



New Zealand Employment Relations Authority Decisions

You are here: [NZLII](#) >> [Databases](#) >> [New Zealand Employment Relations Authority Decisions](#) >> [2016](#) >> [\[2016\] NZERA 701](#)

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

Brennan v AFOS Ltd (Auckland) [2016] NZERA 701 (21 January 2016)

Last Updated: 15 December 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND		
		[2016] NZERA Auckland 24 5438164
	BETWEEN	NEVILLE CRAIG BRENNAN Applicant
	A N D	AFOS LIMITED First Respondent
	A N D	ANN ROSEMARY SHARPE Second Respondent
	A N D	RICHARD BRUCE SHARPE Third Respondent
Member of Authority:	Rachel Larmer	
Representatives:	Tim Oldfield, Counsel for Applicant Persia Templeton, Counsel for Respondents	
Investigation Meeting:	30 November and 01, 02 and 03 December 2015 at Auckland	
Date of Determination:	21 January 2016	
DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY		

Employment relationship problem

[1] Mr Craig Brennan started work for Kiwi Pallets Limited (Kiwi Pallets) on 22 February 1999. On 22 November 2005 Kiwi Pallets was sold to the first respondent, AFOS Limited (AFOS).

[2] Mr Brennan was offered new employment with AFOS on the same terms and conditions that applied to his Kiwi Pallets' employment. AFOS employed Mr Brennan as its National Sales and Marketing Manager and he was the sole salesperson until January 2012.

[3] Mrs Ann Sharpe and her son, Mr Richard Sharpe, are both directors of AFOS. They have been personally named as respondents in these proceedings to answer

claims that they aided, abetted, incited or instigated breaches of Mr Brennan's employment agreement by AFOS. Mr Brennan seeks that penalties be imposed on each of them.

[4] Mr Brennan started work for AFOS on 01 December 2015. He was paid a base salary of \$535.20 per week plus commission as per the commission structure Mr Brennan and Kiwi Pallets had agreed. The parties documented the applicable commission by recording that Mr Brennan was entitled to “1% commission on all current clients (all clients must be called on) and 2% commission on all new clients”.

[5] Neither Kiwi Pallets, AFOS nor Mr Brennan defined or listed who the “current clients” were at the time Mr Brennan started work for AFOS. However, the parties agree that for the purposes of calculating Mr Brennan’s commission entitlements the reference to “current clients” refers to clients who as at 22 February 1999 (being the date Mr Brennan started work with Kiwi Pallets) were existing clients of Kiwi Pallets.

[6] There remains a dispute between the parties as to which actual clients fell into that category (i.e. were Kiwi Pallet clients as at 22 February 1999). This is addressed in more detail later.

[7] The parties agree that they entered into an oral addition to the commission structure whereby it was mutually agreed that AFOS would pay Mr Brennan 1% commission on sales to James Hardie from May 2007. AFOS said this was a discretionary commission arrangement which it decided to stop from 01 August 2010.

[8] Mr Brennan says this additional oral commission arrangement regarding James Hardie was a contractual entitlement so could not be varied by AFOS without his agreement. There is no documentation recording the additional oral arrangement the parties entered into regarding the James Hardie commission entitlement.

[9] Mr Brennan claims wage arrears for unpaid commission on sales to James Hardie over the period 01 August 2010 until 01 December 2012. AFOS agrees it did not pay Mr Brennan commission on sales over this period but says it was entitled to exercise its discretion to not pay commission, so it says he is not owed anything.

[10] Mr Brennan also claims that he was entitled to be paid 2% commission on all new product sales to CHH Paperbag, but he could not say with any certainty when this agreement was entered into. AFOS denies agreeing to that.

[11] The parties agree that from January 2012 a new sales person based in Palmerston North took over (by mutual agreement) responsibility for some of Mr Brennan’s clients. However there is a conflict between the parties regarding the actual clients Mr Brennan agreed could be “taken over” (meaning Mr Brennan expressly agreed he would no longer receive commission on sales to these clients) by the new sales representative.

[12] AFOS admits it stopped paying Mr Brennan commission on sales to APC, Van Globe and Weldwell from January 2012 because it says these clients were handled by the new sales representative. Mr Brennan claims he was still entitled to commission for those particular clients because he brought them into the business as “new clients”.

[13] Mr Brennan says he never agreed to forego commission on sales to APC, Van Globe or Weldwell because he considered he was still responsible for these clients. Mr Brennan says this is another unilateral variation imposed by AFOS on his commission entitlements without his knowledge or agreement so he seeks commission arrears for these Palmerston North clients.

[14] Another conflict between the parties arises because AFOS put a hold on Mr Brennan’s commission price point so that his commissions for sales from December 2009 onward were calculated and paid at the December 2009 price point only.

[15] This holding of the sales price point at December 2009 levels meant Mr Brennan did not get the benefit of increased commission which would have flowed from the increased sales prices which were applied in March and June 2010 to AFOS’s products as a result of upward movements in the price of timber. Mr Brennan says this was a unilateral variation by AFOS which he was not aware of and did not agree to, so he seeks commission arrears on the full price of these sales.

[16] AFOS claims that this commission entitlement variation was a mutually agreed oral variation because the escalating cost of timber had been challenging for the business which had elected to pass some of those additional costs onto clients resulting in the total increase in sales prices, none of which were attributed to Mr Brennan’s personal input or actions. Mr Brennan says this was never discussed with him so he could not have agreed to it.

