

**NOTE: This determination contains an order prohibiting publication of certain information at [67]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI Ā TARA ROHE**

[2023] NZERA 46  
3151825

BETWEEN	LEON THOMPSON Applicant
AND	EDWARDS & HARDY HAWKES BAY LIMITED Respondent

Member of Authority:	Sarah Kennedy
Representatives:	Dave Cain, advocate for the Applicant Murray Grant, counsel for the Respondent
Investigation Meeting:	11 October 2022
Submissions received:	26 October 2022 from Applicant 1 November 2022 from Respondent
Determination:	31 January 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Thompson says he was unjustifiably dismissed from his sales role in January 2021 by Edwards and Hardy Hawkes Bay Limited (E&H) for bringing his employer into disrepute by dishonestly increasing his commission payments. Mr Thompson says he complied with E&H's sales policy and its rules on commission payments and always conducted himself ethically with all clients of E&H. He maintains all concerns raised with him were confirmed contracts, other than the handful of normal cancellations and instances where he admitted to making mistakes.

[2] Mr Thompson also says E&H's investigation never established that he had been dishonest to the requisite standard of on the balance of probabilities and that his cancellation rates were not proof in themselves of dishonesty. Mr Thompson seeks compensation and lost wages.

[3] E&H says its investigation uncovered inappropriate dealings with customers over a short period that included the Christmas close down, resulting in what looked like increased sales activity but included, for example, quotes or discussions with customers with agreement to follow up rather than confirmed sales. Some jobs were also under-priced and this resulted in commission payments to Mr Thompson for transactions other than confirmed sales. In the ordinary course of the year, this would have meant significant deductions from Mr Thompson's commission in the next month. However, because of the time of the year, those deductions could not be made because of the statutory bar on deductions taking wages below the minimum wage.<sup>1</sup>

[4] E&H say the dismissal was justified based on the investigation findings and it followed a fair and reasonable process in making Mr Thompson aware of its concerns, providing opportunities to respond and giving his responses genuine consideration.

### **The Authority's investigation**

[5] For the Authority's investigation written witness statements were lodged from Mr Thompson, Graeme Wedlake, Branch Manager, Sheryl Richards, HR Consultant, and Tony Thorn, Group General Manager. All witnesses answered questions under oath or affirmation from me and the parties' representatives.

[6] At the conclusion of the investigation meeting, further information and submissions were timetabled. Mr Thompson provided further information to support his claim for lost wages and E&H provided additional information about the cancelled jobs and Ms Richards' relevant hand-written notes.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

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<sup>1</sup> Minimum Wage Act 1983, s6.

## **The issues**

[8] The issue is whether Mr Thompson was unjustifiably dismissed. In order to resolve this matter I will need to address the conflict in the evidence between the parties about the reasons for Mr Thompson's increased number of sales in December. Mr Thompson says he wanted to exceed expectations and simply made a conscious decision to put extra effort into earning more commission. E&H say it was a dishonest attempt, using its commission framework and remuneration rules, at that particular time of the year, to obtain money through commission payments that Mr Thompson was not entitled to.

## **Background**

[9] Mr Thompson was employed by E&H as a full-time permanent sales representative from 25 November 2019 selling a variety of roofing treatments to customers. A written individual employment agreement was in place and remuneration consisted of a base salary of \$40,000.00 plus commission payments based on total net monthly sales.

[10] Commission was calculated on sales logged on a monthly basis. The last sales period of the year in 2020 ran from the last week in November to Sunday 13 December and was a three-week period. The rest of the year consisted of four or five-week periods. Commission was paid on a tiered basis depending on the number of jobs sold so the higher the number sales in any one month, the greater the commission payment.

[11] When a job cancelled between a sale and the work being completed, for which the commission was already paid out, a deduction was made from the next month's net sales as follows:

### **Cancellations and Payment**

Any cancellations will result in the job being taken off the month the cancellation occurred in and will be deducted from the current months' net sales.

