

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 428
3135143

BETWEEN ANAHERA TAMAHORI
Applicant

AND PPO (NZ) LIMITED
Respondent

Member of Authority: Pam Nuttall

Representatives: Michael O'Brien for the Applicant
Andrew Schirnack and Rebecca White for the
Respondent

Investigation Meeting: 22 February 2022 and 29 April 2022

Submissions received: 16 May 2022 and 7 June 2022 from Applicant
30 May 2022 from the Respondent

Determination: 30 August 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Anahera Tamahori claims that she was unjustifiably dismissed from her employment with PPO (NZ) Limited (PPO), that she was unjustifiably disadvantaged by PPO's actions towards the end of her employment period and that PPO breached its statutory duty of good faith to her under s4(1A) of the Employment Relations Act 2000 (the Act).

[2] In seeking remedies for these grievances, Ms Tamahori claims the statutory remedy of "wages or other money lost...as a result of the grievance" under s123(1)(b) of the Act, but also seeks to raise a separate contractual claim for unpaid bonuses or

commission. Ms Tamahori also seeks compensation under s123(1)(c)(i) of the Act, special damages and interest on lost salary and commission.

[3] PPO denies that Ms Tamahori was unjustifiably dismissed or disadvantaged, denies that PPO breached its statutory good faith duties to Ms Tamahori and disputes her bringing a separate claim of contractual entitlement to bonuses or commission.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from the applicant, Ms Tamahori, and her partner Mr Aaron Foley and from PPO's directors Mr Chris Henderson and Mr Duane Dalton and general manager Mr Brett Ingham. All witnesses answered questions under oath or affirmation from me and the parties' representatives.

[5] The investigation meeting on 22 February 2022 was adjourned part heard because the Member was required to isolate as a close contact of a person who had tested positive for covid 19. The investigation meeting was resumed by audio visual link on 29 April 2022. Before closing submissions were presented, the Member provided a preliminary oral indication of findings on this matter. The parties requested that they adjourn to seek a solution themselves within seven days and that closing written submissions be timetabled if they were unable to resolve the matter in this time frame.

[6] The parties were unable to resolve the matter themselves and closing written submissions were received from Ms Tamahori on 16 May 2022, from PPO on 30 May 2022 and from Ms Tamahori, in reply on 7 June 2022.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[8] The issues requiring investigation and determination were:

- (a) Was Ms Tamahori unjustifiably dismissed from her employment?
- (b) Was Ms Tamahori unjustifiably disadvantaged in her employment?

- (c) Did PPO breach the s 4 duty of good faith?
- (d) If so, is Ms Tamahori entitled to a consideration of remedies sought including:
- reimbursement of monies lost pursuant to section 123(1)(b) of the Act?
 - a contractual claim for commission for sales in 2021 and 2022?
 - compensation pursuant to section 123(1)(c)(i) of the Act?
 - special damages of \$8,860?
- (e) Interest upon any awarded amount?
- (f) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Ms Tamahori which contributed to the circumstances which gave rise to her grievance?
- (g) Is either party entitled to an award of costs?

Background

[9] Ms Tamahori began to work for PPO on 3 February 2020 as its business development manager. PPO was awarded the master franchise for the Pita Pit brand in Australasia in 2006 and the business had grown substantially since that date. Mr Dalton and Mr Henderson are its joint CEOs, and with Mr Tweedie comprise PPO's board of directors. The business development manager position was a new role, and its development was initiated to assist franchisees of the business to capture more of the market and to reverse the trend set by some outlet store closures. PPO's management initially saw this position as targeting new business opportunities predominantly in corporate catering and carried out modelling of the financial feasibility of the role on this basis.

[10] Ms Tamahori went through a recruitment process in November and December 2019, involving phone and in person interviews, initially with Mr Ingham, the general manager, and then with both Mr Ingham and Mr Dalton. She also made a presentation on the business development manager role to them.

