

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
OFFICE**

**BETWEEN** Kevin Pellow-Jarman (Applicant)  
**AND** CMI Fasteners Limited (Respondent)  
**REPRESENTATIVES** In person  
Paul Adlam and Ross Noble, for Respondent  
**MEMBER OF AUTHORITY** Marija Urlich  
**INVESTIGATION MEETING** 13 December 2006  
**DATE OF DETERMINATION** 20 December 2006

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Kevin Pellow-Jarman was employed by CMI Fasteners Limited to manage its manufacturing business from April 2002 until September 2005 when that employment ended by expiry of a fixed term. In September 2006 Mr Pellow-Jarman filed an application in the Employment Relations Authority seeking payment of wages he claims were due and owing when his employment ended. In particular, Mr Pellow-Jarman says the calculation of his holiday pay should have included the incentive payments he received during his employment with CMI. He says he ought to have received \$5362.75 in holiday pay not \$3496.08 which he received from CMI. Mr Pellow-Jarman seeks an order that his holiday be recalculated accordingly and the correct amount paid to him.

[2] CMI was represented at the investigation meeting by Paul Adlam, Managing Director and Ross Noble, General Manager. CMI says the incentive payments were properly excluded from the calculation of holiday pay because those payments are expressly excluded under the terms of the written employment agreement between the parties.

[3] At the investigation meeting I discussed with the parties that it appeared to me that two issues needed to be determined; the first, whether the bonus payments formed part of gross earnings for the purposes of calculating holiday pay entitlement and the second, what that holiday pay entitlement should be. In relation to the second issue, the parties disagreed as to what the holiday pay entitlement should be in the event the first part of Mr Pellow-Jarman's application was successful. I advised the parties that I would determine the first issue and if Mr Pellow-Jarman was successful, would refer the second issue to the Labour Inspectorate.

**The employment agreement**

[4] Over the period of Mr Pellow-Jarman's employment with CMI the parties entered two written fixed term employment agreements. The terms were 1 April 2002 to 31 March 2003 and 1 October 2003 to 30 September 2005. The terms of the employment agreements were identical but for a salary increase in the second. Mr Pellow-Jarman seeks to rely on the following schedule annexed to the first agreement:

**Schedule C**  
**Job description Manager and performance expectations**

...

7. Annual bonus according to the following:

gross bonus	performance standard
\$3000	sales nett GST, nett credits, nett returns annualised at \$1.5m (\$125,000 month) calculated to March 31 each year.
\$5000	Sales nett GST, nett credits, nett returns, annualised at \$1.74m (\$145,000 month) calculated to March 31 each year.
\$10,000	Sales nett GST, nett credits, nett returns annualized at \$2.16m (\$180,000 month) calculated to March 31 each year.
\$20,000	Sales nett GST, nett credits, nett returns annualized at \$2.4m (\$200,000 month) calculated to March 31 each year.
\$30,000	Sales nett GST, nett credits, nett returns annualized at \$2.76m (\$230,000 month) calculated to Match 31 each year.

The bonus payments are not cumulative. For sales performance falling in between the targets, a pro-rata incentive will be paid. The bonus will be calculated and paid monthly but adjusted on an annualised basis according to cumulative sales adjusted for the month to date period of financial year. The Managing Director must approve the Financial Statements and the payments of bonuses.

The final calculation of bonus will be adjusted at the end of the march month each year.

8. Annual bonus according to the following

\$3000	7% nett profit to sales as calculated in the annual accounts
\$5000	8% nett profit to sales as calculated in the annual accounts
\$10,000	9% nett profit to sales as calculated in the annual accounts
\$15,000	10% nett profit to sales as calculated in the annual accounts
\$20,000	11% nett profit to sales as calculated in the annual accounts
\$30,000	12.5% nett profit to sales as calculated in the annual accounts

The bonus payments are not cumulative. For profit performance falling between the targets, a pro rata bonus will be paid.

The bonus will be calculated for each six month period ending September and March of each financial year and upon the completion of a stock take to obtain an accurate Cost of Goods. The bonus will be paid on an annualized basis and paid six monthly as soon as the Financial Statements are completed. The Managing Director must approve the Financial Statements and the payments of bonuses.

(ie half of the bonus will be paid for each six month period, with the final part of the bonus adjusted in each March month.)

[5] Mr Pellow-Jarman says the calculation of his holiday pay entitlement should include the bonus payments he received under schedule C of the employment agreement and that CMI has incorrectly used his base salary to calculate his holiday pay.

[6] CMI accepts that it has only used Mr Pellow-Jarman's base salary to calculate his holiday pay and relies on clause 9 of the employment agreement:

For the purposes of calculating remuneration (*including holiday pay*) any allowance or payment that constitutes a reimbursement of expenses incurred by the Employee on behalf of the Company shall not form part of the calculation of gross earnings when determining the total amount of remuneration paid.

[7] Mr Adlam said the bonus payments were an allowance and relies on the payroll coding system which codes the bonus payments as allowances. Mr Pellow-Jarman says allowances are dealt with in clause 8 of the employment agreement "*Offsite Conditions*" and covers overnight expenses and mileage, not the bonus payments.

[8] There is no suggestion that the payroll system forms part of Mr Pellow-Jarman's terms of employment or that the terms used in that system were agreed with him. The coding of the payroll system has no bearing on the terms of employment. Further, clause 9 does not include bonus payments because the phrase "*that constitutes a reimbursement of expenses*" describes "*any allowance or payment*"; there was no suggestion that the bonus payments were reimbursement payments.

[9] In relation to the Managing Director's approval of financial statements and bonus payments, Mr Adlam said once the accountant had finalised the final accounts that he would sign them off and that he never had occasion not to approve a bonus payment for Mr Pellow-Jarman.

[10] I am satisfied that the bonus payments formed part of the employment agreement and that there was no discretionary element to the payment of those bonus payments under the terms of the employment agreement. The bonus payments paid under schedule C of the employment agreement should form part of gross earnings for the purposes of calculating Mr Pellow-Jarman's holiday pay<sup>1</sup>.

### **Costs**

[11] Mr Pellow-Jarman is entitled to be reimbursed for the filing fee he has incurred in lodging this application. CMI Fasteners Limited is to reimburse him the \$70 filing fee and I so order.

Marija Urlich  
Member of Employment Relations Authority

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<sup>1</sup> Section 25 Holidays Act 2003