

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

**[2022] NZERA 504  
3135143**

BETWEEN ANAHERA TAMAHORI  
Applicant

AND PPO (NZ) LIMITED  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Michael O'Brien, counsel for the Applicant  
Andrew Schirnack, counsel for the Respondent

Costs Submissions 14 September 2022 from the Applicant  
27 September 2022 from the Respondent

Determination: 05 October 2022

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In a determination dated 30 August 2022 ([2022] NZERA 428), the Authority (Member Nuttall) found that the Applicant, Ms Anahera Tamahori, had been unjustifiably dismissed from her employment by the Respondent, PPO (NZ) Limited (PPO).

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately, they have been unable to do so, and both parties have filed submissions in respect of costs.

[3] The matter involved 2 days of meeting time. Mr O'Brien, on behalf of Ms Tamahori, submits that the sum of \$9,000 plus disbursements of \$232.86 is appropriate.

[4] Mr O'Brien acknowledges that PPO made a Calderbank<sup>1</sup> offer, that is a "without prejudice save as to costs" offer by letter dated 17 June 2021. Further letters of offer were provided dated 15 February 2022 and 5 May 2022, with the 17 June 2021 letter (the Offer) being the most relevant to the issue of costs. It is submitted on behalf of Ms Tamahori that it is ineffective.

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<sup>1</sup> *Calderbank v Calderbank* [1976] Fam 93 (CA)

[5] Mr Schirnack submits on behalf of PPO that it should be awarded costs on the basis of its successful defence of the Applicant's claim for commission, and for unjustifiable disadvantage.

[6] It is also submitted for PPO that the Offer was effective and should be taken into account by the Authority.

[7] The Offer letter dated 17 June 2021 stated:

...

4. The offer is also made so that PPO may claim increased or indemnity costs from Ms Tamahori in the event she rejects this offer and is then unsuccessful in her claims, or is successful but secures awards that, in aggregate, are lower than that offered below.

5. PPO's offer is as follows:

- a. The parties enter into a Record of Settlement ("RoS") pursuant to section 149 of the Employment Relations Act 2000 ("ERA");
- b. Upon signing the RoS, Ms Tamahori will discontinue her proceedings in the ERA with no issue as to costs;
- c. Within 14 days of the RoS being signed by a mediator, PPO will pay to Ms Tamahori a total settlement sum of \$45,000 (gross). PPO is open to negotiating how this payment is structured, and we can indicate that it will agree to up to \$35,000 of the settlement sum being paid to Ms Tamahori pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;
- d. The terms and existence of the RoS would remain strictly confidential between the parties;
- e. The settlement monies paid under the RoS would be in full and final settlement of all Annexure & 2 claims PPO has or may have against Ms Tamahori, and all claims that Ms Tamahori has or may have against PPO, its related companies (including franchisees), entities and its directors, shareholders, employees, and contractors, whether arising out of the employment relationship and its termination or otherwise; and
- f. Ms Tamahori will not make any disparaging or derogatory statements to any person about PPO or its related companies (including franchisees), their directors, shareholders, employees, or contractors. Any representatives PPO who are aware of the Agreement will not make any disparaging or derogatory statements about Ms Tamahori to any third party.

6. This offer is inclusive of all costs down to and including the date the offer expires. If it is not accepted by your client, then, in the circumstances described at paragraph 4 above, PPO reserves the right to rely on it when the Authority deals with costs, to seek increased/indemnity costs from the date of expiry of this offer.

*Submissions of the Applicant*

[8] Mr O'Brien submits for Ms Tamahori that the Calderbank offer is ineffective on the following basis:

- a) It is not capable of acceptance as presented on the basis that it refers to all parties entering into the record of settlement, however there is no record of settlement attached. Without clarity about what Ms Tamahori would be signing by way of record of settlement, the offer was not capable of acceptance.
- b) The litigation was between Ms Tamahori and PPO, however the Offer required Ms Tamahori to settle claims against non-parties to the proceeding. In addition it was not just limited to issues arising from the employment relationship.
- c) The non-disparagement clause which includes the phrase: "Any representative [sic] PPO who are aware of the Agreement will not make any disparaging or derogatory statements about Ms Tamahori to any third party" did not make known to Ms Tamahori the identities of those persons made aware of the Agreement.

[9] In addition the Offer failed to provide any acknowledgment of wrongdoing by PPO or apology for the harm occasioned to Ms Tamahori.