[11] Ms Tamahori's evidence is that she had a phone conversation with Mr Ingham on 14 January 2020 about an offer of employment which was emailed to her the following day. Ms Tamahori says that she was disappointed in the \$60,000 base salary offered but was assured that "there would be an achievable commission component

which would deliver an income in line with and likely in excess of my usual expected salary band (~\$125,000 per annum).”

[12] Subsequently a more detailed individual employment agreement, executed by Mr Ingham, was emailed to Ms Tamahori on 2 February 2020. This document repeated some of the material contained in the offer document emailed on 15 January 2020, including details about the commission structure and about work process guidelines, which appear as Schedule A and Schedule D in the employment agreement.

Commission structure

[13] The description of the commission structure in Ms Tamahori’s employment agreement, and its interpretation, are material to various aspects of this employment relationship problem. The relevant documentation from the employment agreement is set out below:

TERMS AND CONDITIONS OF EMPLOYMENT...

6. Salary

- 6.1 Your salary is \$60,000 gross per annum. Your salary is compensation for all the work and hours that you may be required to perform, and not including the bonus scheme...
- 6.4 Your incentive bonus scheme is as outlined in schedule A, and will be paid on a quarterly basis...

Schedule A...	
...Days and hours of work	A minimum of 40 hours per week, Mon-Fri
Base Salary per annum	\$60,000 pa
Pay frequency	Weekly
Commission scheme	% Quarterly bonus scheme - 0.0% of sales between \$0 - \$149,999 - 1.0% of sales between \$1 50k - \$1 79,999 - 2.5% of sales between \$1 80k - \$274,999 - 5.0% of sales from \$275k +
Commission pay frequency	Quarterly • Commission will be paid on settled accounts only (based on net sales, less discounts)

SCHEDULE D

JOB DESCRIPTION

Purpose of the Role:

As the BDM you will be ultimately responsible for developing and managing national sales and partnership programmes to increase new business revenue opportunities and increase sales for franchisees, including but not limited to;

- Corporate and Government catering – general sales/partnerships/Tenders/SLA's
- Developing B2B and loyalty partnerships, e.g...
- School Holiday programme partnerships
- Government, free lunch for schools programme
- Event partnerships e.g...
- Commercial product and channel development, e.g...
- District Health Boards

Workflow Management

- Workflow Software — WorkFlowMax (WFM)
 - Lead management
 - Client management
 - Quoting > invoicing — (Xero integrated)
 - Document and project management
 - Job, task and staff management
- All BDM sales/jobs are to go through WFM,
- Invoiced from WFM (from PPO (NZ) LTD) to client,
- Stores are to invoice PPO (NZ) LTD for all orders generated and be logged through WFTU

Purchase Order Management; process to be outlined by you but not limited to:

...

The Free and Healthy School Lunches programme (FSLP), Ka Ora ka Ako (KOKA)

[14] PPO had some long-standing school lunch programmes run through third party providers and some direct provision arrangements between specific franchisees and local schools. It had also participated in tendering for the government's pilot free school lunch programme (referred to in witness statements as KOKA or FSLP) for Term 1 2020 and four franchise stores were involved in this scheme when Ms Tamahori began work with PPO.

[15] PPO's initial work on this tender process had been undertaken by someone hired as an independent contractor and had not at this stage been considered to be significant

in its growth strategy. However, in common with much of the New Zealand economy, the advent of covid lockdowns from March 2020 significantly affected PPO's business opportunities and development strategy. With its financial viability threatened with the restriction of dine in restaurant business and the elimination of most corporate catering activity, the major expansion of the KOKA programme announced in May 2020 provided a significant opportunity for PPO and its franchisees. PPO's evidence was that at the end of 2021, it was a KOKA supplier to more than 60 schools.

