This determination includes an order prohibiting publication of certain information.

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2025] NZERA 410
3345660

	BETWEEN	KOA Applicant
	AND	BAY Respondent

Member of Authority:	Philip Cheyne
Representatives:	Ashleigh Fechney, advocate for the Applicant Amy Keir, counsel for the Respondent
Submissions Received:	23 May, 6 & 18 June 2025 from the Applicant 5 & 9 June 2025 from the Respondent
Date of Determination:	10 July 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem – preliminary issue

[1] KOA worked for BAY from July 2021 until May 2024. KOA's employment ended in May 2024 and on 14 May 2024 he raised a personal grievance claim of unjustified dismissal. Later, KOA commenced this action in the Authority, claiming reimbursement and compensation to settle his personal grievance. He is also claiming a penalty for breach of good faith.

[2] BAY says that KOA resigned and has no sustainable personal grievance. It says that it acted in good faith towards him during the relationship and when it ended.

[3] At this point in the investigation, the parties disagree about whether the Authority should take into account the "Without Prejudice" communications between them immediately before the employment ended.

The Authority's preliminary investigation

[4] In its statement in reply, BAY referenced the parties' "Without Prejudice" communications and attached copies. It says that the Authority should have regard to the communications as they were not communications to which a privilege should attach, or it would be an abuse of privilege to disregard them in this case.

[5] KOA objected to the "Without Prejudice" communications being part of the reply and the evidence available to the Authority Member who will investigate and determine his claims.

[6] The objection was referred to me and a case management conference was arranged. The representatives agreed that it was appropriate to investigate and determine the admissibility issue on the papers, following an opportunity for them to provide written submissions. These are now available.

Interim non-publication order

[7] The exchanges between KOA and BAY show that they intended their exchanges and any settlement between them to be confidential.

[8] There is little public interest in the identity of KOA and BAY. At this preliminary stage, I should preserve the possibility that there was a confidential settlement.

[9] The representatives who were involved in the "Without Prejudice" exchanges at issue are not parties, did not give evidence and there is little public interest in publicising their names.

[10] In light of the foregoing and with the parties' agreement, I make an order prohibiting the publication and identifying details of the parties' names and their representatives who were involved in the "Without Prejudice" exchanges in May 2024, pending further order of the Authority.

[11] The present representatives were not involved in the May 2024 exchanges.

Background

[12] The following description of the background is based on the application, the reply and the documents provided, including those in dispute. What follows is solely for the purpose of resolving the preliminary issue about admissibility.

[13] In April 2024, KOA received a letter. In it, BAY set out a restructuring proposal which would affect KOA's position. Feedback by 4 May 2024 was sought.

[14] KOA's solicitor wrote to BAY on 4 May 2024. Concerns were raised about recent events, as well as earlier matters. The solicitor said that it appeared that BAY had an advisor so they were open to hearing from that person on a without prejudice basis.

[15] This was followed by a series of exchanges between the advisor and the solicitor, mostly in writing, from 7 May 2024 to 10 May 2024. By 10 May 2024, there appeared to be substantial agreement over terms to end the employment.

[16] KOA finished work in the afternoon on Friday 10 May 2024. That coincided with emails between the solicitor and advisor, with the solicitor saying that it needed to be "finalised" on Monday and the advisor agreeing with "sorting it out" then.

[17] There were further exchanges between the solicitor and the advisor on Monday 13 May 2024 at 8.20 am, 8.24 am and 8.29 am.

[18] At about 9.30 am the same morning, KOA went into the work premises. He had a brief exchange with BAY's director, which he recorded without the director's knowledge.

[19] This was followed by an email from the advisor to the solicitor at 12.47 pm, without mention of the 9.30 am exchange at the workplace. Attached to the 12.47 pm email were a record of settlement and a certificate of service, signed by the employer.

[20] However, KOA says that he was summarily dismissed at about 9.30 am on 13 May 2024, by being told to leave the workplace. He raised a personal grievance on 14 May 2024 through his solicitor's letter directly to BAY.

[21] BAY says that it understood that KOA's resignation took effect on Friday.

[22] After KOA's grievance was raised, there were further exchanges between the solicitor and the advisor about what had happened on and before KOA went into work on Monday.

[23] On 15 May 2024, the advisor proposed, on the basis that BAY had mistakenly thought that KOA had resigned before he attended the workplace on 13 May, that the employment be reinstated. BAY could then continue with the proposed restructure. However, that did not resolve the matter.

[24] KOA later received his final pay. Later again, this application was lodged in the Authority.

