23 January 2003. Mr Stone requested a response to both letters and on 10 February 2003 Mr Stone was advised the respondent was taking his complaints seriously and was investigating them. However, before the respondent had provided that information to Mr Stone, he had already decided to accept another offer of employment and steps were underway to formalise that arrangement.

[116]Mr Stone also relies on the failure by VONZ to pay his full commissions as being causative of him resigning from his employment. However, the evidence shows that the licenses concluded by Mr Stone were completed on the following dates:

Halliday – 24 January 2003
Leathwick – 5 February 2003
Thorne – 7 February 2003
Taylor – 21 February 2003
Hutchinson – 5 March 2003

[117]As can be seen, all the licenses to which the unpaid commissions apply were all entered into after Mr Stone had commenced the process of finding alternative employment and had attended two interviews. Only one of the licenses was entered into before the offer of a new job was made to Mr Stone. Given that, it can not be said that the breach of duty in relation to the commission payments was causative of Mr Stone resigning from his employment.

[118]Further, the unlawful deductions for the net curtains were made in March 2003, after Mr Stone had already concluded a new employment agreement with St John Ambulance on 27 February 2003. I find this breach of the employment agreement was not causative of Mr Stone entering into a new employment agreement.

[119]Good faith in the employment relationship is a two way street. I am satisfied it came as a complete surprise to Mr Murphy, at the investigation meeting, that Mr Stone had accepted new employment during February 2003 and had commenced as early as 31 March 2003.

[120]On 3 April 2003 Mr Stone presented an invoice for the Leathwick sale as if he continued to be employed at VONZ. VONZ understood Mr Stone was on leave during April. Mr Stone, as any employee, is free to pursue and accept alternative employment while still employed. However, Mr Stone's conduct with regard to moving on from his employer is misleading. I also find that Mr Stone's conduct in setting up the pretext calls a breach of his obligation of good faith. Mr Stone set up these calls without first raising any concerns that his sales leads were dropping off, with the Respondent.

[121]In his supplementary statement Mr Stone acknowledges that he had previously arranged to take four weeks annual leave from the Respondent from 31 March to 28 April 2003. However, on Friday, 7 March 2003 Mr Stone submitted a second annual leave application adjusting the start date of his annual leave to 21 March 2003.

[122]In his supplementary statement Mr Stone refers to a "Harrhy" incident which occurred on 8 March 2003 after Mr Stone had signed his new employment

agreement with St John's Ambulance. Mr Harry was seeking an alternative arrangement for his elderly parents who were looking to make the move from Hastings to Auckland. Mr Stone spent more than two hours with Mr Harry on 5 March 2003. When he arrived at work on 8 March, Mr Harry was there meeting with Mr Murphy. Mr Stone asked Mr Harry how his appointment with Mr Murphy had come about. Mr Harry told Mr Stone that he had tried to contact him the day after his initial visit but Mr Stone was not available. Mr Harry's call was referred to another employee who made the appointment for Mr Harry to see Mr Murphy. Mr Stone then approached Mr Murphy about the issue and a heated exchange took place. Mr Murphy was unaware that Mr Stone had seen Mr Harry the previous week.

[123]Mr Stone, in his written statement says this incident was the:

final straw in terms of distress, humiliation and loss of dignity I had experienced as a result of the manner in which the Respondent had treated me and on 10 March 2003 I commenced a period of sick leave from the Respondent.

[124]I do not accept Mr Stone's evidence about the significance of this incident for several reasons. Mr Stone had already entered into a contract to move to another employer; Mr Stone refused to utilise the sales diary to record names of clients and his appointments, had he done so Mr Murphy would have known Mr Stone had seen Mr Harry and may not have spent any time with him; Mr Stone was difficult to get hold of and there is no evidence to show that anyone at VONZ was aware Mr Stone had seen Mr Harry the previous week.

[125]The final reason for not accepting Mr Stone's evidence on this point is related to the common understanding that Mr Stone was due to take four weeks annual leave from 31 March 2003 to 28 April 2003. On 7 March 2003 Mr Stone adjusted the start date of his leave to 21 March 2003. This was the day before the Harry incident. As stated earlier in this determination, I have found that Mr Stone proceeded on sick leave for a period of two weeks due to having the flu.

[126]Conveniently, Mr Stone's sick leave ended on 22 March 2003 at which time he commenced, what the Respondent thought, was four weeks annual leave. On Wednesday, 26 March 2003, while on leave Mr Stone resigned from his employment, after first cleaning out his desk. At some stage during this period Mr Stone also photocopied numerous documents belonging to the respondent in respect of sales he had concluded during his employment. On Monday, 31 March, Mr Stone commenced his employment with St John Ambulance.

[127]While I am satisfied there were breaches of Mr Stone's employment agreement on the part of the Respondent, these breaches were not causative of Mr Stone's decision to resign from his employment. I find that Mr Stone resigned from his employment on 26 March 2003 because he was due to commence employment with St John Ambulance on 31 March 2003.

It follows that Mr Stone was not constructively dismissed. I am unable to be of further assistance to Mr Stone.

Costs

[128]Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Summary of Orders

- **The Villages of New Zealand (Pakuranga) Limited is ordered to reimburse to Mr Stone an amount of \$10,320.00 gross as outstanding commission payments due in respect of the licences to occupy for 41 Centre Court (McKay), 6 Elsmore Crescent (Halliday), 46 Village Drive (Leathwick), 38 Elsmore Crescent (Thorne), 14 Village Drive (Taylor) and 25 Centre Court (Hutchinson).**
- **The Villages of New Zealand (Pakuranga) Limited is ordered to reimburse Mr Stone the amount of \$2,101.60 gross in respect of the unlawful deductions for net curtains.**

Vicki Campbell
Member of Employment Relations Authority