*Submissions of the Respondent*

[10] The Respondent notes that Ms Tamahori's claim seeking compensation of at least \$75,000 (for both unjustifiable dismissal and unjustifiable disadvantage) and lost income in respect of commission scheme payments, interest and special damages for pre-litigation costs, was substantial and far in excess of \$4 million. On the basis of that quantum, the Respondent felt it was required to instruct specialist legal counsel and to mount a comprehensive defence to protect its interests from claims which, if found successful, would have been hugely detrimental to its business.

[11] In determination ([2022] NZERA 428) the Authority awarded Ms Tamahori's monetary claims in respect of unjustifiable dismissal, a total amount of \$35,000 being

\$15,000 as lost wages and \$20,000 as compensation. In aggregate this sum was significantly less than that sought by Ms Tamahori.

[12] On that basis the Respondent submits that it would have been appropriate for costs to lie where they fall. However the parties could not agree costs and the Respondent not having been put on notice of the issues the Applicant now seeks to raise, it is submitted that it would be unreasonable for the Authority to disallow the Offer.

[13] The Respondent notes that had the Applicant raised the issues now presented at the time, it would have been possible to resolve the issues now raised.

[14] In regard to the Applicant's concerns in regard to the Offer it is submitted:

- a) It is not accepted that because no draft record of settlement was provided with the letter of 1 June 2021, the offer must be disregarded as incapable of acceptance, citing *Bushline Trustees Ltd v ANZ Bank New Zealand Ltd* in which the High Court considered, and rejected, that submission.<sup>2</sup>
- b) While it is accepted that the Offer proposed settlement against parties who were not parties to the proceedings, the intention was clearly to "draw a line in the sand" and resolve all matters fully and finally. However the Applicant did not raise this concern with the Respondent and provide it with an opportunity to negotiate.
- c) Similarly the Applicant did not raise any concerns in respect of the non-disparagement clause. Had she done so, this could have been discussed.

[15] It is submitted that the Offer was a genuine offer to settle proceedings and should be taken into account by the Authority with costs awarded in favour of the Respondent.

### *Principles*

[16] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

#### **15 Power to award costs**

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

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<sup>2</sup> *Bushline Trustees Ltd v ANZ Bank New Zealand Ltd*[2018] NZHC 454

[17] Costs are at the discretion of the Authority<sup>3</sup>. The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*<sup>4</sup>.

[18] It is a principle set out in *Da Cruz* that costs are not to be used as a punishment. It is also a principle that costs are discretionary and awards made are consistent with the Authority's equity and good conscience jurisdiction.

### **Costs Award**

[19] In determination [2022] NZERA 428 Ms Tamahori was the successful party and awarded the sums of \$15,000 in respect of lost wages and \$20,000 by way of compensation.

[20] In regard to the submission that PPO should be awarded costs based in part on its successful defence of Ms Tamahori's claim for unjustifiable disadvantage, I note that the presiding Member found that the circumstances which gave rise to the successful unjustifiable dismissal claim, provided no grounds for a separate unjustifiable disadvantage claim. I consider that this reasoning can be distinguished from a 'successful defence' of an unjustifiable disadvantage finding.

[21] It is however necessary to consider what effect the Calderbank Offer should have upon the award of costs in this matter. I observe that parties ignore Calderbank offers at their peril, and consider the points made by the Respondent as to the lack of opportunity to negotiate on the terms of the Offer as having merit. Nonetheless as observed in *Coomer v McCallum and Son*, Ms Tamahori's success, although limited, could not have been achieved without lodging a claim in the Authority.<sup>5</sup>

[22] In addition, there is no indication in the Authority's determination that Ms Tamahori behaved inappropriately in the investigation or in such a way as to unnecessarily prolong it.

[23] Having duly considered the matter which includes some recognition of the attempt by PPO to settle the matter as exemplified by the Offer, I consider that an appropriate award of costs in this matter is \$6,500.

[24] Ms Tamahori has also claimed disbursements of \$232.86 in respect of "copy binding of bundle". The Respondent submits that this claim is excessive in light of the fact that the

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<sup>3</sup> *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622

<sup>4</sup> *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

<sup>5</sup> *Coomer v McCallum and Son* [2017] NZEmpC 156

Applicant did not provide it with hard copy of the bundle but rather a PDF document which provided only an incomplete copy of spreadsheets referred to during the investigation.

[25] Accordingly I provide a reduced amount in respect of disbursements, and award Ms Tamahori the \$71.56 filing fee.

[26] **I order PPO pay to Ms Tamahori the sum of \$6,500.00 as costs pursuant to clause 15 of Schedule 2 of the Act.**

[27] **I order PPO pay to Ms Tamahori the sum of \$125.00 as disbursements.**

[28] **PPO is also to pay Ms Tamahori \$71.56 in respect of the filing fee.**

**Eleanor Robinson**  
**Member of the Employment Relations Authority**