



New Zealand Employment Relations Authority Decisions

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Brennan v AFOS Ltd (Auckland) [2016] NZERA 643; [2016] NZERA Auckland 271 (11 August 2016)

Last Updated: 2 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2015] NZERA Auckland 271
5438164

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

Member of Authority: Rachel Larmer

Representatives: Tim Oldfield, Counsel for Applicant

Persia Templeton, Counsel for Respondents

Investigation meeting: On the papers

Submissions: 05 July 2016 from Applicant

20 July 2016 from Respondents

27 July 2016 from Applicant

Date of Determination: 11 August 2016

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] The Authority issued its substantive determination for Mr Brennan's wage arrears, penalty and disadvantage claims on 21 January 2016.¹ Since then the parties have been attempting to agree on the amounts owed as per paragraph [151] of that substantive determination.

[2] The parties have not yet reached agreement because there are unresolved conflicts between them over:

a. What source documentation should be used to calculate Mr Brennan's

wage arrears;

b. What method of calculation is correct;

c. Whether or not commission arrears is owed for Thomas Brothers and Darling Fruit Packers P10 sales and if so what commission rate is to be applied to these sales;

d. Whether Mr Brennan's commission arrears for August 2013 needs to

be reduced by 50% because his last day of work was 16 August 2013;

e. What commission rate applies to sales to CHH Case Christchurch

(client # 1838) and CHH Case Levin (client # 1717);

f. Whether or not commission arrears are owed on any June 2009 cash sales;

g. Whether or not the interest awarded by the Authority² should be for a different (reduced) period other than that specified in the Authority's substantive determination.

[3] The parties have asked the Authority to determine these matters in order to assist them in reaching (if possible) agreement on the final amounts Mr Brennan is owed as per the Authority's substantive determination.

[4] Accordingly, this determination is a partial remedies determination which is limited to the specific issues identified above.

Issues

[5] The following issues are to be determined:

a. What source documentation should be used to calculate Mr Brennan's

wage arrears;

b. What method of calculation is to be applied when calculating Mr

Brennan's wage arrears;

c. Is Mr Brennan owed commission arrears for P10 sales to Thomas Brothers and Darling Fruit Packers and if so what commission rate applies;

d. Should Mr Brennan's August 2013 sales commission be reduced by 50%?

e. What commission rate applies to sales to CHH Case Christchurch

(client # 1838) and CHH Case Levin (client # 1717);

f. Is Mr Brennan owed commission arrears on June 2009 cash sales;

g. How is the 10% reduction agreed from December 2009-2010 relevant?

h. How is the \$50,216.28 partial reimbursement already paid to Mr

Brennan to be accounted for?

i. Should the period for which Mr Brennan was awarded interest by the

Authority³ be reduced?

What source documentation should be used to calculate Mr Brennan's wage

arrears?

[6] The Authority's substantive determination sets out the commission rates that apply to each of the identified clients and/or types of sales. This allows the parties to calculate what commission should have been paid to Mr Brennan while he was employed had the First Respondent complied with its contractual commission obligations at the material time.

[7] The 250 page Excel spreadsheet filed by the Respondents on 13 June 2016 is to be used for the purposes of calculating the

difference between what commission Mr Brennan was actually paid for the material periods (while employed) and what he should have been paid had the correct commission been applied over the material periods.

[8] This document has been used on the basis that it applies the Authority's commission findings to the specific sales for each month, so it is considered the most up to date material.

What method of calculation is to be applied when calculating Mr Brennan's wage arrears?

[9] The parties are directed to:

- a. Identify what if anything Mr Brennan was actually paid in commission for each month he is claiming commission arrears;
- b. Identify applicable commissions rate (as per substantive determination findings) for each client or type of sale (as the case may be) for each month for which Mr Brennan is claiming he was underpaid commission;
- c. Identify for each month whether or not there is a shortfall between what Mr Brennan was actually paid in commission and what he should have been paid in commission had the contractual commission rate (as per Authority's substantive determination) been applied;

[10] If there is a shortfall in any given month then that is the amount Mr Brennan is owed (i.e. what he should have been paid in each month less what he actually received in that month).

[11] I do not accept the Respondents' submission that there must be an overall recalculation of all commission Mr Brennan received over the entire course of his employment.

[12] Mr Brennan has made very specific commission arrears claims for particular clients and types of sales over specific periods of time. These are all discussed in detail in the substantive determination and those are the specific claims the Authority has determined.

