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Gestro v Relph [2021] NZEmpC 29 (17 March 2021)

Last Updated: 23 March 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[\[2021\] NZEmpC 29](#)

EMPC 149/2020

IN THE MATTER OF a declaration under [s 6\(5\)](#) of
the [Employment Relations Act
2000](#)
AND IN THE MATTER of admissibility of evidence
BETWEEN JAZMINE GESTRO
Plaintiff
AND CRAIG PRESTON RELPH
Defendant

Hearing: (on the papers)
Appearances: P McKenzie-Bridle, counsel for
plaintiff C Relph, in person
Judgment: 17 March 2021

INERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

(Admissibility of evidence)

Introduction

[1] This judgment resolves an issue concerning the admissibility of documents, for the purposes of a hearing which is to take place on Friday, 19 March 2021.

[2] Ms Jazmine Gestro seeks a declaration under [s 6\(5\)](#) of the [Employment Relations Act 2000](#) (the Act), that Mr Craig Relph was her employer. This allegation is made for the purposes of an unjustified dismissal grievance she wishes to bring.

[3] Ms Gestro's employment agreement named Lodge in the City Limited (LCL) as her employer. It is alleged that this company, however, was removed from the

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Companies Registrar prior to her employment. She says Mr Relph is a former shareholder and director of LCL, personally owns the premises from where Lodge in the City is located, and operated the business at the time of her employment. It is her case that the real nature of the employment relationship was accordingly between her and Mr Relph.

[4] For his part, Mr Relph strongly denies these allegations. He says the employer was LITC Ltd trading as Lodge in the City, and that it "superseded" LLC after a change in the ownership and management structure.

[5] To deal with the admissibility issue, it is necessary to summarise, briefly, the recent procedural history.

[6] On 12 October 2020, and in the absence of Mr Relph who chose not to attend, I issued directions for hearing, which included a timetable for the filing of evidence by him.

[7] This occurred only partially. However, after a communication from Mr Relph to the Court on 18 February 2021, I extended time for the filing of his evidence.

[8] Issues as to disclosure then arose, as a result of which I convened a telephone directions conference on 26 February 2021. I issued further directions, including as to disclosure.

[9] The topic of mediation or a judicial settlement conference also arose. I made the point to the parties in the conference call, and in my subsequent minute, that they were of course able to communicate directly with each other, if they chose to, in order to consider settlement options. Ultimately, there was not a consensus about either a direction to mediate or to attend a JSC, so no direction in that regard was made.

[10] Further procedural issues arose, which resulted in a management meeting on 12 March 2021. In the course of that meeting, there was discussion as to the contents of the proposed common bundle. A point of difference between the parties related to

the admissibility of four emails, and whether they should be protected by a without prejudice privilege.

[11] I received submissions, indicating I would issue a minute recording my ruling, so the parties could prepare for the hearing, with reasons to follow. On 16 March 2021, I ruled that the first of the four emails was admissible; the remainder were not. I now outline my reasons for these conclusions.

The parties' submissions

[12] The dispute relates to emails authored by Mr Relph in the period 2 to 5 March 2021.

[13] Mr Relph said that the emails were sent in an attempt to negotiate the issues between the parties, as had been suggested by the Court. He said they are marked without prejudice and formed part of a settlement process.

[14] Mr McKenzie-Bridle summarised the emails. In respect of each, he submitted:

- a. The first email is dated 2 March 2021. It was sent by Mr Relph to a third party; Mr McKenzie-Bridle was simply copied in. It contained no reference to settlement discussions. It did, however, refer to governance matters. He acknowledged it had the words "Without Prejudice, and Private and Confidential" recorded on it.
- b. The second email is dated 4 March 2021. It was sent by Mr Relph to Mr McKenzie-Bridle. It contained the phrase "Without Prejudice". The email related to disclosure issues, although Mr McKenzie-Bridle said it also made a passing reference to an earlier settlement proposal which had been advanced by Mr Relph. It was not proposed that the original settlement email be placed in the common bundle.
- c. The third email is dated 5 March 2021. It was sent by Mr Relph to Mr McKenzie-Bridle. It was marked "Without Prejudice". Mr McKenzie-Bridle said it too related to disclosure. He stated it

contained direct threats against Ms Gestro, referring to her mental health status, and accusing her of lying. He said there was a general reference to a settlement option in this email.

- d. The final email was also dated 5 March 2021. It was sent by Mr Relph to Mr McKenzie-Bridle. It was not labelled as being sent on a without prejudice basis. It related to disclosure and did not say anything about settlement options. However, it repeated some of the criticisms about Ms Gestro that were included in the previous email.

[15] Mr McKenzie-Bridle addressed provisions under the [Evidence Act 2006](#) (the EA). He said the material in each of the emails was relevant under [s 7](#) of that Act, in that each contained information that was directly relevant to the issue which is before the Court. The first email contained information as to governance matters which would be relevant to the [s 6](#) analysis; the second, third and fourth emails contained threatening statements, relevant to Mr Relph's credibility which would also be an aspect of the [s 6](#) analysis.

