

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 240  
3151521

BETWEEN

JOHN MUIR  
Applicant

AND

NETWORK SERVICE  
PROVIDERS LIMITED  
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Michael Smyth, counsel for the Applicant  
Kirsti Laird, counsel for the Respondent

Investigation Meeting: 27 and 28 September 2022

Submissions received: 11 and 26 October, and 4 November 2022

Determination: 12 May 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] For about 25 years John Muir has worked in IT for several companies. His roles have included Software Manager and Developer, Senior Systems Engineer, and Solution Architect.

[2] In May 2012 he accepted an offer of employment with Network Service Providers Ltd (NSP) in the senior position of Strategic Advisor.

[3] After nearly nine years, in May 2021 Mr Muir resigned from NSP. He advised his employer that its actions had forced him to leave and that he regarded himself as having been constructively dismissed.

[4] He raised a personal grievance and claimed compensation and monetary entitlements, including commissions which had been expressly a part of his remuneration under an individual employment agreement (IEA) entered into with NSP.

[5] The claims reached the Authority and mediation was undertaken, but without resolution of the problem by the parties themselves. The claims have been investigated and are now to be determined by the Authority.

[6] Several witnesses including Mr Muir and Brent Larsen, Managing Director and owner of NSP, gave material evidence and were questioned by the Authority and counsel Mr Smyth and Ms Laird. Counsel also provided extensive submissions to assist the Authority.

[7] This determination is given in accordance with s 174E of the Employment Relations Act 2000 (the ER Act) and does not therefore fully record all the evidence or information considered by the Authority, or submissions received.

[8] The Chief of the Authority has granted an extension of time beyond the normal three-month period for giving this determination, required because of the demands of other Authority work.

### **Mr Muir's claims**

[9] Mr Muir seeks a determination and appropriate orders

- upholding his claim that he was underpaid commissions agreed to in the IEA
- requiring NSP to pay commissions in an amount to be determined by the Authority
- requiring annual holiday pay, Kiwisaver and interest to be paid on those commissions, and on any remuneration or other money NSP has paid Mr Muir since he brought his claims to the Authority
- finding that Mr Muir has a personal grievance of unjustified dismissal, or other type

- requiring NSP to pay compensation and provide any other monetary remedies the Authority may award to remedy a grievance.

### **NSP's response to the claims**

[10] NSP denies it owes Mr Muir any commissions.

[11] After the problem was brought to the Authority and before the investigation meeting began, NSP paid a total of \$33,071.31 to Mr Muir, expressing the payments to be made on an *ex-gratia* basis and without admission of liability.

[12] NSP also denies Mr Muir has a personal grievance, whether of constructive dismissal or any other kind.

[13] NSP seeks a determination resolving the employment relationship problem in its favour.

### **Commissions claim**

[14] Mr Muir's commissions claim is founded on express terms of the IEA set out in the Commission Schedule at Appendix C.

[15] Appendix C provides a scale of commission rates ranging from 5% up to 10%, for levels of Gross Sales Income (GSI) ranging from \$500,000 up to \$2,500,000. The words that follow the scale explain it, as below

Commission to be paid on Gross Profit (Gross profit is defined as:  
Gross Sales Income minus Cost of Sales = GP)

Cost of Sales is defined as: Hardware, Software, or external third-party costs.

Commissions will commence once the total Gross Sales Income of \$500,000, had been reached and will apply to every dollar from [sic] that point.

GSI targets are based on an Apr – Mar Financial Year

Contracts which are secured for periods greater than 12 months and roll over to another financial year will contribute to the following years target

Commission is not retrospective

The income must be received by NSP before the commission is paid.

[16] Mr Muir's claim for commissions is based on his interpretation of the Schedule and IEA as requiring payments, at scale, to be made on gross profit, regardless of whether that profit is derived from new business clients or from additional business carried on with existing clients. He contends the Schedule and scale were not restricted to new customers but drew in customers NSP continued to carry on business with as well.

[17] NSP rejects that interpretation.

[18] Both parties have tended to focus on what the IEA and Appendix C do not expressly say. Mr Muir contends there are no words limiting commissions to new business, whereas NSP contends there are no words extending commissions to existing clients or customers. In the absence of words of restriction or exclusion, Mr Muir contends such words are not to be introduced or implied into the IEA and Appendix C, whereas NSP contends a term is to be implied to fill the lacuna.

### **Supreme Court's judgment in *Bathurst***

[19] To support their arguments as to how the IEA is to be interpreted, both parties have made submissions referring to the relevant legal principles applied by the Courts.