[12] Mr Wedlake, Branch Manager, met with the sales team individually on a daily basis for approximately 15 minutes to review their contracts. This involved checking the pricing and customer details were correct and any notes recorded in the contract to see where more detail or clarification might be needed. Mr Thompson's evidence was these meetings were to review quotes as well as contracts. Mr Wedlake's evidence was he had no visibility over quotes or sales discussions with customers unless one of the

sales team chose to discuss something with him. It was put to Mr Thompson in cross examination that a quote put through as a sale is not something Mr Wedlake could know about based on the contract paperwork and Mr Thompson replied that he did not know.

[13] Mr Thompson says he was passionate about his role. He always met his minimum target and said it was unusual for him to fall below the second tier. E&H agreed he was a good performer and consistently performed well in terms of monthly sales achieved.

[14] A table setting out Mr Thompson's cancellation rates from February to December 2020 was provided as follows:

Jobs and products	Feb	March	April	May	June	July	August	Sept	Oct	Nov	Dec
% cancelled	18%	15%	14%	8%	18%	15%	23%	13%	14%	19%	34%

[15] In December 2020, Mr Thompson had a 34 per-cent cancellation rate which was the highest for that year. August was the next highest in terms of cancellations at 23 per-cent and June was a month where the cancellation rate was lower at 18 per-cent. Mr Thompson had been spoken to earlier in the year about ensuring jobs that he put through for commission were confirmed sales. December was the month that led E&H to audit Mr Thompson's sales and ultimately led to an investigation and his dismissal for serious misconduct.

#### *Final warning*

[16] Two months prior, Mr Thompson received a final written warning in October 2020 after consistently higher than expected use of the company fuel card was identified and investigated. Mr Thompson admitted that he was filling jerry cans with fuel for emergencies and when he felt the fuel was getting old, he put it in his personal vehicle for his own personal use. When asked why he did not put it in the work vehicle Mr Wedlake says Mr Thompson had no answer for that but says he did admit to experiencing financial hardship and apologised for taking the fuel. He undertook to be honest in all future dealings with the company and the letter issuing the warning recorded dishonesty as the reason for the finding of serious misconduct and the warning.

It was stated the warning would be taken into account if any further breaches of acceptable conduct or performance occurred in the next 12 months.

[17] At the investigation meeting Mr Thompson accepted he used company fuel for personal use but denied admitting or having financial difficulties.

### **What happened in December 2020?**

[18] E&H have an annual Christmas close down from 13 December to 5 January. The team were instructed by email from Mr Thorn, Group General Manager to drop off their cars and iPads on 14 December, for collection when they returned to work on 5 January 2021.

[19] Mr Thompson's evidence was that he deliberately put extra effort into sales in December because he was eager to ensure January was a good month for him. He said at the investigation meeting he had to work seven days a week and 15-hour days in December to achieve the high number of sales that he did.

[20] In the week before close down, Mr Wedlake recalled Mr Thompson telling him he had a number of jobs to put through for December. Mr Wedlake discussed this with Mr Thompson at the time, noting commission would be at a higher rate because it is tiered but reminded him to ensure they were all genuine sales and not just quotes. Mr Wedlake was aware of Mr Thompson's financial issues after the fuel card investigation (although denied by Mr Thompson at the investigation meeting).

[21] He also had had cause to talk to Mr Thompson earlier in the year about ensuring jobs put through were sales rather than quotes. Mr Thompson denied both of those things at the investigation meeting which is inconsistent with the email Mr Wedlake sent to Mr Thompson on 11 December after their conversation:

Re our conversation this morning regarding your sales for the end of the month please ensure the customer is clear that there's are [sic] confirmed contracts, as I will not take a high number of cancellations lightly and if this happens there will be consequences. You were quite genuine when we spoke about this in our meeting this morning. I just wanted to reiterate this in writing.

[22] Then on 14 December Mr Wedlake became aware that Mr Thompson had logged sales well above what would be expected, even for a high performer. Mr Wedlake was immediately concerned him because of the extraordinary number of

customers that would have been required to be signed up over a short three-week period, particularly after their conversation and his email reminder about quotes versus sales.