[16] Turning then to [s 57\(1\)](#) of the EA, which relates to privilege for settlement negotiations, Mr McKenzie-Bridle submitted that the first email claimed to be both confidential and made in connection with an attempt to settle a dispute.¹ The second and third emails claimed to be made in connection with an attempt to settle the dispute between the parties.² The fourth email asserted neither such claim.

[17] Mr McKenzie-Bridle said that the first email contained information relating to a key issue in the case, as to the governance arrangements for Lodge in the City. He said it did not relate to negotiations between the parties and should

accordingly be admitted.

[18] He also argued the first email was admissible for a second reason, in that it met the requirements of waiver under [s 65](#) of the EA.

1 [Evidence Act 2006, s 57\(1\)](#).

2 [Evidence Act 2006, s 57\(1\)\(b\)](#).

[19] Mr McKenzie-Bridle then referred to the basis for admitting the remaining emails. He referred to the nine situations where evidence of without prejudice communications might be admissible, as identified by Lord Clarke in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd*,³ followed by the New Zealand Court of Appeal in *Sheppard Industries Ltd v Specialized Bicycle Components Inc*.⁴ One of those exceptions relates to the situation where the exclusion of evidence would act as a cloak for “perjury, blackmail or other serious impropriety”. He said the abusive statements made by Mr Relph justified the admission of the second and third emails, and if the fourth email was to be regarded as having a privilege, it too.

[20] In response, Mr Relph submitted that the emails were all relevant to his attempt to try and resolve the matter. The information would not have been disclosed if settlement had not been under discussion.

[21] Redaction, a possibility that had been raised by Mr McKenzie-Bridle, would result in the information being taken out of context.

[22] He agreed that the email exchanges had become robust, but he said this was due to a failure on Ms Gestro’s behalf to engage. He went on to say that Ms Gestro was being “incredibly dishonest”, and his frustration had flowed through to the emails, which were a genuine attempt to comply with the Court’s direction to discuss matters. He said that no threat was contained in the contested emails, as had been asserted. He went on to say Ms Gestro was attacking him, and that Lodge in the City had never engaged with a person like this before.

[23] Mr Relph also submitted that the full context of the exchanges was not before the Court, as there were yet further emails that were sent on a without prejudice basis.

[24] I was invited to inspect the contested emails, a step which is often taken by a trial Judge. Mr Relph opposed this course. I decided it was unnecessary to do so, since the submissions made were sufficiently fulsome as to enable determination of the admissibility point.

3 *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [\[2010\] UKSC 44](#), [\[2011\] 1 AC 662](#).

4. *Sheppard Industries Ltd v Specialized Bicycle Components Inc* [\[2011\] NZCA 346](#), [\[2011\] 3 NZLR 620](#) at [\[24\]](#).

Principles

[25] I begin with a brief description of without prejudice discussions. This is a term that:

... attaches to an offer of settlement of a proceeding or potential proceeding made by a defendant or potential defendant but on the understanding that if the offer is not accepted, the fact of its making, and the details cannot subsequently be brought up in litigation by the plaintiff.

[26] It is well established without prejudice discussions are “a longstanding, important and frequent feature of attempting to resolve employment relationship disputes”.⁶

[27] The Court of Appeal has noted:⁷

... it is distinctly in the broader public interest that [without prejudice discussions] should continue, with the parties safe in the knowledge that what they say is protected from admission before the Authority or the Employment Court.

[28] In *Oceanbulk Shipping*, which is a leading authority on this topic, the House of Lords emphasised that in general, the rule protects admissions made with a genuine intention to reach settlement.⁸

[29] [Section 189](#) of the Act bestows a discretion on the Court to take into account evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not. However, it is also well established that the Court may consider the provisions of the EA, applying them if the interests of justice so require.

[30] [Section 57](#) of the EA materially provides:

57 Privilege for settlement negotiations, mediation, or plea discussions

(1) A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect

5 *Jackson v Enterprise Motor Group* [2004] NZEmpC 131; [2004] 2 ERNZ 424 at [16].

6. *Morgan v Whanganui College Board of Trustees (No 2)* [2013] NZEmpC 117, [2013] ERNZ 285 at [47]. Approved by the Court of Appeal in *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, [2014] 3 NZLR 713, [2014] ERNZ 80 at [27].

7 At [27].

8 *Oceanbulk Shipping*, above n 3, at [22].

of any communication between that person and any other person who is a party to the dispute if the communication—

(a) was intended to be confidential; and

(b) was made in connection with an attempt to settle or mediate the dispute between the persons.

...

(3) This section does not apply to—

...

(d) the use in a proceeding of a communication or document made or prepared in connection with any settlement negotiations or mediation if the court considers that, in the interests of justice, the need for the communication or document to be disclosed in the proceeding outweighs the need for the privilege, taking into account the particular nature and benefit of the settlement negotiations or mediation.