[16] Ms Tamahori and witnesses for PPO provided different accounts as to her role in the company's work to secure KOKA business. Ms Tamahori portrayed herself as leading and project managing this process, while PPO's management viewed this more as a major involvement for much of the team under the oversight of the general manager. This discrepancy is not material to determining the issues. The evidence is conclusive that Ms Tamahori's role for much of her employment focussed on procuring the KOKA business, that she worked long hours to secure these opportunities for PPO and that her work was recognised and acknowledged, as documented in these emails:

From: Chris Henderson <chris@pitapit.co.nz>
Sent: Wednesday, 23 September 2020 4:08 PM
To: Brett Ingham <brett@pitapit.co.nz>; Duane Dalton <duane@pitapit.co.nz>; Dominica Wilkinson <dominica@pitapit.co.nz>
Cc: Anah Tamahori <anah@pitapit.co.nz>

Subject: FSLP - Planning workshop to support Anah

Hi Brett/Duane/Dom,
Cc Anah

There is a lot of focussed momentum now as we attempt to recruit many schools in the free school lunch programme for Tranche 3 and get on top of Tranche 4 beginning Term 1 2021. Anah is doing an amazing job and we will find out from her on Friday where any 'gaps' may lie that can be addressed. The board has well and truly grasped the magnitude of this programme and has agreed to understand and recruit (if required) resources that may be needed...

If we could all put our thinking caps on and bring ideas for the above along to a special leadership meeting purely to address resources in order to draft a project plan, I suggest these dates and times for 1 hour, please reply with the ones you can do; ...

From: Chris Henderson <chris@pitapit.co.nz>
Sent: Wednesday, 23 September 2020 10:13 AM
To: Anah Tamahori <anah@pitapit.co.nz>
Cc: Brett Ingham <brett@pitapit.co.nz>; Duane Dalton <duane@pitapit.co.nz>

Subject: FSLP Catchup - 1230pm Friday

Hi Anah,

It is exciting to hear of the traction being made in the FSLP. Well done on your efforts.

Duane and I would appreciate 30mins of your time, ideally before Dom's lunch this Friday, to hear from you the current state of play – namely;

1. Tranche 3 progress;
2. Tranche 4 planning;
3. Other – e.g resource requirements, marketing, product development, feedback, franchisee support, school liaison.....

From this we will see what further resources you need (if any) to ensure we get the maximum number of schools on board, with the maximum number of days reasonably possible. In other words we don't want to lose any opportunities due to product relevance, resource issues or lack of franchisee capability. We see this as one of the largest government initiatives that will benefit our brand since we started in 2007...

Developing the restructure proposal

[17] PPO's evidence is that its Board was considering whether it might need to restructure its business from June 2020. Documentation supplied included an agenda and minutes for the July 2020 Board meeting which referred to restructuring having been raised in the prior meeting in June. Subsequent to the resumed investigation meeting, PPO also supplied two earlier iterations of its restructure proposals drafted in August and early September 2020. Both these draft documents proposed disestablishing Ms Tamahori's business development manager role.

[18] At some point during the development of the restructure proposals, PPO's management became concerned that there may have been potential for the wording of Ms Tamahori's employment agreement to expose them to larger commission payments than they had anticipated. Documentary evidence establishes awareness of this potential exposure prior to the first restructuring information meeting with affected staff on 9 October 2020:

From: Brett Ingham

Sent: Friday, 25 September 2020 11:53 AM

To: Chris Henderson <chris@pitapit.co.nz>; Duane Dalton <duane@pitapit.co.nz>

Subject: Anah's Employment agreement

Anah's Doc's attached.

Final commission structure calculations were based on catering revenue assumptions only and based around a 5% PPO commission rate on top of Royalties. FSLP or schools was not considered within as at this stage as were unaware of the scale it has now become...

At the time of writing her Schedule A, Dec/Jan we did not understand the full scale of the FSLP and considered it only from a project management perspective...Tranche 2 was only in RFP phase while we were at BDM interview stage.