[13] I accept Mr Brennan's submission that the Respondents' are now attempting to recover alleged overpayments which have already been ruled inadmissible for want of jurisdiction.

[14] I consider that the Respondents' proposed approach to the method of calculation is an inappropriate 'backdoor' attempt to reactivate claims that have either already been dismissed for want of jurisdiction or which were filed by the Respondents then withdrawn during the investigation meeting on the basis the evidence simply did not support such claims.

[15] The Respondents had a legal obligation to ensure that they complied with the contractual arrangements they had agreed with Mr Brennan. They did not do so, which is entirely their fault and for which Mr Brennan is not to blame. The Respondents had the means to ensure they paid Mr Brennan correctly but they failed to ensure that occurred.

[16] Any adverse consequences that the Respondents consider may flow from the Authority's rejection of their 'methodology' for calculating commission arrears are consequences that arise from their own breaches of contract and failings to comply with minimum statutory obligations including regarding accurate record keeping.

[17] The Authority's substantive determination makes it clear that Mr Brennan has succeeded in establishing to the required standard that he is owed wage arrears consisting of unpaid contractual commission entitlements and underpaid minimum statutory entitlements. No other calculations are required.

Is Mr Brennan owed commission arrears for P10 sales to Thomas Brothers and Darling Fruit Packers and if so what commission rate applies;

[18] Mr Brennan is entitled to 2% commission on the sale of 150 P10 pallets to Thomas Brothers. If he has not already been paid that, then he is owed it as commission arrears.

[19] Mr Brennan is entitled to commission of 2% (being \$3.66) on the sale of one P10 pallet to Darling Fruit. If he has not already been paid for that, then he is owed it as commission arrears.

Should Mr Brennan's August 2013 sales commission be reduced by 50%?

[20] The Respondents' submission that Mr Brennan's August 2013 commission should be reduced by 50% because he finished work on 16 August 2013 is rejected. There is no contractual basis for such a reduction to be applied and Mr Brennan does not agree to it.

[21] Mr Brennan is therefore owed his full contractual commission entitlements for all August 2013 sales.

What commission rate applies to sales to CHH Case Christchurch (client # 1838)

and CHH Case Levin (client # 1717)?

[22] There are three different CHH Case entities – CHH Case (Auckland), CHH Case (Levin) and CHH Case (Christchurch).

[23] CHH Case (Auckland) was number 8 on the agreed Master list and was held to attract commission at the rate of 2%. CHH Case Levin was number 57 on the agreed Master list and was held to attract commission at the rate of 1%. The parties have agreed that CHH Case (Christchurch)⁴ attracts commission at the rate of 2%.

[24] Mr Brennan's commission is to be calculated for client 1838 at the rate of

2% and for client 1717 at the rate of 1%. Commission for sales to CHH Case

Christchurch is at 2%.

Is Mr Brennan owed commission arrears on June 2009 cash sales?

[25] It is unclear whether or not Mr Brennan has already been paid his full commission entitlements on all of the cash sales that occurred in June 2009. If the Respondents are claiming that Mr Brennan has received his full contractual commission then it must provide proof of that to him.⁵

How is the 10% reduction agreed from December 2009-2010 relevant?

[26] Once the parties have calculated what, if any, specific commission arrears Mr Brennan is owed arising from the period June 2009-2010 then the total amount of commission arrears owed over that period must be reduced by 10% to reflect the agreed reduction that applied over that one year period.

How is the \$50,216.28 partial reimbursement already paid to Mr Brennan to be accounted for?

[27] The parties are directed to use the information in this determination and in the substantive determination to calculate:

a. what commission Mr Brennan should have been paid for clients 1-27;

b. what commission Mr Brennan was actually paid for clients 1-27;

⁴ Not named on the final client list presented to the Authority at the substantive IM.

⁵ Being itemised details of all cash sales made in June 2009 and details of exactly what commission Mr Brennan was actually paid for these June 2009 cash sales at the material time.

c. what, if any, shortfall there is between (b) and (c);

d. what commission Mr Brennan should have been paid for clients 28-56;

e. what commission Mr Brennan was actually paid for clients 28-56;

f. what, if any, shortfall there is between (d) and (e);

g. what commission Mr Brennan should have been paid from January 2012 onwards for sales to APC, Van Globe and Weldwell;

h. what commission Mr Brennan was actually paid from January 2012 for sales to APC, Van Globe and Weldwell;

i. what, if any, shortfall there is between (f) and (g);

j. what commission Mr Brennan should have been paid after the March

2010 and June 2010 sales price increases (note – this applies to clients who were actually charged the increased sales price, not to clients who did not for whatever reason actually have the increased sales price applied to their purchases);

k. what, if any, commission Mr Brennan was actually paid after the March 2010 and June 2010 sales price increases occurred;

l. what, if any, shortfall there is between (j) and (k);

m. what commission Mr Brennan should have been paid on sales of the kiwifruit P10 pallets from April 2012 onwards (calculated at 2% rate);