[20] Currently the leading case on contractual interpretation in New Zealand is the judgment of the Supreme Court in *Bathurst Resources Ltd v L & M Coal Holdings Ltd*<sup>1</sup>.

[21] The primary principle of contractual interpretation, to be found in a decision of the House of Lords, is reproduced at paragraph [41] of the Supreme Court's judgment

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<sup>1</sup> [2021] NZSC 85

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

[22] In approaching the IEA and its Appendix C, the Authority must first ask itself whether there is really an interpretation problem at all, or whether ordinary words with plain meaning have been used and an interpretation of them is not required beyond applying knowledge of everyday written English.

[23] Reading the words as they must be read, in the context in which they are used, leads the Authority to conclude there is an interpretation issue. It arises from an apparent absence of some words as much as from any that do appear on the pages of Appendix C and the IEA.

[24] At first sight, the structure and contents of Appendix C seem brief and simple and do not suggest an extensive or bespoke arrangement under which Mr Muir was entitled to commissions. There is no issue between the parties about the application of Appendix C to new business, or 'net new' as it is sometimes called. Appendix C applies to new business Mr Muir secured through his own efforts. With existing business, the evidence of Mr Muir tends to show there were several ways he could potentially gain an entitlement under Appendix C. Which way or ways that might be, was ultimately a matter of agreement between NSP and Mr Muir, if that was their intention.

[25] Because of its relative brevity and simplicity, Appendix C does not seem to have expressly made it clear what involvement he was intended to have, as he contends was agreed, before he could claim commissions from existing clients' business. Mr Muir was uncertain in his attempts to define that involvement or connection he was to have to that business, to become entitled to commissions from it.

[26] Thus far the Authority has recognised that interpretation is required. To give that, an objective approach must be taken and the Authority must consider how the notional reasonable person would have understood Appendix C and the IEA.

[27] The Supreme Court decision in *Bathurst* guides the Authority as to how and when it may take account of material extrinsic to the IEA and Appendix C, in the course

of interpreting the written contractual documentation. The Court observed<sup>2</sup> that such material usually falls into three categories

- commercial context and purpose of the contract
- evidence of prior negotiations
- evidence of subsequent conduct.

[28] The decision in *Bathurst* draws heavily on the Evidence Act 2006, which governs the admissibility of all evidence in court proceedings. Although the Authority is not within the definition of a court under the Evidence Act, its provisions are nevertheless a guide for the Authority, which tends not to look so much at the admissibility of evidence but at the relevance of that evidence or information and the weight that it should be given when any facts are to be established in an investigation. The evidence and information given by witnesses for Mr Muir and NSP was considerable, and some of it is persuasive if not determinative of the interpretation issue.

### **Context and purpose**

[29] In his written evidence Mr Larsen described NSP in the following way<sup>3</sup>

NSP's business involves the development of specific IT solutions to resolve issues or improve IT arrangements for its clients. This includes IT system infrastructure, private and public cloud solutions, information security services, data security, and back up, increased network efficiencies, managed maintenance services and procurement.

[30] Mr Larsen described Mr Muir's role as Solution Architect. Mr Muir used the same description and referred to himself as a designer/developer. The purpose of the position was described in Appendix A of the IEA as requiring him to, .... 'use your business and technical expertise to consult, architect, design, secure and contract

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<sup>2</sup> At [40]

<sup>3</sup> At para 10

enterprise quality technical solutions and consulting services to existing and potential clients, contributing to NSP's income growth and bottom-line profitability'.

[31] Appendix A referred to Mr Muir's role as containing, .... 'a high level of client interaction, managing and building our sales pipeline/funnel'.

[32] The scope of the job included, .... 'Prospecting, Opportunity identification and management', and responsibility for, ..... 'promoting, presenting, negotiating, contracting, and securing new business'. Mr Muir's job included assisting in developing and maintaining NSP's business/vendor relationships.

[33] His responsibilities were expressed in Appendix A to include, ..... 'contributing to the achievement of Gross income and net profit targets', and managing the sales processes for portfolio customers, and customer account and relationship management.

[34] Appendix C seems drafted to give Mr Muir wide entrepreneurial freedom to develop the role, and encourage him to maximise opportunities as they presented themselves. A responsibility for delivering ' "remarkable outcomes" ', suggests Mr Muir was incentivised to take a liberal view of his role and be active in trying to expand it where he could. The reference to him acting as, .... 'a strategic "Trusted Advisor"' 'also seems intended to recognise his position as a special and select one within NSP.

