

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 705  
3109492

BETWEEN JOHN MCDERMOTT  
Applicant

AND EMPLOYSURE LIMITED  
Respondent

Member of Authority: Peter Fuiava

Representatives: Allan Halse, advocate for the Applicant  
Jessie Laphorne and Caitlin Sargison, counsel for the  
Respondent

Investigation Meeting: On the papers

Submissions received: 19 September 2023 from the Applicant (redacted)  
15, 20 September 2023 from the Respondent

Determination: 27 November 2023

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**FIRST DETERMINATION OF THE AUTHORITY**

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**What is this determination about?**

[1] This is an application by Employsure Limited (Employsure) that I recuse myself from investigating and determining this employment relationship problem because I have come to know of a without prejudice settlement offer between it and the Aotearoa Legal Workers Union (ALWU). While I do not know the specific terms and conditions of the settlement offer, it was submitted that the fact that I know that a settlement offer was made compromises my ability to bring an impartial and unprejudiced mind to resolving this employment problem. For the reasons that follow, the application for recusal is declined.

**What is the relevant background?**

[2] John McDermott's employment relationship problem is one of unjustified dismissal. He claims that his redundancy by Employsure in May 2020 was not genuine and was retaliatory in nature because he had become a member of the ALWU.

[3] In December 2019, Mr McDermott raised a personal grievance with EmploySure and mediation of that dispute occurred in early 2020. Without prejudice offers of resolution were exchanged between the ALWU and EmploySure in March 2020.

[4] On or about 11 July 2023, Mr McDermott applied to the Authority for third party disclosure of information from the ALWU. On 7 August, I held a case management teleconference with the representatives to discuss among other things Mr McDermott's written request for information from the ALWU. During the conference call, concerns regarding without prejudice information were raised by me and Ms Lapthorne, counsel for EmploySure. I indicated to the representatives that I would be writing to the ALWU to request information from it under s 160(1)(a) of the Employment Relations Act 2000 (the Act) which empowers the Authority when investigating any matter to call for evidence and information from the parties or from any other person.

[5] On 8 August 2023, I issued a ninth minute which summarised what was discussed during the abovementioned teleconference. Attached to that minute was a copy of my letter to the ALWU (8 August 2023) which set out a list of documents that I had requested including:

(v) Communications related to exit package offered by EmploySure to Mr McDermott through an ALWU delegate around 19 March 2020 and the conditions associated with this. If material to which this particular request relates is marked "without prejudice" or is legally privileged information the document(s) need not be provided but I would like to know if such material exists or not.

[6] The wording of (v) incorporated Mr McDermott's written request for that information. However, the last sentence:

If material to which this particular request relates is marked "without prejudice" or is legally privileged information the document(s) need not be provided but I would like to know if such material exists or not.

was my addition as I wanted to know why a document may not have been provided to the Authority as an absence of evidence may not necessarily be evidence of absence.

[7] I received no objection to my letter from the representatives. Ms Lapthorne now states that it was difficult for her to make an objection as that would have defeated the purpose of her objection and expressly or impliedly confirmed the existence of

privileged information. However, counsel could have sought a further case management conference so that a duty Authority Member could consider the merits of the objection. That did not occur.

[8] On 16 August 2023, the ALWU responded to my letter and sought an extension of time to respond. On 17 August, the parties were made aware of the union's extension request which was granted to 25 August. There continued to be no objection to my letter to the ALWU. On 25 August, the ALWU emailed the Authority stating:

- One document we located under item (v) is relevant but we have excluded it on the basis it is marked without prejudice in its entirety.

[9] Employsure submits that because I now know of the without prejudice material which is an exit offer made by Employsure to Mr McDermott, I cannot unknow or disregard this information and that I am disqualified from determining this employment problem as a result.

[10] Mr McDermott's advocate, Mr Halse, has provided written submissions. My copy of the same has been redacted because the original refers to the exit offer in question. Briefly stated, Mr Halse submitted that the exit offer was not made on a without prejudice basis and can be considered. I disagree. On its face, the exit offer is expressly marked "without prejudice" and such material is generally not considered until after a determination has been made however it may have some bearing in the assessment of costs.

### **The recusal question**

[11] In *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*,<sup>1</sup> the Supreme Court described the test for judicial bias as whether a fair minded and well informed lay observer would have a reasonable apprehension that the decision maker might not bring an impartial mind to the issues which he or she is required to determine.

[12] The lay observer is presumed to be objective and intelligent as well as reasonably informed about the Authority's workings on the facts of this particular case.

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<sup>1</sup> *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72.

[13] The Authority goes about resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case.<sup>2</sup> In carrying out that role, the Authority must comply with the principles of natural justice.<sup>3</sup>

[14] The request for recusal is based on my knowledge of the fact that an exit offer was made on a without prejudice basis by Employsure to the ALWU. The fact that a settlement offer has been made should not be regarded as something of a controversy particularly in this jurisdiction where mediation is the primary problem-solving mechanism for employment problems other than for enforcing employment standards.<sup>4</sup>

[15] That said I can imagine a situation where the fact that a settlement offer has been made known to a presiding Member could be a ground of recusal but every situation turns on its own facts. In the present case, I remain ignorant of the actual terms of settlement which appears to be but one settlement offer that has been made between the parties since March 2020. With Employsure making the exit offer when it did at any early stage in this problem, I cannot discount the possibility of it doing so on a without admission of liability basis so as to avoid incurring further costs.

[16] The fact that the existence of one settlement offer between the parties has come to my attention is not a scandalous or controversial revelation such that the informed reasonable lay observer would reasonably apprehend that I am not able to determine this employment problem with an open mind on an impartial or disinterested basis.

## **Conclusion**

[17] The grant of a recusal application is an exceptional situation and while such applications must be robustly considered and ventilated, for the reasons given, I see no proper basis to recuse myself and therefore decline the application.

[18] With the exception of assessing costs, which is a post investigation meeting consideration, the exit offer by Employsure to the ALWU can be given no weight in assessing the substantial merits of this employment problem. To be clear, as a without

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<sup>2</sup> The Act, s 157(1).

<sup>3</sup> s 157(2)(a).

<sup>4</sup> s 3(a)(v).

prejudice communication, it is my expectation that this document and all other privileged communications are kept out of any revised witness statements or submissions to the Authority. Moreover, there is to be no reference by either party to without prejudice/privileged communications during the course of the investigation meeting itself.

**Costs**

[19] Costs are reserved.

Peter Fuiava  
Member of the Employment Relations Authority