IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 102/08
5113739

	BETWEEN	NEIL ANDREW CURTIS Applicant
	AND	COMPUTER ENGINEERING LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Katherine Burson for Applicant Jo Douglas for Respondent
Submissions received:	17 March 2008
Determination:	18 March 2008

DETERMINATION OF THE AUTHORITY ON PRELIMINARY ISSUE

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[1] A preliminary issue arises in this matter. It concerns whether the content of discussions between the parties and their representatives on 29 November 2007, and notes of those conversations, are admissible in evidence in an Authority investigation.

[2] The Applicant has lodged, along with his statement of problem, a copy of notes said to have been made by his counsel at that time, Terri Witters. He also wants the Authority to hear evidence from him and Ms Witters about "without prejudice" discussions that took place on 29 November. That evidence seeks to establish that a binding agreement was made that day. It would support the Applicant's request for a compliance order to enforce the alleged verbal agreement.

[3] The Applicant says without prejudice material is admissible to prove the existence or otherwise of an agreement. The Respondent contends that the 29 November discussions remain protected by privilege so evidence of them is not admissible. However it also says that, if the Authority does admit that evidence, it

should be limited to considering only information relevant to whether or not an agreement was reached and not any background information relating to any employment relationship problems that the parties may have discussed that day.

[4] At this stage I need say nothing about the employment relationship except to note, from papers on the file, that the Applicant appears to have been employed by the Respondent between July and November 2007.

Determination

[5] By consent this preliminary issue is determined "on the papers".

[6] Assisted by helpful submissions from both counsel, I am satisfied that the content of the 29 November discussions, and any written or oral evidence of it that is relevant to whether or not an agreement was reached (and the terms of any such agreement), is not subject to privilege for the purpose of considering the Applicant's present application. Such evidence is admissible in the Authority's investigation.

Reasons

[7] Both counsel cite *Rush & Tompkins Limited v Greater London Council* [1988] 3 All ER 737 as authority for applicable principles.

[8] The general "without prejudice rule" governing the admissibility of evidence applies to exclude the contents of all negotiations genuinely aimed at settlement whether oral or in writing: *Cutts v Head* [1994] 1 All ER 597 at 605-6 per Oliver LJ, cited in *Rush & Tompkins Limited v Greater London Council* (above) at 739.

[9] However the following exception to the general rule, and relevant to the present matter, is stated the following passage from Lord Griffiths' speech in the *Greater London Council* case, at 740:

> *Nearly all the cases in which the scope of the without prejudice rule has been considered concern the admissibility of evidence at trial after negotiations have failed. In such circumstances no question of discovery arises because the parties are well aware of what passed between them in the negotiations. These cases show that the rule is*

> *not absolute and resort may be had to the without prejudice material for a variety of reasons when the justice of the case requires it. It is unnecessary to make any deep examination of these authorities to resolve the present appeal but they all illustrate the underlying purpose of the rule which is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement. Thus the without prejudice material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement …* *[my emphasis]*

[10] In *NZALPA v Air Nelson Limited* [1998] 3 ERNZ 332, at 337, the Employment Court cited Lord Griffiths' analysis before noting that, where the central issue in a case is whether a settlement was concluded, privilege "*may be required to give way to the determination of that matter*" if documents that would otherwise be protected are relevant to what outcome negotiations produced.

[11] The Court in the *Air Nelson* case gave greater weight to the public interest in deciding whether the parties had reached agreement than the private interest of one party's privilege. However it did emphasise, at 338, that this conclusion was on that basis that disclosure was required only of those documents "*which directly bear on the question of whether a settlement was reached*". Documents relating to the other aspects of the negotiations were "*still entitled to the cloak of privilege because a greater harm could ensue to the [employer] by such unwarranted disclosure if the parties are required to resume negotiations*".

[12] The latter observation is relevant to the present case in this way. If the Applicant's request for a compliance order is, after investigation, dismissed because the Authority determines no enforceable agreement was made, the Applicant may – conceivably – pursue a personal grievance about the circumstances of his employment ending. In short, if there is found to have been no settlement agreed to date, he might proceed with further steps in the employment dispute resolution process, effectively starting 'from the beginning'. In its investigation of such a grievance claim – of a different nature and scope than the present claim – the Authority may not be able to look at the content of the without prejudice discussions of 29 November, if they were truly held on that basis: see *Bayliss Sharr & Hansen v McDonald* [2006] ERNZ 1058 at [29] – [46] (EC, Couch J).

[13] I note too, that if that scenario eventuated, the present Authority member would, on the Authority's usual practice, not be involved in the investigation of that

personal grievance. In that way there is less risk of prejudice to the Respondent by the removal of its privilege in some documents and evidence for the purposes of investigating the present claim.

[14] Looking at the present issue overall, I accept Applicant counsel's submission that the interests of justice require investigation of without prejudice discussions where it is necessary to determine whether an agreement was reached. Otherwise there is a risk that a party could misuse privilege to 'renege' on an agreement reached and proving such an agreement existed would be impossible.

[15] I do not accept Respondent counsel's submission to the effect that discussions of the type held between the present parties on 29 November attract the same level of confidentiality as provided in the statutory scheme for mediation of employment relationship problems. There are clear and special rules around the mediation assistance provided both by the Department of Labour, and in some circumstances, private mediators (s148 of the Employment Relations Act 2000 ("the Act")). However those rules are not applicable to the circumstances of the present case, at least on the account of relevant facts given in the Respondent's statement of reply.

[16] The parties' meeting on 29 November was not mediation. It was direct negotiation between the parties and their legal representatives. The meeting was held at the invitation of the Respondent's managing director Jason Kyle.

[17] If it is correct – as the Respondent contends (SiR 1.10) but is yet to be determined – that the parties agreed in the meeting that any terms of settlement reached would not be effective until a record of settlement was signed by a mediator under s149 of the Act, that does not turn such a meeting into mediation. Section 149 provides a process of certification that the parties have confirmed they are aware of the effect, finality and enforceability of any agreement reached. It does not change the nature of an agreement or the basis on which it was reached.

[18] However Respondent counsel correctly submits that in reviewing the discussions of the 29 November meeting, the Authority should "take a cautious approach" and only consider evidence which is relevant to the question before it, that is whether or not a binding and enforceable agreement was entered into that day. It

may be appropriate to limit the extent to which that evidence is reported in the determination on the present matter so as not to risk influencing any substantive grievance that might proceed. That, of course, depends in large part on which party's evidence and argument succeeds in the present matter.

[19] Accordingly, admissible evidence for the present matter – regarding the application for a compliance order – is limited to the content and outcome of the negotiations. For the purposes of the present investigation I am not interested in any admissions of liability or culpability that may or may not have been made in the course of discussions before, during or after the 29 November meeting.

Next steps

[20] The timetable for investigation of the Applicant's application for a compliance order now continues. An investigation meeting for 21 April 2008 has been notified. Dates for the lodging of written witness statements and reply statements have been set.

[21] The evidence of all witnesses – including the Applicant, his former counsel Ms Witters, Mr Kyle and the Respondent's former counsel Susan Christmas – is expected to meet the scope of admissible evidence described in this determination. There may be additional documents which are now to be provided, and these should be attached to the relevant witness statement. These documents may include, for example, some or all of the notes made during the 29 November discussions by Ms Christmas (Amended SoP 2(k) refers) or other witnesses.

[22] Leave is reserved for counsel to apply for a further telephone conference at short notice should any issues regarding evidence and preparation for investigation require further discussion.

Robin Arthur
Member of the Employment Relations Authority