[35] The Authority finds that sales was presented to Mr Muir as being a potentially significant component of his job with NSP. He was strongly encouraged by the IEA to pursue and secure new business wherever he could.

[36] The express exclusion of 'retrospective' commission in Appendix C, gives no indication one way or the other about the source of commissions intended by the IEA. The Authority reads the exclusion to mean that Mr Muir would not be paid commissions if they had been earned before the IEA commenced, or before he became employed under the IEA.

[37] The letter from NSP offering employment to Mr Muir held out the possibility of his being offered Mr Larsen's shares in NSP, to acquire whenever Mr Larsen was ready to leave the company and sell. There was no firm offer but the potential for share acquisition was floated before Mr Muir.

[38] The situation that has led to this dispute is one of a lack of wording in the agreement. Paucity of detail and specificity has left the door open for the parties to dispute what was intended by them. The apparent gap in the agreement has created ambiguity and some confusion. This is not a case where a typographical error, or mistake in transposing text, has led to a problem. Mr Muir and NSP have looked at the same gap but concluded there are very different meanings lying within it.

### **Prior negotiations**

[39] Before joining NSP, Mr Muir had not been employed in IT positions where he had been entitled to commissions as part of his remuneration. The Authority accepts that Appendix C was introduced by NSP as a part of the IEA and in a form NSP devised. Mr Muir did not seek professional advice about the IEA while negotiating it. He requested a higher salary, which NSP agreed to, but did not actively seek to have his eligibility for commissions differently defined or specified.

[40] The Authority notes that the major component of Mr Muir's remuneration was intended to be salary, which the parties agreed he would be paid on a weekly basis by direct credit. Unlike some employees, Mr Muir was not dependent on earning commissions or having a high ratio of commission to salary, to make a living and pay his bills.

### **Evidence of Jonathon Prentice**

[41] Jonathon Prentice, a co-founder, and former director of NSP, supported Mr Muir's claim for commissions. He was involved with Mr Larsen, his co-founder and co-director, in the recruitment of Mr Muir but not in the negotiation of the IEA and Appendix C. Mr Prentice said he had left it to Mr Larsen to prepare the employment documentation. He said that the employment agreement, when he saw it, reflected the commission structure which Mr Muir contends was agreed.

[42] The Authority agrees with NSP's submissions that Mr Prentice's evidence can carry little weight in the circumstances, because he was not part of the negotiations.

[43] The difficulty with his evidence is raised in *Bathurst*; 'evidence of what a party subjectively understood or intended as to the meaning of the contract will not be

admissible if that was not communicated to the other party prior to contract formation'<sup>4</sup>. Mr Prentice said he did not speak to Mr Muir about the employment package when it was being negotiated.

[44] The evidence of Mr Prentice is not information that would have been available to the notional reasonable person having all the information that was reasonably available to the parties at the time.

[45] The Authority can accept from Mr Prentice that he considered NSP had written the agreement in a way that reflected NSP's intention. But the question remains for the Authority, what reliable and relevant evidence is there helping to show what that intention was?

### **Terms and conditions of other NSP employees**

[46] Evidence given about this is also of little assistance. It may show NSP's contractual intentions towards others - third parties - the firm employed, but if that was not information communicated to Mr Muir at the time he was in negotiation, in principle it is not evidence that should be given much weight by the Authority. It seems unlikely that NSP would have disclosed to Mr Muir the terms and conditions others were employed under. It is also in the nature of similar fact evidence, which does not exclude a possibility that with Mr Muir, NSP intended to depart from a more conventional 'net new' commissions arrangement entered into with others and tailor it to include existing clients.

[47] Again, evidence of Mr Larsen's understanding based on employment agreements entered into with others can carry little weight, as it is merely evidence of subjective intention which remained uncommunicated with Mr Muir.

[48] NSP's appeal to 'commercial sense', by assuming an intention by the parties to maintain uniformity of relevant terms and arrangements among all employees of NSP, must be viewed with the caution given aptly in *Bathurst*, that 'commercial absurdity tends to lie in the eye of the beholder'<sup>5</sup>. In principle Mr Muir's terms and arrangements

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<sup>4</sup> At [68]

<sup>5</sup> At [45]

could have been different, or even very different, from those of others paid commission, *if* that was the intention of NSP and Mr Muir. There was no benchmark or standard which the contractual arrangements had to meet.