- n. what commission Mr Brennan was actually paid for the kiwifruit P10 pallets from April 2012 onwards;
- o. what, if any, shortfall there is between (m) and (n);
- p. what commission Mr Brennan should have been paid on dunnage sales;
- q. what commission Mr Brennan was actually paid on dunnage sales;
- r. what, if any shortfall there is between (p) and (q);
- s. what, if any, unpaid commission arrears is Mr Brennan owed for the period June 2009-2010?
- t. what is 10% of the amount in (s) above?
- u. what is amount in (s) minus amount in (t) because that figure is the amount of commission arrears Mr Brennan is entitled to be paid for the period June 2009-2010, as per the agreement that he was reduce his commission entitlements by 10 % over that period;
- v. what is the total commission arrears Mr Brennan is owed under each of the above calculations?
- w. what commission arrears has Mr Brennan been paid since his employment ended?⁶
- x. what, if any, shortfall is there between (v) and (w).

[28] The parties will need to calculate Mr Brennan's correct commission arrears so that they can then use that information to recalculate Mr Brennan's annual holiday pay ⁷ arrears.

[29] If agreement is not reached regarding Mr Brennan's annual holiday pay arrears then the parties will need to calculate that amount as per the applicable sections in the Holidays Act 2008. This will involve calculating:

- a. What annual holiday entitlements Mr Brennan should have been paid;
- b. What annual holiday entitlements Mr Brennan was actually paid;
- c. Whether there is any shortfall between (a) and (b).

[30] It is not clear to the Authority exactly what the \$50,216.28 the Respondents say they have paid Mr Brennan subsequent to the substantive determination being

issued actually relates to.⁸

⁶ This includes the \$578.76 paid under the consent determination dated 01 December 2015 if that amount has not already been accounted for in paragraph [27] of this determination (i.e no duplicate reduction is to occur).

⁷ Mr Brennan says he is not claiming arrears of any sick leave entitlements. Mr Brennan also accepts the Respondents' calculations regarding his public holiday entitlements arrears claim so that is no longer a live issue.

⁸ In terms of whether it is commission arrears, or unpaid contractual entitlements or unpaid statutory entitlements or some combination of that.

[31] However, it should be obvious that any commission arrears already paid as part payment of the award in the substantive determination are to be credited against the total commission arrears Mr Brennan is still owed. The same obviously applies to any annual holiday pay arrears Mr Brennan has already been paid.

Should the period for which Mr Brennan has been awarded interest be reduced?

[32] Paragraph [151] [l] of the substantive determination sets out the award of interest made in Mr Brennan's favour. The Respondents' submission that Mr Brennan's interest period should be reduced does not succeed.

[33] The award of interest in the substantive determination, including the period interest applies to remains unchanged. There is no jurisdiction for the Authority to change a previous substantive determination which is already a matter of public record. The appropriate way to seek changes to the Authority's substantive determination is lodge a challenge with the Employment Court – not to file submissions asking the Authority to change a prior determination.

Other

[34] I record the parties' agreement that the amount of unpaid business expenses

Mr Brennan was awarded in the substantive determination is \$284.50.

[35] Mr Brennan is also to be reimbursed for the unlawful deductions made from his wages,⁹ if that has not already occurred.

[36] The First Respondent owes Mr Brennan \$4,000 distress compensation plus

\$15,000 in penalties if those have not already been paid to him. The Second and Third Respondents each owe Mr Brennan \$5,000 each in penalties, if those amounts have not already been paid to him.

Next steps

[37] The information in this determination should be sufficient to enable the parties to calculate the final amounts owed to Mr Brennan in respect of each of the

claims he has succeeded on.

⁹ See paragraphs [106 – 107] and [151] of the substantive determination.

[38] The parties have until 31 August 2016 to agree on the amounts Mr Brennan is owed. If agreement is not reached, then either party may apply to the Authority to fix any amounts that are in dispute.

Rachel Larmer

Member of the Employment Relations Authority

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