[17] There is no dispute between the parties that they agreed to reduce Mr Brennan’s commission by 10% for a specified period of time. Mr Brennan says this was for 12 months from October 2009 to October 2010 whilst AFOS says the reduction was for six months only. In closing submissions Ms Templeton says that AFOS accepts Mr

Brennan's concession that the 10% commission reduction ran for 12 months.

[18] Mr Brennan claims that his commission for kiwifruit (P10) pallet sales was unilaterally reduced from 2% to 1% by AFOS from April 2012. Mr Brennan says he did not agree to this variation but was merely informed by Mr Sharpe that it had been implemented. Mr Brennan says that in the absence of any mutual agreement, this unilateral variation to his commission entitlement is not binding on him. Mr Sharpe admits that he unilaterally imposed this variation on Mr Brennan but says he (Mr Sharpe) did so for legitimate business reasons.

[19] The parties agree that "*dunnage*" (wood offcuts) attracted commission but it became clear from the commission reports that commission on all *dunnage* sales had not been paid to Mr Brennan. AFOS agrees that was an error and accepts it owes Mr Brennan unpaid commission for some of the *dunnage* sales.

[20] The parties provided the Authority with various lists recording their views on which clients were "*current clients*" and which were "*new clients*". There is no dispute that clients numbered 43 to 57 are "*current clients*" and therefore attract 1% commission.

[21] Mr Brennan claims he is entitled to be paid 2% commission on clients which he says he "*reactivated*" (these are the clients identified at numbers 28 to 42 of his list). Mr Brennan claims that they were not "*current clients*" of Kiwi Pallets as at 01 December 1999 because they were not generating sales at that point in time but he accepts that these clients had all purchased from Kiwi Pallets before he (Mr Brennan) started work for Kiwi Pallets.

[22] Mr Brennan says that because he gained the custom of these clients again as a result of his efforts (notwithstanding they had previously purchased from Kiwi Pallets) they should fall within the category of "*new clients*" (rather than "*current clients*") for the purposes of calculating his commission entitlements. AFOS disputes that.

[23] The parties are also in dispute about whether or not the clients numbered 1 to 27 were "*new clients*". Mr Brennan says clients 1-27 should attract commission at 2%

on the basis they are "*new clients*" while AFOS says that these clients were "*current clients*" so the applicable commission rate is 1%.

[24] AFOS bases its view of "*current clients*" on what it claims is the 'original' Exonet computer system records. The Sharpes say AFOS took over the existing Exonet software from Kiwi Pallets when they purchased the business and just continued running things in exactly the same way Kiwi Pallets had.

[25] The Exonet documents produced to the Authority all showed the same client joining date of 05 November 1998. The Sharpes speculated that must have been the date that Kiwi Pallets moved from a paper system to a computerised one. Mr Sharpe's evidence was that once the start date of a client is logged into the Exonet system it cannot be changed.

[26] Mr Sharpe told the Authority that he understood that the clients listed on the Exonet documents were "*active clients*" of Kiwi Pallets, by which he meant they had purchased products from Kiwi Pallets as at November 1998. Mr Brennan denies that and says he had never seen the Exonet documents before.

[27] Mr Brennan was adamant that this Exonet information could not be correct because he says he had introduced some of these clients to the business after the supposed client start date of 05 November 1998.

[28] Mr Brennan told the Authority he believes he is really the only person who could possibly know who the existing clients were at the relevant point because he was the person who had responsibility for clients. The previous director and owner of Kiwi Pallets was not prepared to voluntarily give evidence and neither party summonsed him.

[29] Mr Brennan says the Sharpes did not and could not know for sure who was a current client because they were not involved in the Kiwi Pallets business at the material time. Mr Brennan says that the Exonet data should not be relied on because the person who entered the data did not give evidence, all of the clients are recorded as commencing on the same date, and he believes that the information in the Exonet documentation is factually incorrect.

[30] Mr Brennan claims commission arrears for sales to clients numbered 1 to 42 and on all "*new product sales*" to

client 44.

[31] AFOS presented evidence to the Authority which showed that some of the clients who had initially started off in its computer system as 1% commission clients had moved over time to become 2% commission clients. The Sharpes say they did not authorise this change so they consider the increased commission payments to Mr Brennan amount to unauthorised overpayments.

[32] AFOS's expert witness, chartered accountant Mr Jeff Walker, identified from a sampling of commission reports between the period July 2007 and September 2008 that there had been a:

- (a) Re-categorisation of clients from 1% to 2% commission; and
- (b) Removal of existing product codes on certain products and the subsequent creation of new stock product codes for what appeared on the face of it to be the same or similar products.

[33] The Sharpes say that they did not authorise any product code changes. This evidence was contradicted by a former employee, Mr Glen Smith, who confirmed that he made changes to product codes after consulting with Mrs Sharpe about the need to do so.

[34] Mr Smith's evidence was that the new codes would be created for products which had been re-engineered or redesigned and that he made such changes several times a year. Mr Smith's evidence was that these changes must have been obvious from the commission reports each month which clearly recorded the rate of commission that had been applied.

[35] Mr Smith also said that Mr Brennan would sometimes give him new product specifications which resulted in new product codes being issued.

[36] The information presented to the Authority was not sufficiently detailed to enable the Authority to determine with any certainty whether there had actually been re-engineered or redesigned products as Mr Walker had just noted for the Authority's attention the change in commission rate and product code.

