

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 187  
5498281

BETWEEN

DINESH SOOD  
Applicant

A N D

SUPER FINANCE LIMITED  
Respondent

Member of Authority: Rachel Larmer

Representatives: Thuzar Henry-Win, Advocate for the Applicant  
Tim Oldfield, Counsel for the Respondent

Investigation Meeting: 18 June 2015 at Auckland

Submissions: 22 June 2015 from Applicant  
23 June 2015 from Respondent

Determination: 24 June 2015

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**DETERMINATION OF THE AUTHORITY**

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**A Within 28 days of the date of this determination Super Finance Limited is ordered to pay Mr Sood:**

- (a) \$1,728.48 wage arrears from 01 March - 11 April 2014;**
- (b) \$58,715.70 lost remuneration from 12 April 2014 to 30 March 2015;**
- (c) \$5,195.28 holiday pay;**
- (d) \$8,500 towards his actual legal costs;**
- (e) \$423.56 to reimburse his disbursements and filing fee.**

**Employment relationship problem**

[1] The Authority in its substantive determination issued on 30 March 2015<sup>1</sup> determined that Super Finance Limited's (Super Finance's) dismissal of Mr Sood was unjustified.

[2] In the Authority's substantive determination Super Finance was ordered to pay Mr Sood:

- (a) Lost remuneration from 12 April 2014 to 30 March 2015;

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<sup>1</sup> [2015] NZERA Auckland 95

- (b) Wage arrears for unpaid commission in April 2014;
- (c) Wage arrears for unpaid commission on sales in the Mangere store for March and April 2014;
- (d) Holiday pay on the above amounts.

[3] The Authority did not have sufficient information available to enable it to determine the above amounts so the parties were encouraged to calculate and, if possible, agree on the relevant amounts themselves. Agreement has not been reached so Mr Sood now seeks orders from the Authority. Mr Sood also seeks costs.

### **Issues**

[4] The following issues are to be determined:

- (a) How should March commission for sales in Mangere store be calculated?
- (b) What wage arrears is Mr Sood owed from 01 March – 11 April 2014?
- (c) How is lost remuneration to be calculated?
- (d) What lost remuneration is Mr Sood owed from 12 April 2014 to 30 March 2015?
- (e) How much holiday pay is Mr Sood owed?
- (f) What, if any, costs and/or disbursements should be awarded?

### **How should March commission for sales in Mangere store be calculated?**

[5] The contractual commission structure does not specifically address the addition of the Mangere store. It provides that breakeven is \$x<sup>2</sup> for 4 stores. The addition of the Mangere store makes it 5 stores.

[6] Mr Sood is entitled to 1% commission from the breakeven figure (which I have not specified but which the parties know) to “*actual or previous high (for 3 stores)*” [...] “*Plus 3% on net increase (from previous high to a new high).*”

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<sup>2</sup> I am not inserting the actual figure to preserve confidentiality but note that the parties have this actual breakeven figure at page 18 of the JB.

[7] Mr Sood says he is entitled to 3% of increase from the previous high for 4 stores to the new figure for sales across 5 stores.

[8] Super Finance says that approach gives Mr Sood an unfair windfall merely because a new store has opened. Mr Sood's approach means that all sales in the Mangere store count towards the new actual high. Super Finance say that because there are no previous or actual sales for the new store the previous high for the Mangere store cannot be calculated (there being no sales) so the "*actual high*" sales doesn't apply.

[9] Instead Super Finance says Mr Sood should be paid commission on sales for the new Mangere store which are over the breakeven amount. This means he is rewarded for actual sales in the Mangere store but doesn't get the windfall 3% commission merely because a new store opens thus increasing total previous high sales across all stores.

[10] I prefer Super Finance's interpretation. The commission structure refers to actual or previous sales. There are no previous sales in the Mangere store so the "actual" sales figures must be used. The 3% applies to a previous high but because there were no previous sales for Mangere there is no "*net increase*" so I consider that formula does not apply.

[11] Mr Sood is entitled to 1% commission on the actual sales in the Mangere store in March above the contractual breakeven figure.

**What wage arrears must Super Finance to pay Mr Sood for March and April 2014?**

*Unpaid wages for March and April 2014*

[12] Mr Sood is owed wage arrears consisting of:

- a. Unpaid commission for the Mangere store's sales in March 2014;
- b. Unpaid commission for all stores (including Mangere store) from 1-11 April 2014.

[13] Mr Sood has already been awarded \$1,621.53 for March 2014 sales<sup>3</sup> however that amount did not account for Mangere sales as that information was not available when the award was made.

[14] The parties agree that Mr Sood is entitled to commission of \$1,192.78 for March sales in the Mangere store and of \$535.70 for commission earned across all stores from 1-11 April (i.e. up until his employment ended).

[15] Super Finance is order to pay Mr Sood \$1,728.48 wage arrears.

### **How is lost remuneration to be calculated?**

[16] Mr Sood says his lost remuneration from 12 April 2014 to 30 March 2015 (the material period) must be calculated based on his average total gross earnings over the 12 months before his employment ended. This is effectively a looking back calculation.

[17] Mr Sood says the business would have done much better if he had remained General Manager so using actual sales figures over the material period is unfair to him. Mr Sood claims that bad management resulted in lower sales after his employment had ended and therefore a lower commission calculation if actual sales data is used.

[18] Super Finance says that Mr Sood's lost remuneration must be calculated based on the actual sales data for the period 12 April 2014 – 30 March 2015. It says it is too speculative to determine what sales would have been generated if Mr Sood remained employed as General Manager over the material period. Super Finance claim that using actual sales data provides the most accurate means of assessing loss.