Admissibility of without prejudice communications

[25] When investigating a mater, the Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.[1]

[26] Although the Authority has that discretion and is not bound by the rules of evidence as set out in the Evidence Act 2006,[2] it still must be guided by settled principles of common law and relevant provisions of the Evidence Act 2006.[3]

[27] To summarise the relevant statutory provision, parties to a dispute of a kind for which relief may be given in civil proceedings have a privilege for communications

[1] Employment Relation Act 2000 s
[2] Evidence Act 2006 s 5(1).
[3] *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340 at [24].

between them, if the communication was intended to be confidential and it was made in an attempt to settle their dispute.[4] A person with that privilege has the right to refuse to disclose the privileged communication in any proceedings.[5]

[28] However, this privilege does not apply to evidence necessary to prove the terms of a settlement agreement or the existence of an agreement to settle the dispute.[6] Nor does it apply to otherwise privileged communications, if in the interests of justice, the need for the communication to be disclosed in proceedings outweighs the need for the privilege, taking into account the particular nature and benefit of the settlement negotiations.[7]

[29] The rule protecting privileged communications is based on public policy, as well as the parties' agreement. Parties should be encouraged to attempt to resolve disputes between themselves, secure in the knowledge that what they say openly and honestly for that purpose will remain confidential, even if there is no settlement. Second, the law should recognise the sanctity of the parties' agreement to communicate on a without prejudice basis.[8]

The Authority will take into account the disputed communications

[30] The written exchanges between the solicitor and the advisor starting on 7 May 2024 at 4.32 pm to 13 May 2024 at 12.47 pm are marked "without prejudice", or continued the settlement discussion. The communications were intended to be confidential and were made in an attempt to settle the dispute. The exchanges are privileged. It appears that the first email might have been prompted by a conversation between the solicitor and the advisor, also covered by privilege. The same would apply to any subsequent discussions.

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[4] Evidence Act 2006 s 57(1).
[5] Section 53(1).
[6] Section 57(3)(a) and (b).
[7] Section 57(3)(d).
[8] *Morgan v Whanganui College Board of Trustees*, above n 3, at [11].

[31] It would not be consistent with equity and good conscience for the Authority to take into account those privileged communications, unless a recognised exception applied.

[32] KOA accepts that the exchanges are admissible for the limited purpose of proving the existence of an agreement to settle the dispute. BAY too says that the communications are admissible for that purpose.

[33] KOA disputes that they reached the point of settlement and points out that BAY did not make the payment provided by the draft terms of settlement. That is said to be compelling evidence of the absence of agreement.

[34] BAY says that they reached settlement and that the absence of a completed record of settlement under s 149 of the Employment Relations Act 2000 just affects the method of enforcement.

[35] The preliminary investigation was not for the purpose of deciding whether the parties reached settlement. Also, the parties may want to provide evidence about any verbal exchanges, in addition to the documents. At this point, it is appropriate to confirm that the without prejudice exchanges will be considered as part of the Authority's further investigation into whether the parties agreed to settle the dispute.

[36] There remains the question of their admissibility, if the parties did not settle the dispute in May 2024.

[37] When KOA arrived at the workplace on 13 May 2024, the transcript shows the following was said between BAY's director and KOA (*BAY in italics*):

> *Eh, excuse me*
> Hello, I have been instructed to continue working
> *No, go.*
> Are you telling me to leave?
> *Well, yeah … Erm, that'll be dealt with today … Erm, Friday. That is what I told you on Friday. Until we get it sorted from our end.*
> Er, okay …
> …
> … So okay, bye.
> *Yeah, no. The um stuff we spoke of on Friday, that'll hopefully be sorted out today. So yeah*
> Cool

> *So the instruction that we was on, was that er that was just to finish you on friday*
> …

[38] KOA's claim is that he was summarily dismissed, after he was told to leave the workplace.[9] BAY says that it had been agreed that KOA's employment would end on Friday 10 May 2024, with that in the process of being "sorted". Assuming the parties had not reached settlement, whether the statement "No, go" and what followed was intended and/or received as a sending away comprising a dismissal or reflected an arrangement that was in the process of being "sorted", can only properly be investigated and determined by the Authority with knowledge of the without prejudice exchanges at the time.

[39] Similarly, whether BAY breached good faith and is liable to a penalty, can only be properly investigated and determined with knowledge of the without prejudice exchanges.

[40] In *Crummer v Benchmark Building Supplies*,[10] the court expressed the general rule that exchanges in mediation for the purpose of settling employment differences are not admissible in evidence, unless on grounds of public policy there is good reason to admit the evidence. One example was if there was a strong risk that the Tribunal in its adjudication jurisdiction would be deceived by the exclusion of the evidence. The court noted there was a high threshold before any exception to the general rule was engaged.

[41] The judgment concerned statements during mediation which had been conducted on an agreed "without prejudice" basis, prior to the Employment Relations Act 2000, so without the statutory confidentiality that currently applies. The court considered that without prejudice confidentiality when a mediator was involved was no weaker than without a mediator.

[42] In *Crummer*, the employer's pleading was that it dismissed Mr Crummer solely based on events on a specific day. However, in its the presentation at mediation the employer said that it had taken account of other matters in its decision. The court held

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[9] Statement of Problem para 2.5.
[10] *Crummer v Benchmark Building Supplies* Ltd [2000] 2 ERNZ 22.

that the statement was admissible assuming that the employer maintained its pleaded position during the adjudication, otherwise the Tribunal could be deceived.

[43] The differences between the Authority's investigation role and the Employment Tribunal's adjudication function are not reasons to depart from *Crummer*. The fact that a mediator was not involved in the privileged exchanges here is not reason to depart from *Crummer*.

[44] Considering the Authority's role and powers, it is appropriate to set aside the usual rule regarding without prejudice communications to determine whether or not KOA was dismissed.

Conclusion

[45] The material relied on by BAY in its statement in reply will form part of the Authority's substantive investigation.

[46] A case management conference will be arranged shortly.

Philip Cheyne
Member of the Employment Relations Authority