[37] The Sharpes' evidence was that they were not aware of any commission changes although Mrs Sharpe agreed that she was the one who signed off the commission reports each week.

[38] The Authority also saw a number of reports where Mrs Sharpe had made amendments in her handwriting to the commission entitlements which shows that she was checking and adjusting the commission payable where she did not agree with what was recorded in the commission reports.

[39] The obvious implication from this arrangement being that the commission increase must have been known to Mrs Sharpe because the commissions payable were clearly listed under each different commission percentage.

[40] Mr Brennan claims wage arrears consisting of unpaid [Holidays Act 2003](#) (HA03) entitlements for any commission arrears he is owed.

[41] Mr Brennan claims unpaid business expenses of \$13,478.75, all of which he submitted after his employment with AFOS ended. AFOS initially said that these expenses were not authorised, many of the receipts were illegible and involved excessive spending and/or were unreasonably incurred.

[42] However Mr Sharpe changed his position on that during questioning at the Authority's investigation meeting. Mr Sharpe accepted that the expenses claimed by Mr Brennan were legitimate business expenses, were reasonably incurred at the time and were not excessive or at an unreasonable level.

[43] Mr Sharpe maintained the claims had been filed too late but he did not explain why AFOS had reimbursed Mr Brennan for some of his business expenses that had been submitted at the same (post-employment and therefore late) time.

[44] Mr Brennan says that his HA03 entitlements will need to be recalculated because the definition of gross earnings in [s.14\(a\)\(iv\)](#) of the HA03 includes commission payments. There is no dispute that reimbursement of business expenses is excluded from the definition of "*gross earnings*" when calculating HA03 entitlements.

[45] Mr Brennan says his HA03 public holiday pay, sick leave pay and bereavement leave pay will all need to be recalculated to take account of any commission arrears the Authority awards to him. AFOS agrees with that.

[46] Mr Brennan also identifies that a recalculation of his relevant daily pay and/or average daily pay under HA03 will also need to take account of any commission arrears he is awarded in this substantive determination. AFOS accepts that.

[47] AFOS further acknowledged to the Authority (via Mr and Mrs Sharpe at the investigation meeting) that it made deductions without Mr Brennan's written consent from his wages and that such actions appear to be in breach the [Wages Protection Act 1983](#) (WPA) and HA03.

[48] AFOS agrees that it made total deductions of \$50,216.28 from Mr Brennan's commission payments over the period December 2005 to March 2011. This amount has still not been repaid to Mr Brennan.

[49] AFOS says it made these deductions because it decided (without reference to Mr Brennan or to applicable employment legislation) to deduct 8% from Mr Brennan's commission before it paid it to him to account for what the Sharpes described as the "holiday pay" it had to pay Mr Brennan when he was on holiday. AFOS also deducted 2.56% from Mr Brennan's commissions to take account of its employer "ACC levies".

[50] AFOS accepted during the Authority's investigation meeting that there was no statutory or contractual right for it to have made such deductions which effectively meant that Mr Brennan was funding not only part of his own holiday pay but also AFOS's employer ACC levy. Clearly these unlawful deductions are wage arrears which must be repaid to Mr Brennan.

[51] Mr Brennan seeks that interest be awarded under clause 11 of the Second Schedule of the [Employment Relations Act 2000](#) (the Act). Mr Brennan says he has been deprived of the use of his own money so interest should run from the date his cause of action arose until the date of repayment.

[52] AFOS says interest should not be awarded because if Mr Brennan is awarded commission and wage arrears then he will be put back into the position that he would have been in had the underpayments not occurred.

[53] I do not accept that submission. Even if Mr Brennan receives the commission and wage arrears claimed he is not put back in the same position he would have been in because he remains out of pocket due to Statute of Limitations issues associated with recovering the full amount he is owed.

[54] Mr Brennan requested his wage and time records on 24 September 2013. He says that at the time he requested such records it had been more than a month since his employment had ended and he had still not received his final pay so he had raised

issues with AFOS about the unlawful deductions and wage arrears he believed he was owed.

[55] Mr Brennan says that AFOS failed to respond to his requests for wage and time records until the matter was before the Authority and only did so after it had been directed by the Authority to provide them. Mr Brennan says that the records were not provided until two months after they had been sought (three months if the archived records are taken into account).

[56] Mr Brennan says the failure of AFOS to produce his wage and time records impeded his ability to quantify and bring a timely claim, bearing in mind that his final pay including his minimum statutory entitlements had not been paid upon termination as required under HA03. Mr Brennan seeks that a penalty of \$5,000 be imposed on AFOS for this breach.

[57] Mr Brennan also seeks that penalties be imposed against Mr and Mrs Sharpe personally. Mr Brennan claims that the Sharpes, as directors of AFOS, incited, instigated, aided and abetted the alleged breaches by AFOS of his employment agreement.

[58] Mr Brennan further claims he was unjustifiably disadvantaged by AFOS's failure to pay his final pay upon termination. AFOS accepts that Mr Brennan's final pay (at least from its perspective in terms of what it believed he was owed when his employment ended) was not paid until 19 August 2014.

[59] There is however an ongoing dispute as to what Mr Brennan was owed in his final pay given Mr Brennan's concerns about unlawful deductions from his wages and the alleged failure to pay his full HA03 entitlements.

