

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number:
WA 52/08
File Number:5120578

BETWEEN	SIMON BETTS Applicant
AND	KAWAROA CONSULTANCY LIMITED First Respondent
AND	KCL PROPERTY MANAGEMENT LIMITED Second Respondent

Member of Authority: G J Wood

Representatives: Steve Ebert for Applicant
Clayton Kimpton for Respondents

Investigation Meeting: By way of submissions received by 28 April 2008

Determination: 29 April 2008

**DETERMINATION OF THE AUTHORITY
ON ADMISIBILITY OF EVIDENCE**

[1] Mr Betts is seeking reinstatement to the employment of whichever of the respondents is found to be his employer (both treated herein for convenience as one entity and referred to as Kawaroa, although that is not the legal position). He has filed an application for interim reinstatement supported by an affidavit, but following mediation and undertakings given by Kawaroa, he has withdrawn the application for interim reinstatement.

[2] Kawaroa has raised an objection to evidence provided by Mr Betts, and in particular wishes to have one document and any reference to it removed from the record. It does so on the ground that the document in question involved the relaying of legal advice or assistance received by Kawaroa.

[3] Kawaroa claims that the email in question was from one decision maker (Mr Bishop) in relation to the restructuring affecting Mr Betts to another (Mr Dingle), and relayed legal advice that had been obtained from Kensington Swan on that date. On behalf of Kensington Swan, Ms Charlotte Hatlauf-Coles has confirmed that the email does relay to Mr Dingle legal advice given to Mr Bishop that he had received from it.

[4] Kawaroa considers that Mr Betts came across this document, which was intended to be confidential, by in effect snooping, even although the email was in a folder that was not password protected. Mr Betts, by contrast, claims that he came across the email by simply searching in Kawaroa's computer system under the title *Restructuring*.

[5] While Mr Ebert accepts that some of the material clearly involves the relaying of legal advice and has agreed that those portions be removed from the record, he categorised the email as a whole as setting out a plan or strategy after having received legal advice, rather than the relaying or recording of that legal advice. In support Mr Ebert relies on the heading of the email, the attachments which were later sent to Mr Betts, that it contains statements of Mr Bishop's opinion and that the advice recorded, if true, would be negligent. Mr Ebert also submitted that Kawaroa had waived privilege because they were stored in part of the computer system available to all staff.

[6] In response, Mr Kimpton submitted that every aspect of the email was privileged because it deals with the many stages and aspects of a restructuring and the potential consequences - including the proposal for restructuring, the strategy for implementation, the letters to be given to affected parties, re-deployment, the difference between the two roles, the risks, costs and benefits of restructuring and options to resolve any subsequent disputes.

[7] Mr Kimpton also submitted that the email is unable to be dissected part by part as the email as a whole reveals the substances of legal advice and therefore is privileged. He also submitted that inadvertent disclosure does not waive privilege in reliance on s.65 (4) of the Evidence Act 2006.

[8] He also submitted that where there is some legal advice relayed then the whole document is privileged, not just those parts that contained legal advice, and that even if the advice was negligent, it would remain privileged.

[9] In response Mr Ebert noted that the email was not all legal advice and that the Authority should be shown the legal advice, which may necessitate a new Member investigating the substantive problem.

[10] It was also submitted that it was not the law that any communication with any connection with legal advice, however tenuous, was privileged, nor that if one part is privileged then the whole document is privileged.

The Law

[11] For reasons of public policy the Authority is required to uphold privilege, as it relates to communications between representatives and their clients. That issue was dealt with by the Employment Court in *Bierre v. Diagnostic Medlab Services Ltd* unreported, Travis J, AC55/03, 14 October 2003. In that case at para.[9] the Judge accepted the principles adopted by the parties during discovery, one of which involved documents relaying or recording legal advice or assistance received between employees or agents of the defendant. That is the same privilege claimed here.

[12] *USP Strategies Plc and Ors v. London General Holdings Ltd and Ors* 2004 EWHC 373 makes it clear that the possibility of inaccuracy in the relaying of the advice should not destroy the privilege.

[13] It is also clear that parts of a document may be privileged, but the remainder of the document can be taken into evidence, see for example *Gilbert v. Attorney General* [1999] 3 ERNZ 519.

Determination

[14] Investigation procedures need to be flexible to meet the needs of the situation. In this case I have decided not to require Kensington Swan to release its legal advice because this would mean a new Member would have to undertake the investigation meeting (which could well delay a meeting set down under extreme urgency), the provision of the actual advice is a foray into what is clearly privileged material and I am able to determine to a reasonable level of certainty what parts of the email are likely to involve the relaying of legal advice.

[15] I conclude that the email contains some material that relays legal advice (perhaps inaccurately) and other material that sets out Kawaroa's intended strategy. The former is not so intertwined with the latter that the relevant portions can not be excised. For instance, some parts of the email contain statements of Mr Bishop's opinion that can not have simply involved the relaying of legal advice.

[16] I go further than Mr Ebert's two deletions, however, by determining that two further portions of the email should be removed from the record. These relate to options Kawaroa might

adopt if Mr Betts were to apply for the new position in the restructuring, but not to the likelihood of him applying or the implications for both parties thereof. I do so because they cover legal options and the language in the two additional deletions is consistent with the sort of language used by lawyers rather than accountants.

[17] I do not accept that there has been any waiver of privilege. The tone of the email is clearly confidential and the failure by Messrs Bishop and Pringle to password protect the email does not imply that Kawaroa has waived privilege.

[18] I therefore order that Mr Betts may only use the attached version of the email in question in evidence, and that all reference to expurgated sections of the email are to be removed from any evidence or other documentation before the Authority. For the purposes of clarity I direct that Mr Betts resubmit the material currently before the Authority in an amended form accordingly.

G J Wood
Member of the Employment Relations Authority