

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 268
5438164

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

Member of Authority: Rachel Larmer

Representatives: Tim Oldfield, Counsel for Applicant
Parvez Akbar, Counsel for Respondents

Investigation Meeting: On the papers

Information and submissions:

- 02 August 2017 Updated Expert Report
- 02 August 2017 from Applicant
- 18 August 2017 from Respondents
- 21 August 2017 from Applicant
- 23 August 2017 from Respondents
- 24 August 2017 from Expert
- 24 August 2017 from Applicant
- 25 August 2017 from Respondent
- 25 August 2017 from Expert
- 28 August 2017 from Respondent
- 28 August 2017 from Applicant
- 01 September 2017 from Respondent
- 01 September 2017 from Expert
- 01 September 2017 from Applicant
- 04 September 2017 from Respondent

Date of Determination: 04 September 2017

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The Authority issued its substantive determination on 21 January 2016.¹ Since then the parties have been attempting to resolve remedies by agreement, with the assistance of a jointly engaged accountancy expert (“the Expert”).

[2] The parties have now asked the Authority to fix the outstanding amounts Mr Brennan is owed.

[3] The First Respondent Afos Limited (Afos) has already repaid Mr Brennan \$51,192.23 for unlawful deductions it made from Mr Brennan’s salary while he was employed. This repayment does not form part of my determination today and was not part of the Expert’s report because that liability has effectively already been settled.

[4] Afos was also ordered to pay Mr Brennan interest at the current prescribed rate of 5% per annum on the unlawful deductions made from his salary (which was to run from 31 March 2011) and on his wage and commissions arrears (which was to run from 01 September 2013) until paid in full.²

[5] Mr Brennan has asked the Authority to determine Afos’ interest liability. Afos has made some partial payments towards its interest liability and acknowledges it still has an outstanding interest liability to pay Mr Brennan.

[6] The Expert report did not calculate Afos’ interest liability. The Authority has insufficient information to be able to fix the amount of interest Afos owes Mr Brennan to date.

[7] The parties are encouraged to attempt to agree within 7 days of the date of this determination on the amount of interest AFOS owes to Mr Brennan in light of the final amounts owing as per the findings in this determination.

[8] If agreement is not reached on the total amount of interest owed then either party has 14 days within which to file an application to have the amount of interest Mr Brennan is owed determined by the Authority.

[9] The Authority will require Expert evidence about the interest claim if it is required to determine interest.

¹ [2017] NZERA Auckland 24.

² Supra paragraphs [148] and [149].

[10] Mr Brennan asked that I set a timetable for costs but I consider it more appropriate to determine costs once the interest liability issue has been resolved, because that exercise is likely to involve additional costs being incurred by the parties.

[11] In terms of the substantive findings made by the Authority in its substantive determination³ the amounts Afos owe Mr Brennan consists of (with reference to paragraph [151] of the substantive determination dated 21 January 2016);

- (a) \$8,368.43 commission arrears outstanding on sales to clients numbered 1–57;
- (b) \$3,931.18 commission arrears for Palmerston North clients from January 2012 onwards. This amount and interest on it was paid by Afos in full on 22 June 2017 so there is no outstanding liability for this;
- (c) \$71,426.08 commission arrears arising from March and June 2010 sales' price increases. This arrears plus the full amount of interest on it was paid in full on 22 June 2017 so there is no outstanding liability for this;
- (d) \$12,818.57 commission arrears arising from the kiwifruit (P10) pallet sales from April 2012 onwards;
- (e) \$367.36 commission arrears on dunnage sales;
- (f) \$7,204.98 public holiday arrears were paid pursuant to a consent determination dated 01 December 2015 so there is no outstanding liability for that;
- (g) In an affidavit sworn on 17 May 2016 Mr Brennan advised that he is not claiming sick leave arrears on the basis he didn't take any sick leave so there is no outstanding liability for that;
- (h) \$21,541.30 annual holiday entitlements arrears being \$314.49 owed for arrears on sales to Palmerston North clients plus \$6,267.66⁴ underpaid

