



New Zealand Employment Relations Authority Decisions

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Brennan v AFOS Ltd (Auckland) [2017] NZERA 174; [2017] NZERA Auckland 174 (16 June 2017)

Last Updated: 23 June 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 174
5438164

BETWEEN NEVILLE CRAIG BRENNAN Applicant

A N D AFOS LTD

First Respondent

ANN ROSEMARY SHARPE Second Respondent

RICHARD BRUCE SHARPE Third Respondent

Member of Authority: Rachel Larmer

Representatives: Tim Oldfield, Counsel for Applicant

Parvez Akbar, Counsel for Respondents

Investigation meeting: On the papers

Submissions, affidavit and information:

15 May 2017 from Applicant

15 May 2017 from Respondents

15 May 2017 Expert report

25 May 2017 from Respondents

Date of Determination: 16 June 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] *Substantive findings* - The Authority issued its substantive determination for

Mr Brennan's wage arrears, penalty and disadvantage claims on 21 January 2016.¹

Since then the parties have been attempting to agree on the amounts owed as per paragraph [151] of that substantive determination.

¹ [2016] NZERA Auckland 24.

[2] *Expert report* - The parties jointly engaged Staples Rodway to provide an expert report (the expert report) on remedies. Mr Brennan seeks an award of remedies in accordance with the calculations in the expert report. However the respondents have raised issues with the methodology and final figures set out in the expert report.

[3] *On the papers* - The parties agree that the Authority should determine these issues on the papers.

[4] *Dunnage* – During the substantive investigation the Respondents agreed that Mr Brennan should have been but was not paid commission on dunnage. The expert report has not dealt with dunnage and the parties appear to dispute the commission rate that is to apply to dunnage sales.

[5] *Dunnage rate* - I find that 2% commission dunnage should be applied to the dunnage sales because the client cited in the expert report did not appear on the existing client list. The expert report needs to be updated to reflect that.

[6] *October 2010 formula misalignment* – The expert report was amended before being filed with the Authority to address the respondents' concerns about this. I am satisfied this issue has been dealt with correctly in the expert report I saw.

[7] *Commission on kiwifruit P10 pallets* - At the substantive investigation the parties agreed that a separate commission arrangement had been agreed in respect of the sale of kiwifruit P10 pallets. I therefore do not accept the respondents' latest claim that the commission for the kiwifruit P10 pallets falls into the client categorisation approach to commission. I find that the expert report has dealt with the kiwifruit P10 pallets commission issue correctly.

[8] *Negative commission* – I agree with the respondents' submission regarding the negative commission issue. The return of defective product by a customer resulted in the first respondent issuing a credit note to the client for that product. I find the commission on the returned product is not owed to Mr Brennan because it was not in effect a sale because the sale was voided. When the client reorders Mr Brennan got commission on the reordered product.

[9] *Change to expert report* - The expert report dealt with voided sales on the basis they involved 0% commission. However I find the expert report needs to be

adjusted to account for a deduction of \$136.37 in sales commission which was paid but which Mr Brennan was not owed because the sale was voided.

[10] *Client 1717* – I find that 2% commission is payable on sales to this client because it involved the sale of kiwifruit P10 pallets which attracted commission at the rate of 2%. I do not accept the respondents' submission that client 1717, was a 1% client because the P10 sales took it outside the client categorisation commission structure. I am satisfied that the expert report has dealt with commission for client

1717 correctly.

[11] *Clarification of period 10% commission reduction applied to* – I have been advised there is ambiguity in the substantive determination regarding the actual period for which the agreed 10 % commission reduction was to apply. I wish to clarify that as discussed and agreed by the parties during the substantive investigation, the material period is from 01 December 2009 to 30 November 2010. I find that the expert report has applied the correct commission reduction.

[12] *Dispute over the 10% commission reduction* - There is a dispute between the parties regarding how the 10% commission reduction is to be applied where the reduction was greater than the calculated commission for each month, effectively resulting in negative commission arrears.

[13] *Finding on 10% reduction* - I find that the expert report has dealt with this issue correctly. The commission payable for the period 01 December 2009 to 30

November 2010 is to be calculated for each separate month.

[14] *Application of commission finding* - If commission is owed in any particular month then 10% is to be deducted from the commission entitlement to determine what Mr Brennan should have been paid. If he was paid less than that amount (after 10% deduction has been applied) then Mr Brennan is owed commission arrears. However if, after the 10% reduction has been applied, the commission owing is less than what had already been paid to Mr Brennan (or a negative amount) then that is to be treated as \$0 commission arrears in that particular month.

[15] *Total 10% reduction approach* – I do not accept the respondents' submission that total commission entitlements for the 12 month period during which commission entitlements was to be reduced by 10% should be calculated as an overall total figure to which the 10% reduction is then applied. I have preferred the way in which the

expert report has dealt with this issue on the basis I consider that approach aligns with my factual findings set out in the substantive determination.²

[16] *Leave days* - The respondents submitted a handwritten note from Mr Brennan recording he was not at work on 13, 14, 17, 18, 19 and 20 June. It is unclear from the information I have available to me what year this relates to, what type of leave it was, or whether or not Mr Brennan was paid for this leave. Staples Rodway is requested to review the first respondent's wage and time and holiday and leave records to determine whether or not this was recorded as paid annual holiday or paid alternative holiday or paid sick leave or leave without pay. Any adjustments that need to be made to the expert report to account for these leave dates then need to occur.

[17] [Holidays Act 2003](#) entitlements – Mr Ganjia’s affidavit dated 25 May 2017 says that the respondents cannot understand the expert report’s calculations regarding holiday pay and they seek clarification on that. The expert report needs to be updated to reflect the specific HA03 entitlements arrears calculations as per paragraph [151](f)-(h) of the substantive determination.³

[18] *Updating of expert report* - If the document at Tab 41 of the respondents’ bundle of documents related to paid [Holidays Act 2003](#) (HA03) entitlements then the expert report must account for that. The expert report may also need to be updated to reflect any additional HA03 entitlements arrears that result from any adjustments that are made in accordance with this latest determination.

[19] *Agreed arrears* – The parties have agreed that the first respondent owes Mr Brennan \$3,931.18 for commission arrears relating to sales to the three Palmerston North clients. Accordingly AFOS Limited is ordered to pay Mr Brennan that amount within 7 days of the date of this determination.

[20] *Format of updated expert report* – The Authority asks that the expert report specifically identify a discrete figure for each item identified in paragraph [151] (a) – (h) of the substantive determination.⁴

Orders

[21] I make the following orders:

² [2016] NZERA Auckland 24.

³ Supra.

⁴ Ibid 2.

- a. The expert report is to be updated to reflect the findings in this determination.
- b. Within 7 days of the date of this determination, Afos is to pay Mr Brennan \$3,931.18 in settlement of his commission arrears for the three Palmerston North clients. I note that this amount is only a partial payment towards Afos’ total remedies liability.
- c. Costs are reserved pending the final disposition of the substantive matter.

Rachel Larmer

Member of the Employment Relations Authority

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