[23] On accessing the jobs logged and after starting to look at them, Mr Wedlake became concerned. More than one of the contract notes recorded that Mr Thompson was to contact the customer in January, February and March the following year which indicated an immediate issue for Mr Wedlake. Once a contract is sold, except in a very small percentage of cases, there is no contact again with the sale representative. Also, E&H sales policy does not permit sales in the future. Mr Wedlake commenced an investigation after seeking advice from Mr Thorn, who asked him to establish whether Mr Thompson's sales were genuine or not by checking with the customers.

[24] Later that day when Mr Thompson dropped off his car and iPad for the close down, Mr Wedlake told him he would be doing an audit because of the high number of sales logged. Mr Thompson accepts they spoke about his high sales but says he was interrogated and put on the spot. Mr Wedlake said he simply let him know of his intention to investigate. I note it had been signalled in the email of 11 December that there would be consequences if there were to be a high number of cancellations due to contracts not being confirmed sales.

[25] Mr Thompson says Mr Wedlake agreed he could work for an additional week over the Christmas closedown during the week of 14 to 18 December despite having dropped off the work equipment. Mr Wedlake denies that and pointed out that no other sales staff were permitted to work that week. In circumstances where Mr Wedlake had raised his concerns with Mr Thompson about his December contracts already submitted and drove Mr Thompson home because the work car had been returned, I prefer Mr Wedlake's evidence about whether there was permission to work that week. It would also have been contrary to Mr Thorn's directive in his November email to all staff.

[26] Mr Thompson was paid commission on his December sales on 16 December.

[27] Mr Wedlake set about contacting customers and took and followed advice from Ms Richards including to wait until the end of Mr Thompson's holiday before communicating with him further about Mr Thompson's sales contracts audit.

[28] Mr Wedlake gave Mr Thompson the first letter setting out the concerns on or about 11 January inviting Mr Thompson to attend a meeting to discuss 16 contracts Mr Wedlake had identified as under-priced and/or cancelled jobs. They met the next day

and Mr Wedlake says Mr Thompson said to him he had been distracted when logging sales and that he had been trying to secure business by under-pricing jobs. Discounts were generally not permitted unless Mr Wedlake approved them, and he had not approved any of the discounts.

[29] Mr Thompson denies making those admissions at that meeting. He had sent some responses through by email from his iPad and his evidence was that all 16 contracts were confirmed contracts other than the normal cancellations and it made no sense to suggest he was dishonest because cancelled jobs were always taken off him.

[30] While it had been Mr Wedlake's intention to consider Mr Thompson's responses at that meeting and make a decision, shortly before the meeting a number of further contracts came to his attention. Ultimately, they represented a further 19 contracts or concerns about Mr Thompson's sales for December and his dealings with customers. Mr Wedlake chose to go ahead with the first meeting to hear Mr Thompson's explanations for the first tranche, but informed Mr Thompson there were more to come and he would be given a further chance to respond.

[31] Mr Thompson denies he was told about the further issues at the first meeting, however, Ms Richards also attended the meeting and it is confirmed in her meeting notes additional issues would be raised in another letter and this was mentioned at the start of the meeting.

### *Suspension*

[32] It was submitted that Mr Thompson was suspended on 14 December 2020 and that he had all his company property confiscated from him at that time. After hearing the evidence, including Mr Thompson saying that he continued to work in December, I consider it more likely he has confused the Christmas close down with a suspension. E&H did in fact suspend Mr Thompson but that was not until 14 January 2021.

[33] After the initial meeting and as more information came to Mr Wedlake about the further contracts of concern, he decided to consider suspending Mr Thompson pending the completion of the full investigation. That decision was based on the number of contracts of concern, his first-hand knowledge of some of the customers responses and one customer in particular, given how upset she was because she maintained she had not agreed to a sale. He was also concerned that Mr Thompson could log further sales incorrectly before they had completed the investigation and he

considered reputational damage had already been done in some cases and there was the potential for more.