### **Subsequent conduct**

[49] While Appendix C gave Mr Muir an ‘entitlement’ to commissions (at scale), for him to realise the monetary value of that entitlement, he had first to make a claim.

[50] After accepting and commencing the employment and for the next eight years, Mr Muir not once made a claim, whether from new business or from existing clients. Consequently, NSP did not ever process such a claim, by rejecting, modifying, or paying out on one.

[51] Because there is an element of mutuality in this conduct, an objective observer might consider the conduct, especially because of its duration, was a display of a common understanding. It was also an overt display, in the sense that NSP could see that no claims were being made, and Mr Muir could see that NSP for whatever reason was content with that situation.

[52] In his evidence Mr Prentice, for his part, could offer no explanation as to why Mr Muir did not claim and was not paid commission during his employment.

[53] The Authority is satisfied that Mr Muir understood the requirement for him to initiate recovery of commissions if he considered they were due to him. He knew what NSP’s standard procedures were for employees to use if claiming, and he had access to all the information he needed to verify his entitlement as due.

[54] The Authority finds that NSP did not obstruct or hinder Mr Muir from making commissions claims. NSP made available to him access to all the information needed to calculate his entitlements and, in the format required by NSP, to prepare an application to recover his entitlements.

[55] It is surprising for an employee to allow an employer to retain custody over their unclaimed entitlements for as long as eight years, a period in which financial fortunes may change suddenly and dramatically for the worse. Allowing the employer to hold

the entitlements in trust as it were, for a long period, carries with it some risk of the employer's ability to pay disappearing if situations such as GFC, Covid, recession or other cause of financial collapse should arise. The usual and more secure arrangement is to claim and receive the entitlements reasonably soon after eligibility arises, use the money in a way that will retain or enhance its value if possible, and keep control over security of it. It is a situation where a bird in the hand might well be worth two in the bush.

[56] The Authority agrees with Mr Larsen's wry observation made from his long experience, that it is unusual for an employee to not recover remuneration reasonably soon after the entitlement arises. Moreso where that is from a direct component of remuneration such as commissions rather than reimbursement of expenses.

[57] The Authority did not view Mr Muir as someone disinterested in wealth, or someone indifferent to the accretion of assets, or an employee who regarded the regular and timely receipt of remuneration as unimportant. Apparently, he was reasonably comfortably off, as he chose not to work for a year when he left NSP, but he also had ambitions to acquire a stake in NSP from Mr Larsen. He obviously viewed the business as potentially a good investment for his future. He also mentioned to Ms Larsen his ambition to retire at age 50. That goal, if it is to be achieved, usually requires good financial acumen and planning. Not attempting for a long period to claim his entitlements, which he has calculated as over \$120,000, does not sit well with Mr Muir's ambitions.

[58] Mr Muir in his evidence gave an explanation why he did not make a claim. The Authority finds unpersuasive a suggestion that by not claiming commissions Mr Muir considered he was building up equity in the business, which he could later bring to bear in any discussion about the purchase price of Mr Larsen's shares. Taking that approach could attract uncertainty and risk as to what might happen to his equity over such a long period as eight years, while it remained in NSP's hands.

[59] There is no evidence that Mr Muir kept his own accumulating total, even approximately, of what he might be owed after each year of business, so that when he did eventually seek an increase in remuneration he could add that information into the mix.

[60] Standing back from the various explanations there may be for Mr Muir's extended period of almost complete inactivity regarding his entitlement to commissions, the Authority does not put such weight on this factor as to make it determinative of the interpretational issue. It is an equivocal factor.

[61] The Authority keeps it in mind that the unclaimed commissions were both for 'net new' business and existing customers, according to Mr Muir's understanding of his entitlement to commissions. Both were treated with the same passivity. In the case of existing customers there is no question that Mr Muir knew he had an entitlement to claim at scale, although it appears that he viewed 'net new' as potentially less remunerative than commissions from existing clients.

[62] The approach the Authority must take is to consider the apparent gap or lacuna in the wording of the IEA and Appendix C and try to determine why that gap was left or what it reveals about the parties' likely intentions.

[63] The Authority concludes that the parties, NSP and Mr Muir, agreed to Appendix C with its minimalist wording, because they each understood that the entitlement to commissions was to be based upon a relatively simple and more common scheme under which an employee is rewarded for bringing in new business, or net new. The explanation for the lack of detail is that it might go without saying that this was the scheme, rather than the less usual and potentially more complicated one, devised to apply to profit arising from business conducted with existing clients or customers.