If we had known more about FSLP at the time we would of otherwise been more particular of what the commission structure was assign to. Suzie was at the time the FSLP procurement lead, of which Anah took over upon Suzie's exit and a gap filler due to covid killing corporate catering opportunities.

Unfortunately as her Schedule A currently reads it can be interpreted as all sales generated.

I'm extremely sorry for how this has eventuated and was not anticipated at the time

Regards

Brett Ingham

GM Pita Pit NZ

The email below was forwarded to the two CEOs:

From: Valerie Broomfield
Sent: Friday, 25 September 2020 12:29 PM
To: Brett Ingham <brett@pitapit.co.nz>
Subject: RE: Anah's Employment agreement

You may make some changes to an employee's responsibilities – within reason – but only if you have a clause in their Individual Employment Agreement that permits you to do that. ... However, if the role changes significantly, you must consult with the employee and draw up an amended Position Description.

Probably need legal advice but I would say this is significant change.

[19] The awareness of potential exposure to significantly larger commission payments than anticipated precipitated the decision to go ahead with the restructuring proposals and determined the timing for initiating the consultation process with affected staff. The evidence of Mr Henderson's written witness statement is that:

13. We held off on starting the restructuring process for as long as we could...

14. At one point, it looked as if we would be able to avoid a restructure, but we then became aware that Anah's employment agreement could be argued to extend the commission scheme for the BDM role beyond just the corporate catering sales it had been intended for.

15. I cannot recall exactly how we became aware of this issue. It is likely that I asked Brett to send me details on PPO's potential liabilities for commission, so I could factor that into the financial forecasting for the business. When he did that, we realised there was an issue.

16. If the commission scheme in Anah's employment agreement was held to apply to KOKA, it would not have been economically viable for PPO to participate in the programme. It would have resulted in 83% of PPO's revenue from KOKA being paid to Anah as commission, and PPO only retaining 17% within which to meet operating expenses, including costs of other staff. In addition, while Anah worked extremely hard on the tender process for KOKA, that was true of everyone at PPO who worked on the project.

17. This potential liability meant we could no longer hold off on starting a restructuring process, and we started consultation.

[20] This evidence as to the relationship between the issue of Ms Tamahori's commission and the decision to proceed with the restructure process, is confirmed by an email exchange between the directors. Mr Tweedie, the third member of PPO's Board, requested a brief update on 9 October 2020 on how things were progressing. Mr Henderson's email in response is as follows:

From: Chris Henderson

Sent: Friday, 9 October 2020 5:10 PM

To: Ross Tweedie

Cc: Duane Dalton

Subject: Re: Up-date

Hi Ross, these next 12 days are slammed. We have a taskforce on the FSLP and Duane and I are likely on the 'campaign trail' through the North Island to schools in advance of the RFP close off.

We had the first round of meetings today on the reorganisation proposal. We learned that we were at an at risk position on the commission structures of the BDM. If we landed some large tenders in the school lunch programme we may have been liable for commissions far exceeding the intent of the job description. This caused the company wide proposal cycle to kick off so a tough day today for 4 potentially affected roles. This evidence as to the relationship between the issue of Ms Tamahori's commission and the decision to proceed with the restructure process, is confirmed by an email exchange between the directors. Mr Tweedie, the third member of PPO's Board, requested a brief update on 9 October 2020 on how things were progressing. Mr Henderson's email in response is as follows:

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The consultation process

[21] In relation to Ms Tamahori, the restructure proposal presented on 9 October 2020 was to disestablish the business development manager position and to instead engage an independent contractor to oversee the KOKA programme development. The intervening month was extremely pressured for both Ms Tamahori and PPO in efforts to secure KOKA opportunities for the company. On 31 October 2020 Mr Michel O'Brien contacted PPO notifying the company that he acted for Ms Tamahori and on 2 November 2020 Ms Rebecca White notified Mr O'Brien that her firm was acting for PPO.