[34] Mr Thompson was given an opportunity to respond to the suspension proposal in person on 14 January and the decision to suspend him was communicated verbally to him on the same day and in writing on 18 January. The reason for the suspension was so E&H could complete its investigation into further matters that had arisen since he returned to work on 11 January pertaining to cancelled sales and incorrect quotes.

[35] In the letter confirming the suspension Mr Wedlake also recorded that it had just come to his attention that Mr Thompson had breached his suspension (on 14 January) by working and selling jobs on Sunday 17 January. Further contracts and issues of concern that had been identified since the first meeting were also listed with the reasons for the concerns. Mr Thompson was again invited to meet to discuss and provide his responses.

*What happened at the second investigation meeting?*

[36] The next meeting was held on 20 January. Mr Wedlake recalls Mr Thompson said he had made a last-minute decision to log sales in December that would have otherwise put through in January. Mr Wedlake pointed out a consistent pattern of cancellations and under-pricing from mid-December through to January and suggested to Mr Thompson that he had done this deliberately and therefore fraudulently. Mr Wedlake says Mr Thompson confirmed to him he had been trained and understood the requirements of the job.

[37] Mr Thompson admitted some were sold with the proviso he would return to confirm the sale. Some were genuine cancellations because there was always a level of attrition after people changed their minds and this was accepted by E&H because in law there was a cooling off period in which the customer could change their mind for all door to door sales.<sup>2</sup> Some, Mr Thompson said, the customer never told him what was recorded by E&H in its notes after speaking to the customer and others he could not recall. He said Mr Wedlock should have picked these up these concerns at the daily meetings.

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<sup>2</sup> Fair Trading Act 1986.

### *Reasons for the dismissal*

[38] E&H formed the view that the Mr Thompson's conduct was a deliberate attempt to generate extra income through commissions. Under-pricing formed part of the facts E&H were confronted with and it said Mr Thompson admitted that was a way to increase sales. Mr Wedlake was clear none of the under-pricing had been agreed to because it happened infrequently, and the contracts were mostly put through in the week before close down.

[39] Apart from that under-pricing also represented a loss for the company. Either the job is completed at the lower price and that represents a loss, or the price is revised with the customer, with the risk of customer dissatisfaction, most likely causing a greater loss. Having to revisit the jobs that had been under-priced with customers formed part of the basis for E&H concluding there had been reputational damage.

[40] E&H considered Mr Thompson's previous warning for dishonesty in relation to his use of the company fuel card and formed the view it had now lost trust in him, found that he had caused reputational damage and concluded summary dismissal for serious misconduct was the appropriate outcome.

[41] Mr Thompson raised a personal grievance with E&H by letter dated 17 February 2021 and lodged his personal grievance in the Authority in September 2021.

### *New information*

[42] In cross examination it was noted two of Mr Thompson's explanations, given in evidence, were not provided to E&H by Mr Thompson at either of E&H's investigation meetings and they were not recorded in his brief of evidence. These were the fact he was working 15 hours days, seven days a week to generate sales in December and he used a different application to measure up jobs that may explain the differences in some of the pricings that E&H were concerns about.

[43] Also at the investigation meeting Mr Thompson said the way in which the customers were contacted would have impacted on their dissatisfaction. Mr Wedlake explained that he was careful with his contact with the customers he called. He decided the best way at that stage was to make a courtesy call to check the customer's email and phone number were correct and that would also enable him to check whether the jobs were genuine sales.

[44] As the investigation widened, other customers received an email that was also consistent with Mr Wedlake's approach as follows:

Thank-you for giving us the opportunity to provide maintenance work to your property. The work has been booked in by our sales team and now our operations team will assign it to our work schedule. As confirmation of our contract, we have attached a document detailing the work to be completed. PLEASE NOTE: This is NOT an invoice

[45] I am satisfied E&H did not approach customers in a way that suggested a salesperson had been inappropriate because this would make no business sense in an industry that is regulated by legislation. I accept Mr Wedlake's evidence about the care he took in approaching customers so as to minimise causing customer dissatisfaction or concern.