[64] The primary question remains, what meaning would Appendix C and the IEA convey to a reasonable person having all the background knowledge which would reasonably have been available to Mr Muir and NSP when they concluded their agreement?

[65] The notional reasonable person would be able to see that while in principle a decision could be made to give Mr Muir an entitlement to commissions from existing customers, the options that were potentially available for defining his entitlement would require detailed specification, to the extent that the parties could not have intended to leave that information out of Appendix C, if they had agreed the scheme applied in the way contended by Mr Muir. They could not have intended to leave the wording so bereft of detail in expressing intention. The more reasonable explanation is that they

simply did not see it as necessary to add words to make it expressly clear the scheme was 'net new' only.

[66] The Authority concludes that the parties were aware there were several ways Mr Muir could potentially influence, or be involved in, directly or indirectly, the return of profit from existing clients or customers. Mr Muir mentioned several possible ways in his evidence. They included, having 'responsibility' for accounts, which can be a wide concept of involvement. He mentioned being 'involved' in sales work, also a wide concept, and achieving or generating profit or sales. He mentioned customers introduced by him to NSP and customers allocated to him by NSP. A different kind of involvement he mentioned was through being designated Account Manager of a customer's business, or association with that business through another NSP employee, who was designated the Procurement Manager of it.

[67] If it was intended he would be eligible for commissions from one or more of those ways, Appendix C would have provided details and not been left almost blank.

[68] The Authority agrees with NSP that the scheme Mr Muir contends was intended by the parties, would have been unworkable without the necessary detail needed to bring some understanding as to how and when it was to apply to any contribution Mr Muir made to results.

[69] For the Authority to now try and fill in the details would go beyond interpretation and become the fixing of new terms, which was an exercise open for the parties to carry out when they negotiated the IEA and Appendix C.

### **Implication of terms**

[70] The Authority does not consider the circumstances to be such that it is necessary to imply a term into the IEA as to the meaning and effect of Appendix C. The Authority does not need to consider whether the recognised tests for the implication of terms could be met in this case.

[71] In his evidence Mr Larsen confirmed the wording of more recent employment agreements had been changed to make it clear the entitlement was only for new business, or net new. Undoubtedly this will help avoid disputes such as that before the

Authority in this case, but it does not assist with the interpretation of Mr Muir's agreement.

[72] The Authority finds that Mr Muir's entitlement was limited to 'net new' business which he had brought to NSP by his efforts after commencing employment.

### **Personal grievance – constructive dismissal**

[73] The Employment Court recently reviewed the principles of constructive dismissal in *Ngawaka v Global Security Solutions Ltd*<sup>6</sup>, observing that the situations where a constructive dismissal might occur include:

- (i) Where the employee is given a choice of resigning or being dismissed.
- (ii) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to leave.
- (iii) Where a breach of duty by the employer leads the employee to resign.

[74] For Mr Muir it is contended the circumstances of his case fall within the third situation.

[75] For NSP it is contended there was no dismissal of any kind, constructive or otherwise. NSP did not breach a duty owed to Mr Muir but, if it did, the breach was not of sufficient seriousness that a substantial risk of resignation was foreseeable.

[76] In principle, the conduct complained of by the employee as giving rise to a constructive dismissal must be serious enough to amount to a repudiation of the employment contract. As observed by the Court in *Ngawaka*<sup>7</sup>, conduct that was just unreasonable is insufficient.

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<sup>6</sup> [2022] NZEmpC 40, at [7] to [10]

<sup>7</sup> At [8]

[77] The Court also restated the principle settled in earlier cases, that constructive dismissal may occur even if the employer was not seeking the resignation of the employee and had wanted to retain that person in employment<sup>8</sup>.

[78] The Authority finds that there was no breach of duty owed by NSP to Mr Muir under the IEA, or the ER Act or other statute, inducing his resignation. The Authority agrees with the submissions of counsel for NSP, that there is no reasonable basis on which the company could have foreseen that an employee who (1) believed he was entitled to commissions, and (2) knew, or should have known, he had to initiate a claim before he could receive any commission, and (3) chose not to do so for eight years, and (4) never raised a grievance in that time, would resign over non-payment of commission. He does not have a grievance of unjustified dismissal.

[79] The Authority also finds from the evidence there was no failure by NSP to provide any information needed by Mr Muir to support a claim for commissions. The information had always been there, as it had been for other employees who did make claims. No grievance of any kind arises from any conduct of the employer in this regard.