[22] Much of the consultation process on the restructuring and eventual redundancy dismissal of Ms Tamahori was conducted through, or with the attendance of, legal counsel. As required by s4(1A)(c) of the Act, information was provided, there was opportunity for comment and feedback was considered before a decision was communicated. To that extent I did describe the consultation process as immaculate in my initial indication to the parties.

[23] Also during the consultation process, Ms Tamahori negotiated over an offer by PPO for her to take up the proposed contractor role overseeing the KOKA programme development. She eventually rejected this proposal when PPO was not prepared to provide any on-going security of engagement beyond three months.

[24] On 3 December 2020 Ms Tamahori was given one month's notice that her position had been disestablished and that her employment would terminate on 2 January 2021. On 21 December 2020 PPO notified Ms Tamahori that she would be paid in lieu of her remaining notice period and that the end of her employment would be announced at 4pm that day.

The law

[25] As set out in s103A of the Act, the law requires that for a dismissal to be justified it must meet the objective test of whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This does not mean, and has never meant, that the Authority (or Court) applies the standards that the Member (or Judge) would apply themselves if they were in the employer's position. The Authority is required to apply the standard of what the Authority concludes a fair and reasonable employer in the circumstances of the actual employer could have decided and how those decisions could have been made. Once the fact of a dismissal has been established, it is for the employer to show that its actions meet this objective standard.

[26] In *Grace Team Accounting v Brake*¹, the Court of Appeal confirmed that this statutory test for justification applies to all aspects of a decision to dismiss for redundancy. Not only the process of carrying out the dismissal but also the process of arriving at a decision to disestablish a role or position are amenable to investigation. In *Brake*, the employer's decision was found to be genuine but mistaken. The Court of Appeal said that:

If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply.

So although a genuine redundancy decision where the consultation requirements are complied with "could be expected to go a long way towards satisfying the s 103A test", this is not always sufficient, just as it was not on the facts of the *Brake* case itself.

[27] In reaching its decision on the scope of the application of s103A of the Act to redundancy dismissals, the Court of Appeal placed emphasis on the Act's legislative context. In particular, the Court referred to the strengthening in 2004 of the provisions relating to the duty of good faith and to the requirement in the Act's objects of "acknowledging and addressing the inherent inequality of power in employment relationships". The provisions specified included s 4(1A)(b) which reads:

¹ *Grace Team Accounting v Brake* [2014] NZCA 541 (*Brake*).

The duty of good faith in subsection (1)—

(a)...

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;...

[28] A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations. Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action “because a fair and reasonable employer will comply with the law.”²

Was Ms Tamahori unjustifiably dismissed?

[29] The restructure proposal developed by PPO was a genuine response to the business situation in the wake of the covid lockdowns in 2020. The motivation for the initial development of the proposal was not to provide a pretext for dismissing Ms Tamahori. Mr Henderson’s evidence indicates that this was an evolving situation in which presumably the availability of the KOKA opportunities played a part and that PPO’s decision making was dependent on its analysis of the immediate business environment.

[30] What is clear, though, is that the identification of a potential liability in terms of PPO’s reading of its commission obligations to Ms Tamahori significantly skewed its perception of the business’s operating environment. Once this potential risk had been identified, the evidence is that PPO believed that the KOKA opportunities would no longer be financially viable while Ms Tamahori continued to be employed on terms and conditions which included the commission provision set out above.

[31] Consequently PPO decided that the consultation process had to go ahead. But from this point there was mixed motivation for the restructure. The proposal continued to be a genuine response to PPOs operating environment, but there was now also an additional motivation for disestablishing the employed role to which this potential commission liability attached.

² *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

[32] PPO's belated apprehension of potential exposure in terms of considerably larger than anticipated commission payments was not communicated in the consultation process or directly to Ms Tamahori.

[33] Ms Tamahori's evidence in her witness statement is that:

If PPO had come to me and said they wanted to re-negotiate my commission, I would have been open to that. Potentially, I would have considered an increased salary and the certainty that brought in exchange for a cap on my commissions (where uncertain and at-risk commission structure).