[19] I accept Super Finance's submission. Mr Sood's lost remuneration is to be based on the commission that would have been payable based on actual sales data over the material period.

### **What lost remuneration is Mr Sood owed from 12 April 2014 to 30 March 2015?**

Mr Sood is entitled to be compensated for his lost remuneration from 11 April 2014 (which was a Friday) until 30 March 2015 (which was a Monday). This is a total of 50 weeks and 1 working day. Mr Sood was also paid two weeks' salary upon

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<sup>3</sup> Paragraph [71] substantive determination.

termination so that must be reflected in the final amount of lost remuneration he is awarded.

[20] Mr Sood's individual employment agreement states that his normal hours of work would be 40 hours per week for a fixed salary of \$50,000. However, there was provision for Super Finance to require Mr Sood to work overtime (hours in excess of 40 hours per week) which would be paid at the additional wage rate of \$24.04 per hour.

[21] Mr Sood's remuneration therefore consisted of the following three components;

- (a) a base salary of \$50,000 per annum for up to 40 hours work per week;
- (b) overtime at the rate of \$24.04 per hour for hours he was required to work in excess of 40 hour per week;
- (c) commission payments as per the agreed commission terms appended to his employment agreement.

#### *Lost wages/salary*

[22] Mr Sood says he worked 46 hours every week while he was General Manager because in order to run the business efficiently he was required to work six hours on Saturdays. Mr Sood says he was paid overtime for six hours work on Saturdays in addition to his base salary for every week that he was General Manager. Super Finance acknowledged Mr Sood was paid six hours overtime per week while General Manager.

[23] I therefore find that Mr Sood's gross weekly wages/salary was \$1,105.78 (\$961.54 base salary plus \$144.24 overtime per week (being \$24.04 x 6 hours)). Mr Sood's weekly wages/salary for 50 weeks (\$55,289) and one day (\$192.30) totals \$55,481.30.

#### *Commission calculations*

[24] Super Finance says it has extracted the actual monthly sales data for the period April 2014-March 2015 from its Cin No.7 software so has based its calculations upon actual sales data. Super Finance's witnesses gave evidence on oath/affirmation about the accuracy of the actual sales figures produced to the Authority.

[25] I find the total lost commission Mr Sood is entitled to receive for the period 12 April 2014-30 March 2015 is \$5,157.60.<sup>4</sup>

*Adjustment for notice pay*

[26] Mr Sood received \$1,923.20 pay in lieu of notice so this amount is to be deducted from the lost remuneration he is awarded.

*Outcome*

[27] Super Finance is ordered to pay Mr Sood \$58,715.70 lost remuneration under s.123 (1)(b) of the Employment Relations Act 2000 (the Act) (being \$60,638.90<sup>5</sup> lost remuneration less \$1,923.20 notice pay).

**What holiday pay is Mr Sood owed?**

[28] Mr Sood is entitled to total gross holiday pay of \$5,195.28 being:

- (a) \$138.28 holiday pay being 8% on wage arrears of \$1,728.48;
- (b) \$205.89 holiday pay being 8% on commission arrears of \$2,573.62<sup>6</sup>;
- (c) \$4,851.11 holiday pay being 8% on total lost remuneration of \$60,638.90.<sup>7</sup>

**What, if any, costs should be awarded?**

[29] Mr Sood as the successful party is entitled to a contribution towards his actual costs. The parties were encouraged to resolve costs by agreement, but that has not occurred.

[30] Mr Sood now seeks costs based on the current notional daily tariff of \$3,500. Super Finance accepts that costs based on the notional daily tariff are appropriate. The substantive matter involved a two day investigation meeting in respect of the substantive matter. There has been a further three hour investigation meeting regarding outstanding matters.

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<sup>4</sup> This consists of \$1,855.20 12-30 April 2014, \$1,984.80 May 2014, \$1,317.60 October 2014.

<sup>5</sup> Lost wages/salary of \$55,481.30 plus lost commission of \$5,157.20.

<sup>6</sup> This amount was awarded in paragraph [71] of substantive determination.

<sup>7</sup> This is \$58,715.70 of lost remuneration plus \$1923.20 notice pay.

### *Costs formula*

[31] A notional daily tariff based approach gives costs of \$8,500. This is calculated as \$7,000 (being 2 x \$3,500) for the substantive matter plus \$1,500 (being 3 x \$500) for the three hour investigation meeting.

[32] Super Finance is ordered to pay Mr Sood \$8,500 towards his actual legal costs.

### *Disbursements*

[33] Mr Sood claims disbursements of \$352. These disbursements are supported by invoices from Warehouse Stationary for the costs associated with photocopying and binding the bundles of documents which were used during the Authority's investigation meeting.

[34] I consider it appropriate for Mr Sood to be reimbursed for this amount because it is a separate cost which he actually incurred as opposed to falling within the usual office expenses charged by his representative. Mr Sood is also entitled to be reimbursed \$71.56 for his filing fee.

[35] Super Finance is ordered to reimburse Mr Sood \$423.56 for disbursements (being \$352 for photocopying/printing/binding and \$71.56 for his filing fee).

### **Orders**

[36] Within 28 days of the date of this determination Super Finance Limited is ordered to pay Mr Sood:

- (a) \$58,715.70 lost remuneration;
- (b) \$1,728.48 wage arrears;
- (c) \$5,195.28 holiday pay;
- (d) \$8,500 towards his actual legal costs;
- (e) \$423.56 reimbursement of disbursements and filing fee.

**Rachel Larmer**  
**Member of the Employment Relations Authority**