### **Was the dismissal justified?**

[46] The Authority is asked to determine whether E&H was justified in the decision it made and the actions it took to dismiss Mr Thompson. It is required to apply the justification test which is set out in s 103A of the Act. In applying the test, the Authority does not determine justification by considering what it may have done in the circumstances. It is required under the test to consider on an objective basis whether the actions of E&H and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[47] This includes whether the allegations were sufficiently investigated, the concerns raised with the employee, whether a reasonable opportunity to respond to the concerns was provided and whether such explanations were genuinely considered by E&H before dismissal.

[48] Mr Thompson says the decision to dismiss him because of increased sales and cancellations was unfair and unreasonable because he was simply applying company policy and making extra effort to earn commission. Cancellations were a normal part of doing business and it was submitted on his behalf that on the balance of probabilities E&H was not able to reach the conclusion that Mr Thompson's conduct was dishonest.

[49] Mr Thompson's evidence was that they were all confirmed contracts, and he accepts that he made some errors and that he can be an aggressive salesperson but that he always acted in good faith towards his employer, and he says it is just the nature of sales that sometimes they do not go right.

*What were the reasons for Edwards and Hardy's position?*

[50] The timing of Mr Thompson's increased sales meant if it had paid out the commissions claimed by Mr Thompson in December, E&H could not have recovered any overpayments. When jobs cancel between the sale and the work being carried out, it is usual for that commission to be deducted as an overpayment. However, the sales teams' wages in January are close to minimum wage because it is typically a quiet month for sales. In a slow month, minimal commission is generated due to the holiday period, and wages without commission were just above minimum wage at that time. Deductions could not be made if any deduction reduced an employee's wages below the minimum wage.

[51] Mr Thompson said in evidence E&H could still make deductions in the following month, however, the way the relevant term in the employment agreement was worded meant that was not the case unless Mr Thompson agreed to a variation. I also note there was discussion about the ability to hold off putting jobs through until the next month. This appears to have been a work around to give customers and the sales team time to ensure jobs were confirmed sales and to prevent large numbers of cancellations.

[52] E&H also said no valid explanation was given for under-priced jobs and say this was part of Mr Thompson's dishonesty because aside from the loss to the company, under-pricing a job meant Mr Thompson was more likely to get the client signed up as a sale. For example, out of the first 16 contracts of concern five were under-priced with no discount approved. Four were under by \$100 and the fifth one was sold for \$40.00 when it should have sold for \$450.00. A sixth job was sold for the correct amount, but the customer was given seven months to pay.

[53] In terms of cancellations nine of the first 16 contracts of concern were cancelled by the client both on their own initiative and after being contacted by E&H and one more had to be cancelled because it was recorded as being a two-story property and, because of this, E&H believe Mr Thompson had not visited the site. Mr Thompson disputed that strenuously at the investigation meeting explaining there was a two-story garage which made it look like the whole property was two-story when in fact, it was only the garage.

[54] There was a similar pattern with the additional 19 concerns raised in the second tranche. Some were cancelled, some were under-priced, some only wanted a repair and

not all the treatments Mr Thompson had signed them up for, one was promised a gutter repair as part of the price quoted for the clean, which was not approved, and represented significant extra work because it involved scaffolding. One was sold with an agreement that job would not be carried out until June and E&H say Mr Thompson was aware of the company policy that jobs were not sold more than one sales month ahead.

[55] On review of Mr Thompson's responses and the position E&H set out in its letters to Mr Thompson, only a handful of the contracts of concern were able to be explained. An overall pattern emerged of jobs that were not firm sales with no real explanation given for the under-pricing of jobs, yet Mr Thompson knew permission was required to discount prices. Many of his explanations were not accepted by E&H although it was accepted there would be some cancellations and that was normal.

