

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 384  
3026291  
3027096

BETWEEN	KYLE SCIASCIA Applicant
AND	WHOLESALE CARS DIRECT (2017) LIMITED Respondent
AND BETWEEN	WHOLESALE CARS DIRECT (2017) LIMITED Applicant
AND	KYLE SCIASCIA Respondent

Member of Authority: Trish MacKinnon

Representatives: Viv d'Or, counsel for Mr Sciascia  
Mike Gould, counsel for Whole Cars Direct (2017)  
Limited

Investigation Meeting: On the papers

Date of Determination: 28 September 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] I determined the matters between Mr Sciasica and Wholesale Cars Direct 2017 Limited (WCD) on 29 June 2020, awarding remedies of compensation and lost wages to Mr Sciascia.<sup>1</sup> I gave leave to the parties to revert to the Authority if they disagreed with my calculation of

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<sup>1</sup> [2020] NZERA 262.

three months' lost wages, which had been based on information provided during the course of the investigation meeting.

[2] Both parties responded with submissions and calculations. Ms d'Or, counsel for Mr Sciascia, submitted that the minimum amount Mr Sciascia would have earned in the three months following his dismissal was \$9,584.37 per month or \$28,753.11 for three months.

[3] In Ms d'Or's submission, however, Mr Sciascia would likely have earned far greater commission had he continued to work for that three month period and the calculation should be made on the basis of his average earnings over the period from 2015 to 2017 inclusive. She provided Mr Sciascia's average earning for those years.

[4] This submission was based on an offer Mr Sciascia had made to his employer by telephone on 19 December 2017 that he would relinquish his management role and move to a predominantly sales role with a commitment to reach a certain number of vehicles for the next three months.<sup>2</sup>

[5] It was Ms d'Or's submission that Mr Sciascia was a very proficient salesperson whose remuneration from commissions between 2015 and 2017 was considerably higher than during the period when he had a management-focused role. She also clarified that Mr Sciascia was seeking holiday pay and KiwiSaver contributions on the lost wages.

[6] Mr Gould, counsel for WCD, submitted that Mr Sciascia's historical earnings were of little assistance. His calculation of the remuneration Mr Sciascia would have earned in the three months following the termination of his employment corresponded with Ms d'Or's calculation of Mr Sciascia's minimum earnings during that time.

[7] In Mr Gould's submission, \$28,753.11 was the correct amount of lost wages. He opposed the request for holiday pay to be paid on that amount, on the basis that it was not reasonable or logical to assume the employment would continue for three months from the date of termination. He did not address the KiwiSaver issue.

[8] I do not accept Ms d'Or's submission that the award of lost wages should be based on Mr Sciascia's remuneration between 2015 and 2017. There is no justification for using that

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<sup>2</sup> N1 at [28].

timeframe as Mr Sciascia's proposal to move to a commission-only basis of remuneration was just that – a proposal, which was rejected by the employer.

[9] The award of lost wages I made in Mr Sciascia's favour in the substantive determination was in accordance with s 128 of the Employment Relations Act 2000 (the Act). The section provides for mandatory reimbursement of the remuneration lost as a result of Mr Sciascia's personal grievance or three months' "ordinary time remuneration", whichever is the lesser.<sup>3</sup> In this instance I awarded three months' remuneration less any earnings made by Mr Sciascia during the three month period.

[10] While the Act does not define "ordinary time remuneration", I consider it would be unreasonable to suppose the phrase contemplates the use of historical earnings from two previous years. It would also be unreasonable to conclude the phrase encompasses speculation on what a person's remuneration might have been had he been working in a different role at the termination of his employment. I consider Mr Sciascia's ordinary time remuneration to be based on the role he was performing, and the remuneration he was receiving, before his dismissal in December 2017.

[11] The parties agreed that three months' remuneration, based on Mr Sciascia's Quality Control Manager role from April 2017, was \$28,753.11. I accept that sum as the basis for the award of wages under s 128. From that must be deducted Mr Sciascia's earnings during the three month period which, from his bank records, were \$1,047.63 nett. This equates to \$1,557.66 gross. That gives an amount of \$27,195.45 gross for lost remuneration.

[12] I accept Ms d'Or's submission regarding holiday pay and KiwiSaver which are to be applied to the award of lost remuneration.

### **Orders**

[13] Wholesale Cars Direct (2017) Limited is ordered to pay Mr Sciascia lost wages of \$27,195.45 gross, in accordance with s 128 of the Act, and any applicable holiday pay and KiwiSaver entitlements on this sum.

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<sup>3</sup> There are two provisos to s 128(2), neither of which are applicable to the award made to Mr Sciascia.

[14] For the sake of clarity, this order replaces the order made for lost wages at paragraph 98(a) of my determination of 29 June 2020. The order I made for compensation at paragraph 98(b) of that determination is unchanged.

[15] The issue of costs remains reserved.

Trish MacKinnon  
Member of the Employment Relations Authority