³ Ibid 1

⁴ Mr Brennan had 81.5 days that should have been paid in accordance with the Holidays Act 2000 at the greater of his ordinary weekly pay or average weekly earnings for the 12 months before the last pay

annual holiday pay up to 30 November 2012 plus \$14,959.15 annual holiday arrears owed upon termination⁵;

- (i) \$284.50 business expenses have been paid in full by Afos to Mr Brennan so there is no outstanding liability for that;
- (j) \$50,216.28 for unlawful deductions (being \$38,042.63 “*holiday pay*” and \$12,173.65 “*ACC levies*”) made from Mr Brennan’s wages prior to March 2011. This amount was paid in full by Afos to Mr Brennan on 02 November 2016 together with full interest of \$12,135.63 so there is no outstanding liability for unlawful deductions;
- (k) Total penalties of \$20,000 were imposed on Afos of which \$5,000 was to be paid to the Crown. Afos has paid Mr Brennan his share of the penalties awarded against it in the Authority’s substantive determination. The payment by Afos of the \$5,000 penalty to the Crown is not a matter that is currently before the Authority so that aspect of the penalties imposed has not been determined;
- (l) Afos provided the Authority with a payments schedule on 18 August 2017 which states it has already paid interest of \$13,446.98 (being \$12,135.63 interest on unlawful deductions plus \$563.08 in March 2016 plus \$748.54 for commission arrears for sales to Palmerston North clients). If any other interest has already been paid then that must be accounted for when the final interest amount is calculated in accordance with the timetable set in this determination;
- (m) Afos has paid Mr Brennan the \$4,000 distress compensation he was awarded so there is no outstanding liability for that.

[12] Other relevant calculations which were not specifically addressed in paragraph [151] of the substantive determination⁶ include:

- a. \$3,183.19 where 0 quantity or sales prices⁷;

period before the annual holiday. However while employed Mr Brenna only received his retainer for the paid annual holiday he took.

⁵ I have adopted the explanations and associated calculations in paragraphs 19-21 of the Expert’s report dated 02 August 2017.

⁶ Ibid 1.

- b. \$12,474.53 for 10% reduction over period 01 December 2009 – 01 December 2010 as per paragraph [93] of the substantive determination⁸. \$5,602.56 of that amount had already been withheld by Afos;
- c. Bereavement leave owed was paid correctly at the time it arose so there is no outstanding liability for that;

[13] After making all of the necessary adjustments and in reliance on the calculation provided by the Expert the Authority now fixes Afos' current outstanding liability to Mr Brennan as \$110,832.96.⁹ This amount excludes any unpaid interest and any ongoing interest on the current outstanding amounts.

[14] Afos is ordered within 28 days of the date of this determination to pay Mr Brennan \$110,832.96 plus interest on this amount as per the interest awarded in paragraph [149] of the Authority's substantive determination dated 21 January 2016.

[15] Interest at the current prescribed rate of 5% per annum continues to accrue as determined in the substantive determination¹⁰ until all amounts Afos owes Mr Brennan, including interest on those amounts, have been repaid in full.

Costs

[16] The parties are invited to submit a suitable costs timetable to the Authority after any outstanding interest has been agreed or if agreement is not reached has been determined by the Authority.

[17] The Authority will be open to considering whether indemnity costs are appropriate in relation to the Respondents unsuccessful counterclaims against Mr Brennan and for Mr Brennan's successful clause 12A Second Schedule dismissal application which was determined on 30 June 2015.¹¹

⁷ See paragraph 9 of the Expert's report dated 02 August 2017.

⁸ *Supra*.

⁹ Consisting of \$89,291.66 commission arrears (being \$93,222.84 in Expert's report less \$3931.18 paid by Afos on 22 June 2017) plus \$21,541.30 as per paragraph's 9 and 19-22 of Expert's report.

¹⁰ *Ibid* 1 paragraph [149].

¹¹ [2015] NZERA Auckland 197.

Rachel Larmer
Member of the Employment Relations Authority