[56] Mr Thompson's cancellations were well in excess of what could be considered to be normal. His cancellation rates ranged between eight and 23 per-cent from February to November 2020 with the December 2020 cancellation rate being 34 per-cent. There were further cancellations in January, but these occurred after he had been dismissed and represent further jobs that were cancelled from the sales Mr Thompson generated in December.

[57] In terms of jobs cancelled in December and January by Mr Thompson, 58 per-cent of these were cancelled.

[58] Aside from the volume, I also consider it relevant that Mr Thompson went ahead with his plan to significantly step up his sales despite Mr Wedlake reminding him to ensure he was putting through confirmed contracts verbally and by email. He worked a further week in December despite having Mr Wedlake's email. Again, when he returned on 5 January, after the break, although he says no-one talked to him, Mr Thompson was on notice from the before the break there was to be an audit of his sales figures. Then after Mr Thompson was suspended, he logged four more jobs. In explanation, Mr Thompson said no-one told him not to keep entering jobs from the work he had already done while he was suspended. While that may be true, he was clearly on notice from E&H that his increased sales work was considered inappropriate and his forging ahead with it regardless strengthens E&H's position.

[59] Given the pattern that emerged from the employer's investigation into the contracts of concern and the explanations given by Mr Thompson, I find it was open to

E&H to form the view it did, that Mr Thompson had an ulterior motive to increase his sales activity to bolster his sales figures so he could get a better return. In doing so he took advantage of the time of the year and despite being on notice, he forged ahead with his plan. The previous written warning for dishonesty also supports the conclusion that E&H reached.

*Process defects?*

[60] A number of submissions were made on Mr Thompson's behalf regarding defects in the process followed by E&H. On the whole, while Mr Thompson could have been given more time to prepare his responses for the first meeting, I am satisfied this did not impact unfairly on him because he was had two further meetings and therefore opportunities to provide additional responses.

[61] It was also claimed the suspension was flawed because it was based on predetermination of the substantive issues and was implemented hastily and therefore was unreasonable and disadvantaged Mr Thompson.

[62] In *Sefo v Sealord Shellfish Ltd*<sup>3</sup> the Employment Court said that justification for suspension "will depend upon the circumstances of the parties and the employment and the fairness and reasonableness of the actions at the time and in those circumstances" and that a decision to suspend will only be justifiable if it comes after a process that meets the requirements of the statutory test of justification.

[63] In the circumstances of this case I accept it was reasonable to prevent Mr Thompson having contact with clients until the investigation could be completed, in particular because of the volume, and the fact Mr Thompson was continuing to sell in including logging jobs that would generate commission despite being on notice that E&H had concerns and was actively auditing his sales.

[64] While more time for employees to respond to employer's concerns or proposals is always desirable, in the circumstances of this matter, any process defects were minor and did not result in Mr Thompson being treated unfairly.

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<sup>3</sup> *Sefo v Sealord Shellfish Ltd* [2008] ERNZ 178 at [33].

### *Disadvantage*

[65] Similarly given that I have found the context in which the suspension occurred to mean that it was a reasonable step for the employer to take at that time I am also satisfied Mr Thompson was not disadvantaged by the actions of E&H.

### *Conclusion*

[66] In these circumstances I find that the decision to dismiss Mr Thompson has been justified by E&H and the process that was followed to be fair and reasonable in the circumstances. As Mr Thompson has not been successful in his personal grievance claim and there can be no consideration of remedies.

### **Non publication**

[67] A non publication order is made prohibiting the publication of Mr Thompson's sales and cancellations where they relate to a specified time period on the basis I have accepted that information would be commercially sensitive and should remain confidential to E&H. For clarity this order does not prevent publication of percentages of sales cancelled or summaries of what E&H investigation identified in terms of anomalies.

### **Costs**

[68] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, E&H may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Thompson would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[69] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>4</sup>

**Sarah Kennedy**  
**Member of the Employment Relations Authority**

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<sup>4</sup> For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)