[34] Mr Henderson's response in his witness statement is that:

I see in her witness statement that Anah has said she would have been open to renegotiating her commission to stay in the BDM role. If she had raised that at the time when feedback was requested through the consultation process, we certainly would have considered that. It did not occur to us to raise that as an option at the time, because Anah was all of a sudden insisting that she was entitled to far more commission than had ever been envisaged.

[35] When questioned in the investigation meeting as to whether there was a good faith duty on him to raise the commission issue with Ms Tamahori, Mr Henderson responded that the witness statement "means what it says".

[36] Mr Ingham in an email to Mr Henderson on 3 November 2020 also reports that following a discussion with Ms Tamahori he did suggest to the two CEOs that "maybe a quick meeting with her could settle things down or find an amicable resolution" and that "[i]t was explained to me that this is not possible at (sic) to refrain from any more discussions with Anah."

[37] The statutory good faith duty under s4(1A)(b) of the Act requires the parties to an employment relationship to be active and constructive and responsive and communicative in maintaining a productive employment relationship. While this is a duty which cuts both ways, in investigating a personal grievance for dismissal it is the employer's decision making process I must examine, and it is for the employer to establish that its actions were justified. The objective standard to be applied requires that "a fair and reasonable employer will comply with the law".

[38] I find that PPO breached its statutory good faith obligations in not being active, constructive and communicative in addressing the issue in relation to the commission payments. In this respect it did not comply with the law. Instead it sought to resolve the

matter by going ahead with a restructure process in which its motives were not wholly genuine.

[39] I find that Ms Tamahori was unjustifiably dismissed.

Was Ms Tamahori unjustifiably disadvantaged?

[40] Two personal grievances for disadvantage were raised: the first in relation to an instruction to Ms Tamahori to work from PPO's offices every day instead of an arrangement she believed she had with the General Manager of PPO to work from home with flexible office hours; and the second relating to the manner in which the restructure and redundancy were carried out.

[41] Ms Tamahori sought to have this grievance addressed by working from home and this request was acceded to. No evidence was advanced of any further disadvantage to Ms Tamahori from being initially required to return to working from the office. Consequently no finding by the Authority on this matter is required.

[42] Ms Tamahori has also raised a separate personal grievance for disadvantage in relation to the way in which PPO addressed the manner in which the restructure and redundancy were carried out. Specifically, what is alleged is that the decision to disestablish her role and give her notice of termination is unlawful.

[43] I find that this matter has been addressed in considering Ms Tamahori's personal grievance claim for unjustified dismissal and make no finding that the unjustified actions of the employer also constituted the grounds for a separate claim of unjustified disadvantage.

Claim for breach of the employment agreement?

[44] During the investigation meeting on 22 February 2022, PPO's counsel objected to what was perceived as the raising of a new and separate claim to commission payments on the basis of breach of the employment agreement. Legal argument was provided on the matter in the parties' closing written submissions.

[45] PPO's objection was that its ability to respond to the claim had been prejudiced by this late and significant amendment.

[46] The role of the Authority as set out in s157(1) of the Act requires me to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities. In doing this I must, among other things, comply with principles of natural justice.

[47] The Member's Minute of 13 August 2021 identifies, among other issues for my investigation and determination, whether Ms Tamahori is entitled to "monies lost" pursuant to section 123(1)(b) of the Act. I understand this to require me to determine whether the employment agreement provides that any commission is owing to Ms Tamahori. The Minute also directs Ms Tamahori to provide in her witness statement "calculation of commission claimed cross referenced to supporting documents."

[48] Such a determination does not require me to separately investigate a claim for breach of the employment agreement. The parties have been on notice of this matter since the issuing of the Member's Minute, and I have been furnished with detailed submissions on the commission issue in PPO's closing written submissions.

