

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 499
5359210

BETWEEN ROBERT DAVID BROWN
Applicant

A N D HAMILTON CITY COUNCIL
Respondent

Member of Authority: Rachel Larmer

Representatives: Allan Halse, Advocate for Applicant
Karina McLuskie, Counsel for the Respondent

Investigation Meeting: On the papers

Date of Determination: 04 December 2014

DETERMINATION OF THE AUTHORITY

A. Attachment 4.3 to the Statement of Problem is admissible.

Employment relationship problem

[1] The substantive claims are going to be referred to Member Crichton to investigate. There is a dispute between the parties over the admissibility of attachment 4.3 to the Applicant's Statement of Problem.

[2] Hamilton City Council (the Council) claims that attachment 4.3 is a without prejudice communication so is inadmissible. Mr Brown says at the time he was presented with attachment 4.3 there was no dispute between the parties and the document was not stated to be without prejudice. Mr Brown believes attachment 4.3 is admissible in support of his substantive claims.

[3] Attachment 4.3 has not been seen by Member Crichton. The admissibility issue was referred to another Authority Member to deal with.

[4] Attachment 4.3 was prepared by the Council and presented to Mr Brown by Mr Stuart Brown (Human Resources Advisor) at a meeting on 08 September 2011 which occurred between the two Mr Browns.

[5] The parties agree that this meeting was not stated to be “without prejudice.” However the Council says that Mr Stuart Brown believed the meeting was an “off-line discussion” with Mr Robert Brown. It notes that the document in issue has a “confidential” watermark across it.

[6] On 07 September 2011 Mr Brown’s manager met with him and told him that his (Mr Brown’s) application for unpaid special leave from 31 October – 18 November 2011 had been declined. One of the reasons for that was that the leave request overlapped with a proposed Unity review which Mr Brown’s manager felt it was important for him to be involved with as it potentially affected his role.

[7] Notes produced by the Council record that Mr Brown’s manager told him that if he was unhappy with the decision not to grant him unpaid special leave then he (Mr Brown) could speak to Mr Stuart Brown.

[8] Mr Robert Brown says that during his meeting with his manager Mr Stuart Brown popped into the room briefly to ask to have a chat to him (Mr Robert Brown) about a voluntary redundancy package. The two Mr Browns met the next day.

[9] The Council’s notes say that the purpose of the two Mr Browns meeting on 08 September was to let Mr Robert Brown know that there was a possibility his role could be disestablished as the result of the upcoming review. It was suggested by Mr Stuart Brown that voluntary severance would fit with Mr Robert Brown’s intended holiday plans (which was why the latter had requested the unpaid special leave which had been declined). The document in issue was produced to Mr Brown during this discussion.

[10] At that point Mr Brown had not raised any grievances or a formal complaint. I therefore do not accept that there was any genuine dispute that the parties were attempting to settle during the 08 September meeting. Whilst Mr Robert Brown may have been unhappy that his application for unpaid special leave had been declined he had not at that point raised any issue about that with the Council.

[11] Mr Robert Brown went on sick leave on 09 September and did not return to work. He made a formal bullying complaint on 15 September 2011. He raised disadvantage grievances with the Council on 22 November 2011.

[12] On 12 December 2011 Mr Brown received notice that his position would be disestablished. On or around 09 January 2012 Mr Brown was given four weeks' notice of termination on the grounds of redundancy. He raised an unjustified dismissal grievance on 10 February 2012. The parties attended mediation on 22 February 2012.

[13] I find that the document in dispute was not stated or agreed to be "without prejudice". It was also not produced in an attempt to resolve a dispute because at that stage neither party had raised a dispute with each other. I therefore find that attachment 4.3 is not inadmissible.

[14] I also find that attachment 4.3 is relevant evidence which should be put before the Authority. Mr Brown claims this document was a catalyst for his sick leave on 09 September, the trigger for his bullying complaint and subsequent personal grievance claims. I consider it is important for the Authority to have this document in front of it to enable it to fully and properly consider all aspects of the substantive claims it will be investigating.

[15] I conclude that attachment 4.3 of the Statement of Problem is admissible.

[16] As an aside I note that each party has raised other preliminary issues. These are all matters that Member Crichton will deal with in the normal way as part of his usual case management of the substantive claims.

Costs

[17] Costs are reserved to be dealt with once the substantive matter has been determined.

Rachel Larmer
Member of the Employment Relations Authority