

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 333
5409188

BETWEEN

NICOLA JANE
WALLENDORF
Applicant

A N D

AA LIFE SERVICES LIMITED
Respondent

Member of Authority: K J Anderson
Representatives: Nicola Wallendorf in person
Michael Quigg, Counsel for Respondent
Investigation Meeting: On consideration of the papers
Date of Determination: 2 August 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Ms Nicola Wallendorf, was employed by the respondent, AA Life Limited (AA Life) as an insurance adviser. Unfortunately, Ms Wallendorf's employment was terminated on 4 December 2012; because her role was redundant. Ms Wallendorf was paid redundancy compensation calculated on her base salary of \$55,000. But she says that her compensation entitlement was incorrectly calculated by AA Life in that her total remuneration package, which included a "Tool of Trade" vehicle and commission payments, should have been taken into account. Hence, Ms Wallendorf claims that she was underpaid in regard to her redundancy compensation entitlement.

[2] AA Life rebuts this claim and says that the redundancy compensation has been correctly calculated using the base salary of \$55,000 and Ms Wallendorf is incorrect in regard to her assertion that the value of the vehicle and paid commissions should be

included in the compensation calculation. Following a conference call with the parties, it has been agreed that the Authority should determine the matter “on the papers” and submissions and evidence have been considered accordingly.

The relevant evidence

[3] Via a letter dated 10 November 2011, Ms Wallendorf was offered the position of Insurance Adviser with AA Life Services. Among other things, this letter informed Ms Wallendorf that:

Your total fixed remuneration will be \$72,000 (gross) per annum, \$17,000 of which reflects the value of the tool of trade vehicle which is provided. The balance of \$55,000 may be taken solely as taxable cash, or if you decide to join a Super Scheme, you may salary sacrifice a component of this figure as a company contribution.

Your remuneration of \$72,000 (gross) per annum is made up as follows:

Base Salary (Taxable cash)	\$55,000.00
Tool of Trade vehicle (valued for purposes of remuneration package)	<u>\$17,000.00</u>
	\$72,000.00

You will also be eligible for commission payments under the Insurance Adviser Commission structure for the financial year of 1 October 2011 to 30 June 2012 as outlined in the attached documentation. Target levels for commission in subsequent years will be agreed in the quarter preceding each subsequent financial year.

[4] Attached to the letter are details of the *Insurance Adviser Bonus Structure 1 October 2011 to 30 June 2012*. While the parties have used the term “commission” in regard to the matter in dispute, I assume that it is the bonus structure that is being referred to.

[5] Most relevant is the *Individual Employment Agreement (IEA)* between the parties. At clause 8.5, redundancy compensation is provided for thus:

In the event that the employee is made redundant, the following payment will apply:

- (a) Eight weeks salary for the first year of current service or part thereof; plus
- (b) Two weeks salary for each subsequent year of service or part thereof.

In the event that the employee is made redundant and has completed six years of current service, the following payment will apply:

- (a) Three weeks salary for the first year of current service or part thereof; plus
- (b) Three weeks salary for each subsequent year of service or part thereof.

A “week’s salary” shall be defined as 50% of gross fortnightly earnings, including qualifications, part-time and shift allowances where applicable. For the purpose of this Agreement any current and continuous service which includes previous service with any company acquired by the Royal & Sun Alliance, the Promina Group or the Suncorp Group shall be deemed to be service with the Suncorp Group.

Interpretation of clause 8.5

[6] I conclude that the key words, pertaining to the calculation of redundancy compensation, are: “*A week’s salary shall be defined as 50% of gross fortnightly earnings...*”. And then broken down further: “*fortnightly earnings*” is a key term; in particular, “*earnings*”. The *Concise Oxford Dictionary* (9th edition) defines “earnings” as: “*money earned*”.

[7] Therefore, applying the above to Ms Wallendorf’s “earnings” (money earned), it seems logical that her earnings would be compiled of:

- (a) The basic salary; and
- (b) Contractual commissions (or bonuses) earned as per the terms of the IEA.

[8] It follows that I accept that the redundancy compensation calculation for Ms Wallendorf should include the relevant commission payments; as she has submitted.

[9] Ms Wallendorf seeks to persuade the Authority that the value of the tool of trade vehicle should also be included in the redundancy compensation calculation. I note Ms Wallendorf’s submission about the annual amount of \$17,000 being included in her *Life Insurance Plan* (the Plan), and the applicable *Salary Continuance Benefit*. But I also note that the Plan excludes bonuses; albeit it does include the value of management vehicles for roles with a Hay evaluation of higher than 261 points. While details of Ms Wallendorf’s Hay evaluation are not available to the Authority, I assume that she falls within the “higher than 261 points” category.

[10] But in any event I find that it is the words used in clause 8.5 of the IEA that are relevant to the matter I have to determine. I conclude that the annual value of the tool of trade vehicle cannot be interpreted as “earnings” and it follows that I do not accept Ms Wallendorf’s submissions to the contrary.

Determination

[11] For the reasons set out above, I find that:

- (a) Commission (or bonus) payments were a contractual component of the earnings of Ms Wallendorf and should have been taken into account when calculating the redundancy compensation due to her under clause 8.5 of the IEA. The effect is that the total commission sum of \$11,271 should be divided by the number of weeks that Ms Wallendorf was able to earn commission (not 52 weeks)¹ and then that sum should be multiplied by 8 (weeks) arriving at an appropriate gross sum from which PAYE would be deducted. In the event that the parties are unable to agree on the appropriate sum, leave is granted for the parties to return to the Authority for a supplementary determination. But given that there will not be much difference, regardless of the divisor used, one would imagine that should not be necessary;
- (b) The value of the tool of trade vehicle (\$17,000), for remuneration assessment purposes, does not qualify as earnings under clause 8.5 of the IEA and Ms Wallendorf’s claim to the contrary is unsuccessful;
- (c) The respondent has drawn the attention of the Authority to an *ex gratia* payment, equivalent to three weeks’ salary, made to Ms Wallendorf: being \$3,178.08. It is the submission for AA Life that this payment should be taken into account and any extra payments that the Authority finds are due to Ms Wallendorf should be offset accordingly. While I accept that AA Life was under no legal obligation to make the *ex gratia* payment to Ms Wallendorf, I do not believe that it is appropriate to take it into account as AA Life has urged. This is because AA Life made the same gesture to other employees who were made redundant

¹ Ms Wallendorf says that her potential to earn commission ceased as at 11 October 2012 when her role was disestablished, albeit she remained employed until 4 December 2012.

with Ms Wallendorf. The reason for the payment being that the redundancies were implemented close to the Christmas seasonal break; hence finding new employment may have taken longer than could normally be expected. AA Life is commended for taking this approach and I suggest that the *ex gratia* payment should continue to be viewed in the light of the spirit that it was made. I find that it is not appropriate to now offset the monies due to Ms Wallendorf as a result of this determination.

Costs

[12] Ms Wallendorf represented herself in this matter and hence she does not appear to have incurred any expenses, other than the application fee paid to the Authority. AA Life Services Limited shall pay the sum of \$71.56 to Ms Wallendorf accordingly.

K J Anderson
Member of the Employment Relations Authority