

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 405  
5438164

BETWEEN	NEVILLE CRAIG BRENNAN Applicant
A N D	AFOS LTD First Respondent
AND	ANN ROSEMARY SHARPE Second Respondent
AND	RICHARD BRUCE SHARPE Third Respondent

Member of Authority: Rachel Larmer

Representatives: Tim Oldfield, Counsel for Applicant  
Parvez Akbar, Counsel for Respondents

Investigation meeting: 06 and 12 December 2016 by Telephone Conference

Date of Determination: 12 December 2016

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1] The Authority issued its substantive determination for Mr Brennan's wage arrears, penalty and disadvantage claims on 21 January 2016.<sup>1</sup> A further determination was issued on 11 August 2016<sup>2</sup> partially addressing remedies.

[2] On 11 August 2016 the Authority issued a determination regarding some of the remaining disputed issues that were preventing the parties from reaching agreement.<sup>3</sup> Notwithstanding that, the parties have still been unable to agree on what

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<sup>1</sup> [2016] NZERA Auckland 24.

<sup>2</sup> [2016] NZERA Auckland 271.

<sup>3</sup> [2016] NZERA Auckland 271

Mr Brennan is owed in accordance with paragraph [151] of the Authority's substantive determination.<sup>4</sup>

[3] There are two main problems which have prevented the commission arrears being calculated.

[4] The first problem is that Afos Limited says it cannot actually do the various calculations required by the Authority in its August determination because the system it runs is simultaneously recalculating the commission entitlement based on all of the different variables.

[5] Mr Akbar says that means that Afos' system cannot make the individual calculations separately for each variable – it can only recalculate the overall change to the commission entitlement after all variables have been applied.

[6] Afos therefore says it cannot provide the Authority with the separate amounts identified in paragraph [27] of the 11 August 2016 determination<sup>5</sup> to give the amount owed under each discrete claim.

[7] Afos says it has spoken to its external IT support to see if adjustments can be made to its current system to enable the amounts of commission payable under each discrete claim to be accurately calculated but it has apparently been told that is not possible.

[8] Afos says that if it is required to manually calculate the amount owing under each discrete claim that exercise will involve showing calculations for transactions recorded in excess of 28,000 pages of documents which it believes will take at least 12 months to do.

[9] Mr Oldfield was not in a position to dispute Afos' views about the difficulties inherent in manually calculating the commission arrears owing under each of his discrete claims. I note that Mr Brennan has also still not provided the Authority with updated commission arrears calculations as per the August 2016 determination.

[10] The second problem is that the parties each have a different view of what calculations are required to quantify remedies in accordance with the Authority's earlier determinations.

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<sup>4</sup> Ibid 1.

<sup>5</sup> Ibid 3.

[11] Afos appears to have reduced its overall commission arrears liability by removing any commission overpayments Mr Brennan has received for clients who were recategorised from category 2 (being 2% commission entitlement) to category 1 (being 1% commission entitlement) from the amount of commission arrears it it owes Mr Brennan.

[12] Mr Brennan categorises this action as a 'back door' attempt to recover commission overpayments in circumstances in which the Authority has previously determined that it has no jurisdiction to address Afos' commission overpayments claims and/or where Afos withdrew the overpayment claims during the Authority's substantive investigation.

[13] Afos disputes that. It acknowledges it is not able to claim commission overpayments back from Mr Brennan but it says the way it has calculated what it owes Mr Brennan is in accordance with the Authority's August 2016 determination.

[14] It appears this ambiguity may have arisen because of the way in which paragraph [27] of the August determination has been expressed.

[15] This overview of the calculations necessary to move the remedies aspect of this matter forward was set out in the August determination because the Authority was very concerned that, despite liability having been fixed in January 2016, the parties had by August still not progressed quantification of remedies issues.

[16] I wish to make it very clear that the Authority's position has always been that Afos cannot recover commission overpayments from Mr Brennan. This means that it is not permitted to apply the calculations required by paragraph [27] of the Authority's August determination in a way that effectively allows it to offset or recover any commission overpayments.

[17] The calculations Afos is required to do involve identifying for which (if any) clients out of the client list 1-56 Mr Brennan has been overpaid commission for. These clients are then to be extracted from the commission arrears calculations.

[18] For the clients for whom Mr Brennan has been underpaid commission, Afos has to calculate what he was paid versus what he should have been paid. The difference is the amount Afos still owes Mr Brennan as commission arrears.

[19] Afos then needs to add up all of the commission underpayments for all of the categories in which the Authority has identified it had liability to pay commission to Mr Brennan but where commission has not yet been paid. The total of those discrete amounts equals what Afos owes Mr Brennan in commission arrears.

[20] Afos therefore must focus its attention on what commission entitlements were underpaid. What commission was overpaid is only relevant in so far as those clients are removed from the commission calculations. The amount Mr Brennan is owed in arrears does not have the amount he has been overpaid commission entitlements subtracted from it.

[21] To avoid doubt I determine that paragraph [27](b),(e),(h),(k),(n),(q) of the August determination should have the words “*actually paid*” deleted and replaced with the word “*underpaid*”.

[22] As discussed the most efficient way forward in the circumstances now appears to be for the parties to jointly engage one mutually agreed financial expert who has the necessary expertise, experience and standing in the profession to calculate the amount Afos owes Mr Brennan in accordance with the Authority’s substantive liability determination.

[23] It is the Authority’s view that in order to move this matter forward as expeditiously as possible the parties should initially bear the cost equally for engaging this expert. However I am open to the cost of this expert being addressed as a potentially recoverable disbursement during any subsequent assessment of costs that may be required.

[24] The Authority records that the parties have until 16 December 2016 to provide the name of the agreed expert, the date the expert will be jointly briefed by them and the date on which the expert is expected to file their report quantifying Afos’ outstanding liabilities to Mr Brennan.

**Rachel Larmer**

**Member of the Employment Relations Authority**

