

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 220
5438164/5439227

BETWEEN CRAIG NEVILLE BRENNAN
Applicant

A N D AFOS LIMITED t/a KIWI
PALLETS
First Respondent

ANN ROSEMARY SHARPE
Second Respondent

RICHARD BRUCE SHARPE
Third Respondent

Member of Authority: Rachel Larmer

Representatives: Tim Oldfield, Counsel for Mr Brennan
Persia Templeton, Counsel Afos Limited

Investigation Meeting: On the papers

Submissions Received: 16 July 2015 from Applicant
23 July 2015 from Respondent

Date of Determination: 27 July 2015

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] The Authority has two sets of proceedings currently before it – one in which Mr Brennan is Applicant¹ and in which Afos Limited trading as Kiwi Pallets (Kiwi Pallets) is First Respondent, Ann Rosemary Sharpe is Second Respondent and Richard Bruce Sharpe is Third Respondent. The other proceedings involve Kiwi Pallets as Applicant and Mr Brennan as Respondent.²

¹ AEA 5438164.

² AEA 5439227.

[2] Mr Brennan was employed by Kiwi Pallets. His employment ended on 16 August 2013. Mr Brennan has filed claims for unjustified disadvantage, wage arrears, unpaid Holidays Act 2003 entitlements, unlawful deductions from wages, penalties, a compliance order to produce wage and time records and interest against Kiwi Pallets.

[3] Kiwi Pallets subsequently filed claims³ against Mr Brennan for recovery of overpaid money and penalties for breaches of good faith and the implied duty of trust and confidence.

[4] Mr Brennan has applied for an order excluding the evidence of the Respondents' witness Mr Geoffrey Campbell, Chartered Accountant. The Respondents oppose that application.

[5] Mr Brennan relies on the following three grounds in support of his submission that Mr Campbell's evidence should be excluded as inadmissible:

- a. He is not impartial;
- b. Much of his brief is heresay;
- c. He gives evidence on the ultimate issue.

[6] Section 160 of the Employment Relations Act 2000 (the Act) gives the Authority a wide discretion regarding the evidence it may consider. It is not bound by technicalities and may consider evidence that might otherwise be deemed inadmissible in other jurisdictions.

[7] Mr Campbell identifies in his brief that the firm he is a principal of has in the past acted for the First Respondent in preparing a high level review of the business prior to its purchase and in compiling its annual financial statements and income returns and up to 2011 the Second Respondent's tax returns.

[8] Mr Campbell considers the nature of this work to be limited, the period of it is confined and he himself had no personal involvement with it. Mr Campbell's view is that he does not consider this history to present a conflict of interest or circumstances which may impair his ability to objectively provide the expert assistance required.

³ Supra.

[9] Mr Campbell has previously given evidence and appeared as an expert witness in the High Court of New Zealand. He is familiar with the High Court Rules (HCR) affecting expert witnesses and although he recognises these do not apply to the Employment Relations Authority jurisdiction he has nevertheless prepared his evidence pursuant to Schedule 4, paragraph 9.43 of the Code of Conduct for expert witnesses applicable in accordance with the HCR.

[10] I do not accept Mr Oldfield's submission that Mr Campbell's evidence should be excluded because he is not impartial. I decline to exclude his evidence on that basis.

[11] Mr Oldfield did not identify what parts of Mr Campbell's evidence were objected to as heresay. I am not prepared to exclude his evidence on that basis. The Authority is well able to properly assess what if any weight should be given to any evidence that may be held to be heresay evidence. Mr Oldfield can cross examine on such evidence and he can call evidence to contradict it.

[12] Both parties can address the Authority on the probative value (if any) of any such evidence and on what if any weight should be given to it in their submissions. I decline to exclude Mr Campbell's evidence on the basis of unspecified allegations of heresay.

[13] I do not accept that Mr Campbell is giving evidence on the ultimate issue. He has given expert conclusions regarding various calculations based on the documentary evidence he has reviewed. Whether or not the documents relied on by Mr Campbell are held to accurately reflect the contractual commission and other pay arrangements between the parties is an issue for the Authority to determine.

[14] Mr Campbell has not sought to give evidence on the credibility or otherwise of each parties' views of the agreed contractual arrangements. He has instead provided expert evidence on the accuracy of the source information used to compile the financial information presented to the Authority.

[15] The Authority currently has eleven overstuffed A4 ringbinders before it most of which is financial information. The Respondents have indicated from an early stage in these proceedings that they will be calling expert evidence about the payments actually made to Mr Brennan and the basis for those.

[16] The Authority has spent time on its own and with the parties attempting to clarify the voluminous financial information that has been presented. There has been considerable uncertainty by both parties about financial matters and in particular what financial evidence is or is not available and whether or not the available evidence is or is not accurate.

[17] It has been difficult obtaining up to date clear calculations of each parties' respective position on the financial aspects of their claims/counterclaims. I consider that Mr Campbell's evidence will assist with that.

[18] My view is that Mr Campbell's evidence is relevant and is likely to assist the Authority with its understanding of the basis of each parties' claims/counterclaims. He appears to hold the requisite qualifications and body of knowledge to be in a position to provide the Authority with expert opinion evidence on the financial aspects relating to the factual and other issues the Authority shall be determining.

[19] Mr Oldfield's application to exclude Mr Campbell's evidence does not succeed. Mr Oldfield has 7 days within which to advise the Authority of whether or not he intends to call his own expert evidence. If so, then his expert evidence must be filed within 28 days of the date of this determination.

Costs

[20] Costs are reserved to be dealt with at the conclusion of the substantive matters.

Rachel Larmer
Member of the Employment Relations Authority