[49] I do not find that any significant amendment has been raised or that PPO has been prejudiced in responding to a claim for payment of commission.

Remedies?

Lost salary

[50] Ms Tamahori did not obtain employment until seven months after her dismissal, despite attempts to find other positions. She claims lost wages of \$21,666.67 on the basis of assuming salary payments of \$55,000 had she remained employed at PPO and subtracting earnings of \$33,333.33 in her new position. These claims are not supported by the documentation directed to be supplied by Member Urlich in her Minute of 13 August 2021: calculation of lost wages claimed, an IRD summary of earnings for the period of claim and evidence of all positions applied for and associated relevant communication.

[51] In the absence of this documentation, I award Ms Tamahori 3 months ordinary time remuneration of \$15,000.00 gross.

Commission payments?

[52] The Commission scheme as set out in Schedule A of the employment agreement provides for quarterly payment of % bonuses on sales as follows:

- 0.0% of sales between \$0 - \$149,999
- 1.0% of sales between \$1 50k - \$1 79,999
- 2.5% of sales between \$1 80k - \$274,999
- 5.0% of sales from \$275k +

Schedule A says Commission will be paid on settled accounts only (based on net sales, less discounts).

[53] What is the meaning of “sales” in Schedule A? PPO’s concern on 25 September 2020 was that it could be interpreted as “all sales generated”. This interpretation is also the basis for Ms Tamahori’s claim of commission payments on gross sales amounting to \$1,819,929.44 for 2020 and \$1,676.399.12 for 2021.

[54] Looking within the four corners of the agreement document, however, Schedule D provides further information about the relationship between “sales” and Ms Tamahori’s business development manager role.

[55] Ms Tamahori’s closing written submissions state that:

The respondent’s suggestion that commissions only applied to sales recorded in WorkFlow Max is not recorded in the IEA. Further, the applicant’s unchallenged evidence was that the respondent ceased to use WorkFlow Max as it was not fit for purpose. That WorkFlow Max narrative was a belated concoction to try and deny liability.

[56] But Schedule D, which is headed Job Description, provides that:

Purpose of the Role:

As the BDM you will be ultimately responsible for developing and managing national sales and partnership programmes to increase new business revenue opportunities and increase sales for franchisees...

Workflow Management

- Workflow Software — WorkFlowMax (WFM)...
- **All BDM sales/jobs are to go through WFM,**

- Invoiced from WFM (from PPO (NZ) LTD) to client,
- Stores are to invoice PPO (NZ) LTD for all orders generated and be logged through WFTU

[57] The plain reading of the words in Schedules A & D seems to be: Commission is payable on all sales. That is, commission is payable on all net sales less discounts. Ms Tamahori's position (BDM) is ultimately responsible for developing and managing all sales (national sales and partnership programmes). All these BDM sales are to go through WorkFlowMax (WFM) the Workflow Software.

[58] The logical corollary would appear to be that sales on which commission is payable can be identified by looking at sales recorded in WorkflowMax.

[59] Now presumably, just as PPO would have liked the employment agreement to have specified more precisely that commission applied only to corporate catering sales, Ms Tamahori would prefer that Schedule D did not specify that all sales were to go through WFM. It may be that WorkflowMax was not fit for purpose and ceased to be used, just as Ms Tamahori's role focussed almost entirely on KOKA sales rather than corporate catering.

[60] But neither party has sought rectification of the employment agreement because they assert that circumstances are now different and that the agreement no longer applies. In fact, to the contrary, Ms Tamahori has sought to advance a separate contractual commission claim based on the wording of the employment agreement as it stands.

[61] Accordingly I find that the employment agreement provides that sales which attract commission payments are sales recorded in the Workflow Max software. For 2020 such sales did not meet the threshold level of sales over \$1.5k. No commission payments are owed to Ms Tamahori.