[60] Mr Brennan says that on 22 September 2013 AFOS offered to settle with him for less than what it acknowledged it owed him in unpaid holiday pay. Mr and Mrs Sharpe accept that they were aware they owed Mr

Brennan his final pay but did not arrange for AFOS to pay it.

[61] AFOS disputes that Mr Brennan has suffered a disadvantage in respect of the withholding of his final pay. AFOS also submits that even if there was a disadvantage to Mr Brennan its actions in withholding his final pay were justified and that no remedies should be payable and/or penalties imposed on AFOS.

Issues

[62] The following issues are to be determined:

- (a) What contractual commission structure did the parties agree to?
- (b) Who are the “*current clients*” and who are the “*new clients*”?
- (c) Was the written commission structure varied?
- (d) Did the parties enter into any additional oral commission agreement(s)?
- (e) Is Mr Brennan owed commission arrears?
- (f) What commission arrears has Mr Brennan been paid subsequent to his employment ending?
- (g) What effect does the commission arrears have on Mr Brennan’s HA03 entitlements?
- (h) Is Mr Brennan entitled to be reimbursed for outstanding business expenses?
- (i) Did AFOS make unlawful deductions from Mr Brennan’s wages?
- (j) Did AFOS fail to produce Mr Brennan’s wage and time records upon request?
- (k) Did AFOS breach Mr Brennan’s employment agreement by failing to:
 - (i) Pay him his full commission entitlements?
 - (ii) Reimburse him for all of his business expenses?
 - (iii) Pay him his full HA03 entitlements?
 - (iv) Reimburse him for the unlawful deductions it made prior to March 2011 from his commission?
- (l) If AFOS breached Mr Brennan’s employment agreement did Mr and/or Mrs Sharpe incite, instigate, aid and/or abet AFOS’s breaches?
- (m) If so, should a penalty be imposed on Mr Sharpe and/or Mrs Sharpe?
- (n) Should penalties be imposed on AFOS?
 - (o) Should some or all of any penalties that may be imposed on the respondents be paid to Mr Brennan instead of the Crown?
 - (p) Did AFOS unjustifiably disadvantage Mr Brennan in his employment?
 - (q) If so, what if any remedies should Mr Brennan be awarded?
 - (r) Should Mr Brennan be awarded interest?

What contractual commission structure did the parties agree to?

Relevant commission documentation

[63] Mr Brennan’s contractual commission entitlements are set out in the memorandum from John Woods (the then Managing Director of Kiwi Pallets – Mr Brennan’s former employer) dated 31 October 2005 which states that Mr Brennan will be paid commission “*from date of joining the company (22/12/1999) 1% commission on all current clients (all clients must be called on) 2% commission on all new clients*”.

Who are the “*current clients*” and who are the “*new clients*”?

[64] The parties agree that clients numbered 43 and 45-57 are “*current clients*” who attract sales commission of 1%.

[65] Mr Brennan claims:

- a. clients numbered 1-27 are “*new clients*.” AFOS claims they are “*current clients*”.
- b. clients numbered 28-42 are also “*new clients*” because he “*reactivated*” them.
- c. 2% commission was payable on all “*new product sales*” to client 44. Mr Brennan accepts that all “*non-new product*” sales to client 44 attracts 1% commission because he acknowledges that client 44 was a “*current client*” as per the commission structure.

[66] The Authority must resolve this conflict over who the “*current clients*” are on the balance of probabilities.

[67] I do not accept Mr Brennan's submissions that "*reactivated*" clients are to be treated as "*new clients*". I consider that if that was the case then the commission arrangement could, and should, have specifically stated that.

[68] Adopting Mr Brennan's submissions on this issue would have involved the Authority effectively drafting new terms and conditions of his employment agreement which it is expressly prohibited from doing. The Authority is limited to interpreting the actual wording used by the parties in their contractual documentation. I consider a plain word reading should be applied to the word "*current*" because it is clear and not ambiguous.

[69] I accept Mr Brennan's submissions regarding the unreliability of the Exonet material. It was clear to the Authority during its investigation meeting that AFOS's computer system had a number of serious and material deficiencies. I am not satisfied on the balance of probabilities that the Exonet data is more likely than not to be accurate. To the contrary, the evidence I heard about this issue leads me to conclude that the Exonet information is more likely than not to be inaccurate.

[70] I have therefore preferred Mr Brennan's evidence about such matters given he was the person who had bought the new clients into the business. I consider that there was simply not enough direct evidence from those who knew about how the Exonet entries had come into creation to satisfy me to the required standard that the Exonet information was reliable.

[71] I therefore accept Mr Brennan's claim that the clients numbered 1 to 27 are to be treated as "*new clients*" for the purposes of calculating his commission, so sales to these clients attract 2% commission.

[72] I find that clients numbered 28 to 42 should be treated as "*existing clients*" for commission purposes, so Mr Brennan's commission on sales to these clients should be calculated at the rate of 1%. The parties agree that clients numbered 43 and 45-56 should be treated as "*existing clients*" for the purposes of commission, so commission on sales to these clients is calculated at the rate of 1%.

[73] I find that client 44 attracts commission of 1% on all sales. I do not accept Mr Brennan's claim that the parties agreed he would receive 2% for new product sales because the evidence about that did not reach the required standard of proof. I explain my reason for that later in this determination.