[31] It will be seen that under [s 57\(3\)\(d\)](#), the privilege which otherwise arises under [s 57\(1\)](#) may be overridden if the Court considers that, in the interests of justice, the need for the communication or document to be disclosed in the proceeding outweighs the need for the privilege, taking into account the particular nature and benefit of the settlement negotiations.

[32] Common law exceptions may inform the Court's exercise of its discretion under [s 57\(3\)\(d\)](#): *Body Corporate 21250 v CoveKinloch Auckland Ltd (In Liq)*.⁹

[33] For present purposes, I accept the submission that the Court can consider whether admissibility is justified if the communication is one that abuses the privilege by means of "unambiguous impropriety". This exception is derived from an observation made by Robert Walker LJ in *Unilever v Proctor & Gamble Co*, where it was stated the exception should be applied only in the clearest of cases of abuse of a privileged occasion.¹⁰

[34] I now turn to the application of these principles.

9 *Body Corporate 21250 v CoveKinloch Auckland Ltd (In Liq)* [2017] NZHC 2642.

10 *Unilever plc v Proctor & Gamble Co* [2011] 1 All ER 783 (CA) at 792. Noted by the New Zealand Court of Appeal in *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400 at [83].

Analysis

[35] I start with the question of whether each email is covered by a without prejudice privilege.

[36] I am not satisfied that the first email of 2 March 2021 should attract the protection of the privilege. It was sent to a third party. Mr McKenzie-Bridle was merely copied in. There is no evidence to suggest that it was an attempt by Mr Relph to either convey or advance a settlement option to Ms Gestro via her lawyer. It arose in the context of a parallel discussion in which the parties were engaged as to disclosure. It appears from the information conveyed to the Court that the email should be regarded as relating to that topic.

[37] I am satisfied that the email refers to matters that are potentially relevant to a [s 6](#) analysis; accordingly, the threshold of relevance is met.

[38] In any event, even if the privilege were to be regarded as applying to the email, it has been waived under [s 65\(2\)](#) of the EA. That subsection provides that a person who has a privilege waives it if he or she voluntarily produces or discloses any significant part of the communication in circumstances that are inconsistent with a claim of confidentiality. I find that copying Mr McKenzie-Bridle into the first email was such a voluntary step taken by Mr Relph.

[39] In short, the first email is admissible on either of the two established grounds to which I have referred.

[40] The second and third emails of 4 and 5 March 2021 refer to settlement proposals, either in passing or generally.

[41] On the face of it, they are therefore protected by the privilege, and indeed Mr McKenzie-Bridle's argument that they fell within the exception was predicated on that basis.

[42] The fourth email, although not marked with the words "without prejudice" is somewhat linked to the previous email, in that adverse comments were repeated by

Mr Relph presumably in an attempt to persuade Ms Gestro to settle. In my view, the fourth email is linked to the third, and to that extent the privilege also applies to it.

[43] Notwithstanding the without prejudice privilege, should the common law exception of impropriety apply? I am not satisfied that it should, for several reasons.

[44] Mr Relph conceded that the language he used in his emails was robust. Further, he did not deny he had accused Ms Gestro of lying, or that he had said she has mental health issues. That said, he disputed that he had "attacked, threatened or intimidated" Ms Gestro.

[45] Mr Relph's allegation of lying is not restricted to the without prejudice emails. He has written to the Court itself contending that Ms Gestro is "lying about almost everything". He repeated this view in his submissions to the Court, as already noted. In these circumstances, it is unnecessary to lift the cloak of the without prejudice privilege to establish the fact he has made such statements.

[46] Turning to his assertion that Ms Gestro has mental health issues, it is implicit in Mr McKenzie-Bridle's submission that this is wholly untrue, that Mr Relph's statement is therefore unjustified and that in effect, it amounts to abusive hyperbole.

[47] Whilst Mr McKenzie-Bridle may be correct, the difficulty is that at this preliminary stage there is no primary evidence concerning Ms Gestro's mental health from which a conclusion could be drawn that Mr Relph's statement plainly amounts to serious impropriety.

[48] The next point is that whilst credibility will be in issue, at best the alleged remarks made by Mr Relph could only ever be one aspect of a credibility assessment. More relevant will be what actually happened during Ms Gestro's employment.

[49] I must also recognise that the exception relied on can apply only in a rare case, for the good and proper reason that without prejudice communications are generally protected so as to encourage parties to resolve their differences rather than litigate them to a finish.

[50] Finally, the common law bar for the exception is very high. Even apparently defamatory statements may be insufficient to clear the hurdle of serious impropriety.

[51] Drawing these factors together, I am not persuaded that this is a rare case where the interests of justice require the cloak of the privilege to be lifted in respect of the second, third and fourth emails.

Conclusion

[52] In summary, the first email is admissible, but the second, third and fourth emails are not.

[53] Costs are reserved.

B A Corkill Judge

Judgment signed at 1.20 pm on 17 March 2021