

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 290
3029536

BETWEEN JANE DAVIES
 Applicant

AND CARDINAL LOGISTICS
 LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Dean Organ for Applicant
 Georgina Todd for Respondent

Investigation Meeting: On the papers

Submissions Received: 25 July and 15 August 2018 from Applicant
 9 August 2018 from Respondent

Determination: 13 September 2018

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. The content of the discussion between Ms Davies and Mr Gorton on 11 April 2018 is inadmissible.**

- B. Ms Davies is ordered to lodge and serve and amended statement of problem within 14 days of the date of this determination.**

- C. Costs are reserved.**

Employment relationship problem

[1] This is an application by Cardinal Logistics Limited to exclude evidence about the content of a discussion held between Ms Davies and Mr Anthony Gorton,

Cardinal's managing director on 11 April 2018. The application is opposed by applicant. By consent this preliminary matter has been dealt with on the papers.

[2] As permitted by s 174E of the Act this determination has not recorded all submissions received from Ms Davies and Cardinal Logistics but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Applicable rules for admissibility

[3] The Authority has a statutory discretion to take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.¹ The Authority is guided in the exercise of that discretion by the relevant provisions of the Evidence Act 2006, even though it does not govern proceedings in the Authority.²

[4] Written or oral communications made for the purpose of resolving a dispute may generally not be admitted in evidence. The policy underlying this rule is to encourage parties to settle their disputes without fear of anything said during the course of such negotiations being used to their prejudice in proceedings.³

[5] Off the record or without prejudice discussions between parties to resolve employment relationship problem has been addressed by the Employment Court which has previously held:⁴

It is in the public interest that such practise be allowed to continue in the safe knowledge that the fact of them and particularly their contents will not be disclosed to the Authority or to the Court or any other person subsequently. Such procedures lubricate the machinery of employment dispute resolution. Indeed, the emphasis in the problem solving resolution provisions in the Employment Relations Act 2000 is supportive of this approach.

[6] To invoke the privilege there must be a "dispute" that has already arisen and the communication is made in an attempt to settle that dispute.⁵

¹ Employment Relations Act 2000, s 160(2).

² *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340 at [24].

³ *Hallwright v Forsyth Barr Limited* [2018] NZEmpC 134 at [7].

⁴ *Jackson v Enterprise Motor Group (North Shore) Ltd* [2004] 2 ERNZ 424 at [17].

⁵ Evidence Act 2006, s 57(1).

[7] A dispute will arise where something has arisen between the parties which must be resolved and they have expressly agreed their communications should be protected. This will include a problem relating to or arising out of the employment relationship. The problem could give rise to litigation, the result of which might be affected by an admission made during negotiations.⁶

Background

[8] Ms Davies was employed by Cardinal Logistics as its People and Culture Manager in October 2016. On or about 4 April 2018 Cardinal Logistics embarked on a restructuring process which, if implemented, would result in the disestablishment of Ms Davies' role and the establishment of a new Human Resources Advisor role.

[9] Following an initial discussion on 6 April, Ms Davies contacted Cardinal Logistic's legal advisor. Ms Davies asked the lawyer whether Cardinal Logistics would be willing to explore an agreed settlement package on a without prejudice basis, in light of the proposal to disestablish her role.

[10] Later that day Ms Davies received an email confirming Cardinal Logistics willingness to meet on a confidential and without prejudice basis to explore options to conclude an agreement. The email stated:

...you fully understand the purpose and nature of 'without prejudice' communications:

- that all communications on this matter are to remain confidential (to you and your representative)
- they are without any admission of liability
- the communications cannot be produced as evidence in any subsequent proceedings.

[11] Ms Davies responded to the email by confirming she had noted its contents. She then met with Mr Gorton on 11 April. Ms Davies wants to rely on the content of that discussion to support her claim that she was unjustifiably dismissed and that the redundancy was not genuine.

⁶ Above n 2 at [17] – [19].

Was there a dispute?

[12] Ms Davies submits there was no “serious problem in the employment relationship” as required by the Court of Appeal in *Morgan*.⁷

[13] I find it is more likely than not that an employment relationship problem had arisen and the parties were in dispute at the time the discussion took place on 11 April. Ms Davies had been advised of the possible disestablishment of her role which could result in her employment ending by way of redundancy.

[14] While, at the time Ms Davies requested the confidential discussion no personal grievance had been raised, Ms Davies wanted to explore an agreement to exit the business on terms agreeable to herself and Cardinal Logistics rather than be faced with a possible redundancy. Ms Davies initiated the discussion and initiated the possibility that it be conducted on a without prejudice basis.

[15] In preparation for the meeting Ms Davies emailed a proposed settlement agreement to Mr Brendon Furness the Chief Executive Officer. The proposal included a statement that “an employment relationship problem, personal grievance, and dispute have arisen between the parties, which they wish to resolve” and included a proposed payment of compensation under s 123(1)(c)(i) of the Act. Payments of compensation under s 123(1)(c)(i) of the Act are only available if a personal grievance is established.

[16] I am satisfied that at the time the meeting was arranged Ms Davies considered she was in dispute with Cardinal Logistics and conveyed that to Cardinal in her proposed settlement agreement prior to the meeting taking place.

[17] Ms Davies says the information shared in the meeting on 11 April will support her claim that the redundancy was not genuine.

[18] As part of the substantive investigation into Ms Davies’ claims the onus will be on Cardinal Logistics to prove that its actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This will include an investigation into whether the restructuring

⁷ Above n 2 at [21].

was for genuine commercial reasons and not as a result of undisclosed performance concerns.

[19] The parties should be held to their agreement that the conversation on 11 April proceed on a without prejudice basis and its contents should not be disclosed to the Authority.

[20] There is to be no oral or documentary evidence about the content of the discussion on 11 April given to the Authority. Any reference to the 11 April conversation should now be removed from the statement of problem and attached documents. An amended statement of problem must be lodged and served within 14 days of the date of this determination.

[21] This matter is to be allocated to a different Member who will investigate Ms Davies substantive claims.

Costs

[22] Costs are reserved and will be dealt with when dealing with costs for the substantive matter.

Vicki Campbell
Member of the Employment Relations Authority