[74] Mr Brennan agrees he has been paid 1% commission on clients numbered 43 to 57, so he is not claiming commission arrears in respect of any of those clients (with the exception of client 44 which I have addressed above).

[75] Mr Brennan's claim for commission arrears at the rate of 2% for clients 1 to 27 succeeds so the parties will need to recalculate Mr Brennan's commission for these clients.

Was the contractual commission structure varied?

Palmerston North clients

[76] I find that there was no mutual agreement to vary Mr Brennan's contractual commission arrangements to exclude him from receiving commission on sales to APC, Van Globe, and Weldwell (the Palmerston North clients).

[77] Mr Sharpe agreed in his evidence that he unilaterally imposed this variation on Mr Brennan. I am satisfied that there was no mutual agreement reached to vary the contractual arrangement and therefore AFOS is bound by the original contractual commission arrangement. While it would have been open to AFOS to have renegotiated this with Mr Brennan I find it did not do so.

[78] Mr Brennan's claim for commission arrears for the Palmerston North clients succeeds. The parties will need to calculate the amount that Mr Brennan is owed.

Did parties agree to hold commission entitlements at the December 2009 sales point rate?

[79] I am not satisfied the parties entered into a mutual agreement to vary Mr Brennan's commission entitlements by agreeing to hold his sales commission entitlements at the December 2009 sales price point.

[80] Although AFOS had good reasons for wanting to do so, it was not entitled to unilateral vary Mr Brennan's

commission arrangements in the manner it did. It was open to AFOS to have restructured Mr Brennan's remuneration if it had good reason

to do so and after following a fair and proper process, but I find that did not occur. I also find that Mr Brennan did not agree to this commission variation which AFOS unilaterally imposed on him.

[81] AFOS is therefore bound by the written commission arrangements. Mr Brennan's claim for commission arrears arising from AFOS's failure to pass on commission which arose as a result of the March and June 2010 sale price increases succeeds. The parties will need to calculate what Mr Brennan is owed under this heading.

Commission reduction

[82] I record the parties' agreement that Mr Brennan's commission would be reduced by 10% for the period December 2009-December 2010. I note that Mr Brennan is not claiming commission arrears for this period.

Kiwifruit (P10) pallets

[83] The evidence did not satisfy me that there was a mutual agreement to vary Mr Brennan's commission structure regarding the kiwifruit (P1) pallets from 2% to 1% from April 2012. I consider this is another unilateral variation imposed by AFOS without Mr Brennan's agreement in breach of his written commission entitlements.

[84] Mr Brennan's claim for commission arrears on kiwifruit (P10) pallets from sales from April 2012 succeeds. The parties will need to calculate what Mr Brennan is owed under this heading.

Did the parties enter into any additional oral commission agreement(s)?

James Hardie

[85] I find that the parties entered into an additional oral commission agreement regarding Mr Brennan's entitlement to commission on sales to James Hardie. I find that this additional oral commission arrangement was discretionary because Mr Brennan did not have any contractual entitlement to commission on sales to James Hardie as per the written commission terms or in accordance with the oral agreement the parties entered into.

[86] Mr Sharpe decided to pay Mr Brennan commission on sales to James Hardie to keep Mr Brennan happy after Mr Brennan had expressed concern and dissatisfaction about the manner in which James Hardie had become a client of AFOS (Mr Brennan was upset that he had not been involved with landing this client when he believed he should have been).

[87] I therefore find that because this additional oral commission arrangement was discretionary it was open to AFOS to exercise its discretion not to pay it. Accordingly Mr Brennan's claim for unpaid commission on sales to James Hardie from 01 August 2010 to 01 December 2012 does not succeed.

CCH Paperbag

[88] The evidence did not satisfy me that the parties entered into an additional oral commission arrangement which entitled Mr Brennan to 2% commission on all new product sales to CCH Paperbag.

[89] Mr Sharpe denied that such an agreement had been entered. Mr Brennan's evidence about the date on which the agreement was entered and about exactly what was discussed, with whom and when was too vague to meet the required standard of proof.

[90] The evidence therefore fell short of satisfying me to the required standard that the normal contract formation elements (such as offer, acceptance, certainty of terms, consideration, intention to create legal relations and the like) that are necessary for contractual terms to exist are present.

[91] Accordingly Mr Brennan's claim for 2% commission on all new product sales to CCH Paperbag does not succeed.

Is Mr Brennan owed commission arrears?

[92] I find that Mr Brennan should have been but was not paid:

- (a) At the rate 2% commission on sales to clients numbered 1-27;
- (b) Commission from January 2012 on sales made to the Palmerston North clients (APC, Van Globe and Weldwell);

(c) Commission arising from the March and June 2010 sale price increases (his commission should not have been held at the December 2009 sales price point);

(d) An additional 1% commission on kiwifruit (P10) pallets from April 2012 (he should have been paid 2% but only received 1%.);

(e) Commission on the dunnage sales he has not already been paid.

[93] Because the parties agreed that Mr Brennan's commission would be reduced by 10% for the period December 2009-December 2010, any commission arrears over that period must also be reduced by 10% when the parties recalculate the commission arrears that have been awarded in this determination.

[94] I find that Mr Brennan is not owed unpaid commission:

- (a) For sales to James Hardie from 01 August 2010–01 December 2012 because AFOS was entitled to exercise its discretion not to pay commission;
- (b) Of 2% on all "*new product sales*" to CCH Paperbag.

