# Employment Court of New Zealand



## Broughton v Microsoft New Zealand Limited [2011] NZEmpC 102 (10 August 2011)

Last Updated: 29 August 2011

**IN THE EMPLOYMENT COURT AUCKLAND**

**[2011] NZEmpC 102**

**ARC 21/11**

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER OF a challenge to objection to disclosure

BETWEEN ALEX WAITE BROUGHTON Plaintiff

AND MICROSOFT NEW ZEALAND LIMITED

Defendant

Hearing: 1 August 2011 (Heard at Auckland)

Counsel: Tony Drake, counsel for plaintiff

Kirsty McDonald and Adam Weal, counsel for defendant

Judgment: 10 August 2011

**INTERLOCUTORY JUDGMENT NO 2 OF CHIEF JUDGE GL COLGAN**

[1] This judgment determines the defendant's claims to legal professional privilege in documents which it objects to disclose to the plaintiff on these grounds. In the first interlocutory judgment[1] dated 8 August 2011, I concluded that the contested claims to privilege would be determined by the Court's inspection of the documents in question and these were supplied by the defendant's solicitors late on 9

August 2011.

[2] The first document in issue is the timeline for what was known as "Project

Prius", the proposed restructuring of Microsoft's operations including in New

Zealand. It consists, first, of calendar pages for the months of November and



December and sets out, on most of the days of these months, the span of different elements of the restructuring process and, on some days, particular activities to take place on them.

[3] Next is a document entitled "PHASE 1: Detailed Actions – Justifications & Criteria" which deals with the projected restructuring on a number of positions and holders of those, although only the line relating to the plaintiff is relevant. This is

purely descriptive of Mr Broughton's role, his name, the fact that "Business Justification" has been completed, defines "Consultation Type" as "Dis- establishment", sets out that "Role Description" is "To be completed", identifies Kevin Ackhurst as the "Notifying Manager" and sets out, under "Comments", "Merging the Citizenship Lead & the PR Manager Role".

[4] Penultimately, amongst these documents relating to Project Prius, which was the name of the restructuring exercise that affected Mr Broughton, is a page entitled "Risk Matrix" which sets out a number of comments under headings "RISK AREA", "IMPACT" and "RISK MITIGATION" which are general in the sense that they deal with the restructuring exercise and do not refer to any particular employee including the plaintiff.

[5] The final page, headed "Action Required" is similarly a broad outline of strategy which does not refer to the plaintiff but nevertheless probably covers what was intended to happen to him.

[6] The foregoing documents, both individually and collectively, do not appear to amount to a request for legal and human resources advice about a proposed strategy. Rather, they set out the strategy, or at least parts of it, itself. It is necessary in these circumstances to then consider what Ms Doherty, whose affidavit supports the claim for legal professional privilege in these documents, says about them. Ms Doherty says she was obliged to identify any risk that she saw associated with a proposed restructuring process and then to discuss that with internal and/or external legal advisers. She says that in the course of preparing the memorandum, she discussed it with Waldo Kuipers, Microsoft's New Zealand based in-house lawyer. She says her discussions with Mr Kuipers included references to the restructuring process in

general, each of the potentially impacted employees, and the legal and human resources risks she had identified as being associated with those individuals. Ms Doherty says she also recalls discussing the issues and risk identified in the memorandum and the process in general with the company's external solicitors before forwarding the memorandum to Microsoft's senior human resources director in Singapore. Ms Doherty says she intended that the memorandum would be a confidential document because of the human resources and legal issues concerns she had noted. She says "categorically" that the memorandum was prepared for the main purpose of obtaining legal advice, both internally and externally.

[7] Even accepting Ms Doherty's uncontradicted (and effectively uncontradictable) evidence summarised above, only the material referred to lawyers for legal advice (and that advice which is not in issue in the case) can attract legal professional privilege. Material prepared for human resources advice (and that advice based on that material) cannot attract privilege. Nor can strategy documents prepared or varied after receipt of legal advice support a claim for privilege.

[8] If, as I assume from the material presented to me, the various documents making up the "Timeline Project Prius" are the strategy document sent by Ms Doherty to Stephanie Nash, Microsoft's legal human resources director in Singapore, after advice was taken from the lawyers about it, then the documents, individually and collectively, are not privileged. If, alternatively, the documents that have been submitted by the defendant are those that were provided to the lawyers for the purpose of obtaining legal advice but there is another version or versions of them that were subsequently sent on to Singapore for human resources advice, then the former will be privileged but the latter will not.

[9] In these circumstances, the fairest course is to require counsel for the defendant to confirm by memorandum (copied to counsel, Mr Drake) into which of these categories the "Timeline Project Prius" documents fall. If they are the documents that were sent to Singapore for human resources advice after legal advice had been sought and obtained, then the plaintiff is entitled to copies of them. If the documents fall into the second category identified above, then the plaintiff is entitled

to disclosure and inspection only of the documents Ms Doherty deposes to sending to Singapore after having sought and obtained legal advice.

[10] Given the temporary and inconclusive nature of my decision on these documents, they should remain on the court file but in a sealed envelope pending final disposal of these questions.

[11] I turn next to the documents that were dealt with at [14] of my interlocutory judgment of 8 August 2011. These are described as a string of email communications in respect of which legal professional privilege is asserted.

[12] These begin with an email from Sally Doherty to Kevin Ackhurst (copied to Microsoft's New Zealand in-house counsel, Waldo Kuipers) dated 30 October 2009 attaching a draft letter which I assume was proposed to be sent to the plaintiff. In the email Ms Doherty asks Mr Ackhurst to send her any changes that he would like to make and this draft letter is returned with some tracked changes by Mr Ackhurst in an email dated 10 November 2009 which was also copied to Mr Kuipers.

[13] The next document is an email from Ms Doherty to Mr Ackhurst dated 10

November 2009 which attaches an email that had been sent by the plaintiff, Mr Broughton, to Ms Doherty on the previous day, 9 November 2009. The notation by Ms Doherty to Mr Ackhurst in her email of 10 November 2009 is simply "FYI".

[14] That email was responded to by Mr Ackhurst in an email sent to Ms Doherty later on 10 November 2009 and copied to Mr Kuipers.

[15] The only possible ground for claiming legal professional privilege in respect of these email communications is that Mr Kuipers was copied into most, but not all, of them. There is no express or implied request for legal advice in the contents of the emails which deal with proposed strategic and human resources, rather than legal, issues.

[16] I do not consider that simply copying a lawyer into a communication about human resources strategic issues is, alone, sufficient to attract a claim of legal

professional privilege in the email documents. Put another way, this is not sufficient to satisfy the test that the documents have been prepared and transmitted for the purpose of obtaining legal advice and there is no suggestion that Mr Kuipers responded to the documents by providing advice that had not been sought from him.

[17] In these circumstances, the emails and their contents, which are identified by the numbers 2.2 and 2.1, are not privileged and should be made available to the plaintiff for inspection.

GL Colgan

Chief Judge

Judgment signed at 12.30 pm on Wednesday 10 August 2011

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[1] [2011] NZEmpC 99.

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