



New Zealand Employment Relations Authority Decisions

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Brennan v AFOS Ltd (Auckland) [2017] NZERA 215; [2017] NZERA Auckland 215 (21 July 2017)

Last Updated: 29 July 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 215
5438164

BETWEEN NEVILLE CRAIG BRENNAN Applicant

A N D AND

AND

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: 10 July 2017 from Applicant

17 July 2017 from Respondents

Date of Determination: 21 July 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] *Issue* - The parties are again in dispute about the calculations that the expert they have jointly engaged should be required to do in order to quantify the arrears the Authority determined the first respondent owed Mr Brennan. The parties each seek findings from the Authority that support their view of what the expert is to calculate in order to quantify the various liability the Authority held the first respondent has to Mr Brennan.

[2] *Sick leave* – In an affidavit sworn on 17 May 2016 Mr Brennan says that he is not claiming sick leave arrears because according to the first respondent's records he did not take any sick days off work, so is not owed sick leave arrears. The expert is therefore not required to do any sick leave calculations.

[3] *Bereavement leave* - Mr Brennan was entitled to three days' paid bereavement leave on 13, 14 and 15 June 2015. His time away from work on those dates was not treated by the first respondent as paid bereavement leave at the time he took this leave.

[4] *Bereavement leave representations* - During the Authority's substantive investigation meeting the second and third

respondents on behalf of the first respondent agreed that Mr Brennan had suffered a qualifying bereavement on the stated dates so was legally entitled to have been paid bereavement leave calculated in accordance with the relevant provisions in HA03 for those days when he was absent from work due to his bereavement. That was a proper concession to have made.

[5] *Substantive determination* - The Authority did not deal with bereavement leave liability in its substantive determination because the parties had advised the Authority during its investigation meeting that it should and would be paid. It appears that the first respondent may have now gone back on that representation because it now says it has no liability to pay unpaid bereavement leave.

[6] *Liability for bereavement leave arrears* - If that is the first respondent's position then I want to make it clear that it is liable to pay Mr Brennan bereavement arrears if he has not already been paid his full bereavement leave entitlements for his bereavement leave absence. That is a claim before the Authority which I had thought was resolved but now appears not to have been. On that basis the first respondent is ordered to pay Mr Brennan his bereavement leave arrears.

[7] *Expert to calculate bereavement leave arrears* - The expert is therefore required to calculate Mr Brennan's bereavement leave arrears in accordance with the relevant provisions of HA03. To make it very clear - I do not accept the first respondent's submissions that Mr Brennan cannot recover his bereavement leave arrears.

[8] *June annual holiday days* - There has been a dispute about how 18, 19 and

20 June 2015 are to be treated. These are to be treated by the expert as paid annual

holiday days. If Mr Brennan was not paid correctly for these three days of paid annual holiday then the arrears he is entitled to will need to be calculated by the expert. These annual holiday dates are to be paid in accordance with the relevant provisions in HA03. The expert's recalculations of annual holiday pay arrears for these dates must account for what Mr Brennan was actually paid (in terms of retainer plus commission).

[9] *Public holidays* - I do not accept the first respondent's submission that it has already resolved Mr Brennan's public holiday arrears claim. The consent determination issued on 01 December 2015 was a part payment only towards that liability. It was discussed at the investigation meeting in November/December 2015 that the Authority's findings on commission arrears liability would potentially affect the amounts Mr Brennan should have been for his various legal entitlements under HA03. That is why it was described as a partial payment in the consent determination.

[10] *Prior public holiday calculations* - In accordance with the Authority's directions Mr Brennan filed an affidavit in May last year setting out his view of what he was owed. The aim of that was to assist the Authority to fix the amount of remedies he had been awarded. Mr Brennan did not have the benefit of expert input when setting out the amounts he was claiming at that time. Over a year later Mr Brennan's arrears have still not been calculated. Now an expert has been engaged I consider it only fair that the expert calculate the first respondent's public holiday arrears liability because Mr Brennan had not previously been able to do that himself due to the first respondent's breach of his employment agreement.

[11] *Affidavit* - Mr Brennan's affidavit sworn on 17 May 2016 at paragraph said that "*It is difficult for me to calculate average daily pay and relevant daily pay so I will accept Afos Ltds' calculation.*" The respondents say that acceptance means Mr Brennan cannot now recover any public holiday entitlement arrears he may be entitled to. I do not agree. Mr Brennan at that point was not in a position to challenge the first respondent's public holiday arrears calculations and now he is.

[12] *Expert to calculate public holiday arrears* - The expert is to calculate Mr Brennan's public holiday arrears by applying the relevant provisions of the HA03. If Mr Brennan has been paid less for his public holiday entitlements than he is owed in accordance with HA03 calculations then he is entitled to recover that arrears under paragraph [151](f) of the substantive determination.¹

[13] *No contracting out of HA03* - Public holiday pay is a minimum code entitlement. That means the first respondent cannot contract out of its statutory obligation under HA03 to pay Mr Brennan all of his public holiday entitlements in accordance with the correct calculations done under the relevant provisions in HA03.

[14] *Annual holiday pay arrears while employed* - The expert needs to calculate Mr Brennan's annual holiday pay entitlement arrears in accordance with the applicable sections of HA03. This will consist of recalculating the annual holiday pay Mr Brennan was paid while employed to determine whether he was underpaid and if so by how much for each day of annual holiday he took.

[15] *Annual holiday pay arrears upon termination* - The expert also has to calculate what annual holiday pay Mr Brennan should have been paid on termination which has to be calculated on the basis of him having been paid correctly (as per the Authority's determinations). This requires a s24 HA03 calculation of accrued but unused annual holiday at Mr Brennan's last leave anniversary date of 01 December

2014. Plus a s25 HA03 calculation of 8% of Mr Brennan's total gross earnings (as if he had been paid correctly) from his last

leave anniversary date up to date of termination. Subtracted from these amounts are advance annual holiday payments and annual holiday paid to Mr Brennan since termination.

[16] *Expert's annual holiday pay calculations* – The expert is to calculate Mr Brennan's entitlements based on him having been paid correctly. So any total gross earnings calculations must include all arrears including arrears that were part paid or which have already been paid.

[17] *Purpose of expert report* – The purpose of the expert's report is to provide evidence to the Authority of the various amounts associated with each of the liabilities the Authority in its various determinations has determined the first respondent is legally required to pay Mr Brennan. It also includes any liabilities the parties have agreed first respondent will pay Mr Brennan or have already paid Mr Brennan (such as per the consent determination) or other agreements reached to ensure the overall

total amount Mr Brennan is owed is accurate.

1 Supra.

[18] *Method of expert calculations* – The expert must calculate what is owed by using the Authority's findings regarding commission entitlements. The expert must also apply the relevant provisions in HA03 to calculate Mr Brennan's annual holiday pay arrears, bereavement leave arrears, and public holiday arrears.

[19] *Costs* – Costs are reserved pending the resolution of all outstanding issues between the parties.

Rachel Larmer

Member of the Employment Relations Authority

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