[95] I find that Mr Brennan was entitled to 1% commission on sales to clients numbered 28-56.

What commission arrears has Mr Brennan been paid subsequent to his employment ending?

[96] The parties agree that Mr Brennan was not paid his final pay and therefore did not receive any commission payments upon termination.

[97] On 19 August 2014 Mr Brennan was paid some of his unpaid commission. In accordance with the consent determination issued on 01 December 2015 AFOS was also ordered (by consent) to pay Mr Brennan \$578.76 towards his commission arrears. These commission part payments must obviously be accounted for by the parties when recalculating Mr Brennan's total commission arrears.

What effect does the commission arrears have on Mr Brennan's HA03 entitlements?

[98] The parties agree that Mr Brennan's public holiday entitlements, sick leave entitlements and annual holiday entitlements all need to be recalculated in accordance with the relevant sections in HA03 to reflect his commission arrears.

Is Mr Brennan entitled to be reimbursed for outstanding business expenses?

[99] During the Authority's investigation Mr Sharpe accepted that the business expenses he had initially said were unauthorised and inappropriately incurred were in fact properly incurred business expenses which were reasonable and appropriate.

[100] Mr Sharpe also acknowledged that AFOS did not have any process or systems in place whereby Mr Brennan was required to obtain authorisation for business expenses before incurring them. The longstanding practice which continued throughout Mr Brennan's employment was that he incurred business expenses which were necessary for him to undertake the functions of his role and he was then reimbursed for these when he submitted an expenses claim supported by the applicable receipts.

[101] I accept AFOS's submission that it should not have to reimburse all of the business expenses Mr Brennan claims because some of the expenses were incurred and submitted too long ago. I accept the evidence from Mr and Mrs Sharpe that they specifically directed Mr Brennan to file his expenses in a timely manner after his expenses

claim filed in 2013 was so large and related to expenses incurred so long ago that this caused difficulties for AFOS.

[102] I therefore find that Mr Brennan is only entitled to be reimbursed for business expenses which were incurred within three years prior to the date of this determination. AFOS is not required to reimburse Mr Brennan for any business expenses which fall outside this specified period.

[103] I selected the date of three years because this is the date that AFOS says it is unable to claim the GST back (or it is extremely difficult to do so). I do not consider AFOS should be financially disadvantaged as a result of Mr Brennan not complying with AFOS's reasonable direction to submit his expense claims in a timely manner.

[104] The parties will need to calculate Mr Brennan's outstanding business expenses in accordance with this determination.

Did AFOS make unlawful deductions from Mr Brennan's wages?

[105] During the investigation meeting Mr and Mrs Sharpe accepted that up until March 2011 AFOS made deductions from Mr Brennan's wages without a contractual entitlement to do so and without his prior written consent. Such practices breach the requirements of the [Wages Protection Act 1983](#) (WPA) and HA03.

[106] AFOS admits it deducted \$38,042.63 from Mr Brennan's commission which AFOS incorrectly designated as "holiday pay". Mr Brennan is therefore entitled to be reimbursed for that amount.

[107] AFOS also admits it deducted \$12,173.65 for purported "ACC levies" from Mr Brennan's commission before it was remitted to him. The ACC levies are an employer expense and therefore should have been paid by AFOS and not deducted from Mr Brennan's wages.

[108] These deductions were unlawful deductions from Mr Brennan's wages so AFOS is ordered to reimburse him for the unlawful deductions it made from his wages prior to March 2011.

Did AFOS fail to produce Mr Brennan's wage and time records upon request?

[109] I find that AFOS failed to produce Mr Brennan's wage and time records upon request. Mr Brennan's first request for a copy of his wage and time records was made on 24 September 2013.

[110] By the time Mr Brennan requested his wage and time records, his employment had elapsed more than a month earlier and he had still not received his final pay or received a substantive response to his concerns about the unlawful deductions that had been made from his wages during this employment.

[111] I consider it an aggravating factor that rather than addressing Mr Brennan's wage and time records request, AFOS instead raised various spurious claims against him, all of which have subsequently been withdrawn.

[112] I find that AFOS breached s.130(2) of the Act by failing to provide Mr Brennan with access to or a copy of his wage and time records upon request because the provision of these records was unreasonably delayed.

Did AFOS breach Mr Brennan's employment agreement?

[113] I find that AFOS breached Mr Brennan's employment agreement by:

- (a) Failing to pay Mr Brennan's full commission entitlements;
- (b) Failing to pay Mr Brennan his full HA03 entitlements for his annual holidays, sick leave and public holiday pay;
- (c) Failing to reimburse Mr Brennan for unlawful deductions which by March 2011 (at the latest) AFOS knew should not have occurred.

[114] Mr Brennan's claim that AFOS breached his employment agreement by not paying his business expenses does not succeed. Mr Brennan's employment had ended by the time he submitted his last expenses claim. AFOS had paid the expenses claims Mr Brennan submitted whilst employed.

[115] AFOS breached Mr Brennan's employment agreement by failing to pay him his full wages whilst employed and his final pay upon termination and by failing to reimburse him for what it knew were unlawful deductions despite its unlawful practices being brought to its attention in March 2011.

Did Mr and/or Mrs Sharpe incite, instigate, aid and/or abet AFOS's breaches of Mr Brennan's employment agreement?