Compensation

[62] Ms Tamahori seeks global compensation for humiliation, loss of dignity and injury to feelings in the sum of \$45,000. I have found that Ms Tamahori was unjustifiably dismissed but not that she was unjustifiably disadvantaged. Evidence of the effects on her of PPO's unjustified actions appear to relate to both sources of personal grievance. Ms Tamahori's witness statement describes physical, emotional and cognitive impacts:

a. Physical symptoms of stress including low energy, migraines, stomach ulcers and food issues, insomnia, muscle spasms, asthma being out of control amongst other things.

b Emotional symptoms of stress including irritability, anxiety and depression, panic attacks, feeling easily overwhelmed, restlessness, control issues, inability to relax, low self-esteem amongst other things.

c Cognitive symptoms of stress including a general inability to focus, forgetfulness, nervous behaviours such as fidgeting and obsessive compulsive behaviours, extreme social introversion amongst other things.

[63] Ms Tamahori says that she really withdrew into herself after this experience. Attending interviews was a nightmare. She says that her confidence had taken such a hit through this process and that she had only found some modicum of my usual confident self in the last few months.

[64] I find that Ms Tamahori suffered significant hurt, humiliation and loss of dignity as a result of her unjustified dismissal and award her compensation in the amount of \$20,000.

Contribution?

[65] In my preliminary oral indication to the parties on 29 April 2022 I did say that I had failed to see active, constructive, responsive and communicative efforts to maintain the employment relationship from both parties and that for the applicant this raised the issue of the extent of her contribution to the situation. These comments were not intended to suggest that this meant her conduct was blameworthy in that it contributed to her dismissal or that this failure raised issues as to reduction of remedies if her dismissal was found to be unjustified.

[66] Termination for redundancy is different from most other forms of dismissal in that there will be no question of fault by the employee. Rather, the employee's position has become surplus to the needs of the business. Because it is for the employer to establish that its actions are justified in dismissing the employee on these grounds, the employee's actions cannot be seen as blameworthy in this "no fault" situation. I do not find that Ms Tamahori's remedies should be reduced.

Special damages?

[67] Ms Tamahori seeks special damages for costs incurred during the restructuring consultation process. Because these costs do not relate to the Authority's investigation they cannot be claimed in the usual way in an application for costs.

[68] I accept that Ms Tamahori has incurred these costs, but it is not unusual for an employee to be represented in such a process and there is nothing to suggest the costs were incurred due to the unreasonable actions of PPO.

[69] Special damages are not awarded.

Interest

[70] Ms Tamahori has also claimed interest on sums owing to her. Pursuant to cl 11 of the Second Schedule to the Act, the Authority may, if it thinks fit, order interest on any judgment amount. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. I have found that Ms Tamahori is entitled to \$15,000.00 gross in lost salary payments.

[71] As Ms Tamahori has been deprived of the use of what is owed to her, the Authority orders that PPO pay her interest on \$15,000.00 from 21 December 2020 until the date payment is made in full. Interest is to be calculated using the civil debt interest calculator and payment of that amount is to be made no later 28 days from the date of this determination.³

Summary

[72] Ms Tamahori was unjustifiably dismissed.

[73] PPO (NZ) Limited breached its duty of good faith under s4(1A)(b) of the Act

[74] PPO (NZ) Limited is ordered to pay Ms Tamahori \$15,000.00 gross as lost salary under s123(1)(b) of the Act. Interest is to be paid on this amount as ordered in this determination.

[75] PPO (NZ) Limited is ordered to pay Ms Tamahori \$20,000.00 as compensation under s123(1)(c)(i) of the Act.

[76] Payment of these amounts is to be made no later than 28 days from the date of this determination.

³<www.justice.govt.nz/fines/civil-debt-interest-calculator>.

Costs

[77] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[78] If they are not able to do so and an Authority determination on costs is needed Ms Tamahori may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum PPO (NZ) Limited would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[79] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[80] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁴

Pam Nuttall
Member of the Employment Relations Authority

⁴ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.