[80] The Authority finds that Mr Muir genuinely viewed with concern the conduct of a new NSP employee, Deepak Veerasamy, particularly towards other employees. He raised his concerns with Mr Larsen who responded to them and carried out an investigation. NSP took reasonable and active steps to address the situation, including requesting from Mr Veerasamy his input. NSP endeavoured to resolve matters consensually before disciplinary action needed to be considered.

[81] The Authority finds that the nature of the complaints and the response of NSP do not give rise to a claim of constructive dismissal based on an alleged serious breach of duty.

[82] Mr Muir said that the workplace culture became toxic after Mr Veerasamy had started and NSP appeared unwilling to intervene. That is contrary to the evidence, in the Authority's view. The workplace was not shown to be poisoned and Mr Larsen took reasonable steps to investigate and address Mr Muir's concerns.

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<sup>8</sup> At [10]

[83] Mr Muir said in his written evidence (at para 67) that he came to realise he was never going to recover unpaid commissions while remaining an employee of NSP. He said he feared his position would be eroded to the point where he would have no ability to earn commissions. Coming from an employee who did not try to claim commissions for eight years, this has a hollow ring to it. He was not prevented from bringing a legal claim while remaining employed by NSP.

[84] Mr Muir said (at para 68) it was a combination of these factors, unpaid commission, and workplace culture, that led him to conclude he had no option other than to resign with immediate effect. The Authority has found Mr Muir had no basis for considering that his unpaid commissions had its cause in a serious breach, or any breach, of his terms of employment. His dormancy for eight years was primarily the cause of Mr Muir not receiving any commissions he may have been entitled to in all that time. To get his commission entitlement verified by his employer, Mr Muir needed first to put in a claim but he did not.

[85] Mr Muir was left dissatisfied with the response of NSP but, the Authority finds, that dissatisfaction was not a significant driver of his resignation. Mr Muir resigned because he could not get NSP to agree to the new terms and conditions of employment he wanted, particularly the level of his pay. He was also unable to advance his interest in acquiring all or part of Mr Larsen's shareholding in NSP.

[86] It would not be surprising if Mr Muir was weary after eight years of providing valuable service to NSP while his remuneration remained the same, but it was his choice not to pursue a pay rise during all that time. When he finally did in 2020, Mr Larsen engaged with him and entered negotiations. The Authority concludes that the substantial cause of Mr Muir's resignation was frustration over the direction and speed of negotiations, which he had some responsibility for as well as NSP.

[87] There is no evidence that NSP was totally opposed to his claims for higher remuneration. Mr Muir had been offered a substantial pay increase by the time he resigned, over \$40,000 pa, taking his salary to nearly \$220,000 pa, and it may be that if he had persisted longer with the negotiations, an outcome more satisfactory to him would have resulted and he would not have resigned. The Authority is satisfied that the issue of commissions was first raised by Mr Muir, in 2020, as a lever in bargaining for

higher pay. It was not raised then as the complaint or grievance it has subsequently become in the Authority.

[88] The Authority finds overall that there is no strong enough case that any of the circumstances traversed in evidence amounted to a breach of duty, and one of such seriousness that it could reasonably have been foreseen Mr Muir would resign. His undoubted dissatisfaction with his employer, had to be caused by a serious breach of duty, a repudiation or rejection of his employment before the Authority could find Mr Muir was constructively dismissed.

### **Conclusion**

[89] The Authority determines that under the IEA and Appendix C, Mr Muir was entitled to be paid, at scale, commissions on 'net new' business only. This business was that of new clients Mr Muir introduced to NSP during his employment in each financial year.

[90] Mr Muir was not entitled to commissions on profits from business with existing clients or customers.

[91] No orders are required to be made for the payment of any commission to Mr Muir.

[92] The Authority determines that Mr Muir does not have a personal grievance of unjustified dismissal or of any other type.

[93] The Authority offers its view that the *ex-gratia* payments made to Mr Muir were income or earnings, or closely related to payments of that nature. They are in principle assessable for income tax and are part of gross income for the purposes of annual holiday pay and Kiwisaver. No orders are made in this regard, but leave is reserved for the parties to seek directions or orders if necessary.

## **Costs**

[94] The Authority expects that in the usual way the parties will try to resolve any question of costs themselves.

[95] If an application becomes necessary, it is to be made within 14 days of the date of this determination, and any reply within a further 14 days of such application if made.

[96] The Authority is likely to take its usual tariff-based approach to costs.

Alastair Dumbleton  
Member of the Employment Relations Authority