[116] Mr and Mrs Sharpe as directors of AFOS were the people who effectively controlled AFOS. They made a decision not to pay Mr Brennan despite being aware that he was owed money.

[117] Mr and Mrs Sharpe admitted during questioning at the investigation meeting that they deliberately offered to settle with Mr Brennan for less than they knew AFOS owed him and when that offer was not accepted, they decided to deliberately withhold all payments from Mr Brennan, including the amounts that they knew (according to their own calculations) he was owed.

[118] Mr and Mrs Sharpe also made the decision to engage in litigation with Mr Brennan rather than paying his contractual entitlements, notwithstanding they were aware that he should have been paid his final pay upon termination and that AFOS had made significant unlawful deductions from Mr Brennan's wages prior to March 2011.

[119] I find that such actions by the Sharpes were deliberate and amount to inciting, instigating, aiding and/or abetting AFOS's multiple ongoing and long standing breaches of Mr Brennan's employment agreement.

Should penalties be imposed on Mr Sharpe and/or Mrs Sharpe?

[120] I find that penalties should be imposed on Mr and Mrs Sharpe under s.134(2) of the Act to punish them and to signal strong disapproval of their conduct. I adopt a totality approach to penalties so impose one penalty to account for all breaches.

[121] This matter involved multiple breaches by Mr and Mrs Sharpe. These breaches continued for a number of years and have still not yet been remedied despite such breaches being clearly brought to the Sharpes' attention as far back as March 2011.

[122] I consider the Sharpes were jointly and equally responsible and therefore liable as directors of AFOS for the breaches of Mr Brennan's employment agreement that occurred. The penalties imposed are set at the same level for each of them to reflect that culpability.

[123] Mr Sharpe is ordered to pay a penalty of \$5,000 and Mrs Sharpe is ordered to pay a penalty of \$5,000.

Should penalties be imposed on AFOS?

[124] Mr Brennan says penalties are warranted because the breaches were not technical or inadvertent but were flagrant and deliberate. Mr Brennan says that AFOS must have known that its deductions were unlawful because these ceased in March 2011. However, AFOS did not take any steps to subsequently reimburse Mr Brennan who has still not received his full entitlements.

[125] Mr Brennan says that a deterrent is required because AFOS has knowingly allowed this unlawful deduction regime to persist for an extended period of time. Mr Brennan says he has suffered damage in the form of reduced pay and has been unable to recover all

of the deductions from his wages due to the statutory time limits for bringing proceedings in respect of such matters.

[126] AFOS says that Mr Brennan has not discharged the burden of proof on the balance of probabilities to the high standard required for penalties to be awarded. It says he has not proved instigation by the Sharpes, much less that there was wilful instigation of breaches of Mr Brennan's employment agreement. I do not accept that submission.

[127] Mr Sharpe's evidence was that the deductions stopped in March 2011 when Mr Brennan brought to AFOS's attention that it was not legally allowed to make the deductions it was making. Mr Sharpe says he stopped the

deductions because he was aware that it was not legal to make them but says that up until that point AFOS believed what it was doing was correct.

[128] Ms Templeton submits that if there was a breach, then it was technical and inadvertent, not flagrant or deliberate. Ms Templeton submits that Mr Brennan has not suffered loss or harm and therefore penalties should not be imposed. I do not accept that.

[129] I find that penalties should be imposed on AFOS for:

- (a) Breaching Mr Brennan's employment agreement;
- (b) Breaching the requirements of HA03;
- (c) Breaching s.130(2) of the Act.

[130] The breaches of Mr Brennan's employment agreement and of the HA03 are serious, ongoing and sustained breaches so it is important that the Authority punishes AFOS and sets the penalties at a level that signals strong disapproval of such conduct.

[131] It is a serious matter that almost four years later Mr Brennan has still not been reimbursed the money AFOS unlawfully deducted from his wages. The principles relevant to the imposition of penalties are set out by the Employment Court in its decision of *Xu v. McIntosh*¹. I find that AFOS's breaches were not technical or inadvertent, but instead were flagrant, deliberate and longstanding.

¹ [\[2004\] NZEmpC 125](#); [\[2004\] 2 ERNZ 448](#)

[132] I consider that a penalty is necessary and appropriate to deter AFOS from engaging in similar behaviour in the future and to deter other employers who may be tempted to make unlawful deductions from their employee's wages and/or hold on to an employee's final holiday pay and/or other wage arrears for many years after the employment relationship has ended.

[133] I consider that the effects of the breaches have been serious. Mr Brennan has still not received money that was owed to him from prior to March 2011. Because of the Statute of Limitations, Mr Brennan has been unable to fully recover all of the money which he was owed, which I consider is an aggravating feature of these breaches. That means the harm in this case is particularly serious because it is unable to be fully or completely remedied, leaving Mr Brennan out of pocket through no fault of his own.

[134] Each separate breach by AFOS may incur a maximum penalty of up to

\$20,000. However I adopt the totality approach to fixing penalties so impose one penalty to cover all of AFOS's various breaches. I consider that a total penalty of

\$20,000 is appropriate to punish AFOS for all of its breaches.

Should some or all of the penalties imposed be paid to Mr Brennan instead of the Crown?

[135] Mr Brennan seeks that some or all of any penalties imposed on the respondents be paid to him because of the harm that he has suffered as a result of the various breaches that have occurred. I accept that request.

[136] AFOS is ordered to pay Mr Brennan \$15,000 of the \$20,000 penalty that has been imposed on it directly to him. The remaining \$5,000 of the penalty that has been imposed is to be paid by AFOS to the Crown bank account.

[137] Mr Sharpe is ordered to pay the full \$5,000 penalty that has been imposed on him directly to Mr Brennan.

[138] Mrs Sharpe is ordered to pay the full \$5,000 penalty that has been imposed on her directly to Mr Brennan.

Did AFOS unjustifiably disadvantage Mr Brennan?

[139] I find that AFOS disadvantaged Mr Brennan by failing to pay him his final pay upon termination. Mr Brennan has still not received his full final pay or all outstanding statutory or contractual entitlements which is clearly a

disadvantage as this is his money which he has earned but has not (and still does not) have access to.

[140] AFOS bears the onus of justifying the disadvantage Mr Brennan has suffered. Justification is to be objectively assessed in accordance with the justification test in s.103A of the Act. A fair and reasonable employer is expected to comply with its statutory obligations so failure to do so is likely to undermine its ability to justify its actions.

[141] I do not accept AFOS's submission that it complied with all of the procedural fairness requirements of s.103A(3) of the Act. I find that AFOS did not comply with any of the procedural fairness tests in s.103A(3) of the Act.

[142] AFOS's actions and how it acted are also not what a fair and reasonable employer could have done in all the circumstances. I find that AFOS has not discharged its onus of justifying under s.103A(2) of the Act the disadvantage Mr Brennan suffered. There was no substantive justification for AFOS to have withheld Mr Brennan's final pay and it did not arrive at its decision to withhold Mr Brennan's final pay in a fair or proper way.

[143] Mr Brennan's unjustified disadvantage claim, arising from AFOS's failure to pay his final pay upon termination, succeeds.

What remedies should be awarded for Mr Brennan's disadvantage grievance?

[144] AFOS is ordered to pay Mr Brennan \$4,000 distress compensation under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he has suffered as a result of not being paid his final pay upon termination.

[145] Having found that Mr Brennan has a personal grievance, s.124 of the Act requires me to consider whether or not remedies should be reduced on the grounds of contribution. I find that Mr Brennan did not engage in any blameworthy conduct

which contributed to the situation that gave rise to his disadvantage grievance so his award of distress compensation is not to be reduced.

Should Mr Brennan be awarded interest?

[146] An award of interest is discretionary, with the discretion to be exercised by the Authority on a principled basis.

[147] I consider it is in the interests of justice for Mr Brennan to be awarded interest. This money has been owed to him for many years and he has been deprived of the benefit of it while AFOS has obtained the benefit of using Mr Brennan's money which it should never have retained in the first place.

[148] AFOS is therefore ordered under the [Judicature Act 1908](#) to pay Mr Brennan interest at the current prescribed rate of 5% on the amounts that have been awarded to him. Interest is to run from 31 March 2011 on the unlawful deductions (the

\$12,173.65 deducted for ACC levies and the \$38,042.63 deducted for holiday pay) until these amounts are paid in full.

[149] Interest is also awarded on Mr Brennan's wage and commission arrears and unpaid HA03 entitlements from 01 September 2013 (being the date his employment ended) until all of the amounts are paid in full.

[150] No interest is awarded in respect of the distress compensation award or the outstanding business expenses.

Summary of outcome

[151] In summary, the Authority orders AFOS to pay Mr Brennan:

(a) Commission arrears on sales to clients numbered 1-27;

- (b) Commission arrears on sales to the Palmerston North clients ACP, Van Globe and Weldwell;
- (c) Commission arrears arising from the March and June 2010 sales price increases;
- (d) Commission arrears arising from the kiwifruit (P10) pallet sales from April 2012 onwards;

- (e) Commission arrears on dunnage sales;
- (f) Public holiday entitlements arrears;
- (g) Sick leave entitlements arrears;
- (h) Annual holiday entitlements arrears;
- (i) Outstanding business expenses which were incurred within three years prior to the date of this determination provided these are supported by legible receipts which were also contained in the joint bundle of documents used at the Authority's substantive investigation meeting. AFOS does not have to reimburse any expenses for which the supporting receipts (in the joint bundle) are illegible;
- (j) Reimbursement of all unlawful deductions made from Mr Brennan's wages prior to March 2011;
- (k) Penalties of \$20,000 of which \$5,000 is to be paid to the Crown and

\$15,000 is to be paid directly to Mr Brennan;

- (l) Interest at rate of 5% per annum on the amounts and from the dates specified in this determination;

- (m) \$4,000 distress compensation under s.123(1)(c)(i) of the Act.

[152] Mr Sharpe is ordered to pay a penalty of \$5,000 under s.134(2) of the Act which must be paid directly to Mr Brennan.

[153] Mrs Sharpe is ordered to pay a penalty of \$5,000 under s.134(2) of the Act which must be paid directly to Mr Brennan.

Timetabling

[154] The parties have 28 days from the date of this determination within which to attempt to agree on the various amounts which Mr Brennan has been awarded in this determination. If agreement is not reached then either party has a further 14 days within which to apply to the Authority to fix the various amounts that AFOS has been ordered to pay Mr Brennan.

Costs

[155] Costs are reserved pending the final outcome of the substantive proceedings.

Rachel Larmer

Member of the Employment Relations Authority

NZLII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#)

URL: <http://www.nzlii.org/nz/cases/NZERA/2016/701.html>