IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 54
5527343

	BETWEEN	KATRINA LANGBEIN Applicant
	A N D	NELSON WOMEN'S REFUGE Respondent

Member of Authority:	Helen Doyle
Representatives:	Anjela Sharma, Counsel for Applicant Maree Kirk, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions Received:	8 and 14 April 2016 for Applicant 31 March and 14 April 2016 for Respondent
Date of Determination:	28 April 2016

PRELIMINARY DETERMINATION OF THE AUTHORITY

A **The content of the without prejudice telephone conversation on 10 September 2014 between counsel is inadmissible and as a result of that finding the Authority has deleted part of the statement of problem and parts of the attachments.**

B **Other preliminary matters have also been dealt with in this determination.**

C **A Statement in Reply is to be lodged and served within 14 days of the date of this determination.**

D **Costs are reserved until after the substantive matter has been determined.**

Employment relationship problem

[1] I have been asked to consider the admissibility of evidence about and relating to a without prejudice conversation between Ms Sharma and Ms Kirk on 10 September 2014 by the member who was assigned this matter. The respondent has not at this stage lodged a statement in reply.

[2] Ms Kirk in a memorandum of counsel dated 30 March 2016, asked for a number of preliminary matters to be resolved by the Authority. The issue of the admissibility of the evidence is the primary issue and the focus of subsequent submissions received.

[3] The Authority held a telephone conference with Ms Sharma and Ms Kirk on 11 April 2016 during which it was agreed that the matter would proceed on the papers already before the Authority and further submissions to be lodged.

The issues

[4] The following issues are required to be determined by the Authority in this matter:

(a) Whether the content of a without prejudice conversation between counsel on 10 September 2015 is admissible;

(b) Whether the claims for penalties for breaches of contract and statutory obligations have been commenced within 12 months;

(c) Whether the applicant has provided information to support a claim of unjustifiable dismissal in the event the without prejudice conversation is inadmissible;

(d) When were the alleged unjustified disadvantage grievances raised and what does that claim encompass;

(e) Whether the Authority should direct the applicant to withdraw the statement of problem dated 18 March 2016 and lodge and serve one that complies with a determination of these issues; and

(f) Whether the applicant is required to provide information to support her claim for loss of wages.

Is the without prejudice conversation between counsel on 10 September 2014 admissible?

[5] There was a conversation between counsel on 10 September 2014. Ms Sharma records in a letter dated 11 September 2014 to Ms Kirk that Ms Kirk told her she had instructions to resolve the matter and suggested that the phone call proceed on a without prejudice basis.

[6] One matter that has made me hesitate at this point is that Ms Sharma in a memorandum of counsel dated 8 April 2016 stated at paragraph 7 that the applicant did not accept that the telephone call on 10 September 2014 was on a *without prejudice and liability basis.* If that was the case then the Authority would need to hear evidence rather than determine the matter on the papers as was counsel's preference.

[7] Ms Sharma's subsequent submissions however were focussed on whether the contents of the discussion should be protected from admission before the Authority and not whether the conversation proceeded on a *without prejudice* basis. For present purposes I accept that counsel agreed the conversation would proceed on a without prejudice basis. I note that both counsel are experienced in the employment area.

[8] Ms Sharma and Ms Kirk referred me to the Court of Appeal judgment in *Morgan v Wanganui College Board of Trustees*[1] which confirmed the Employment Court judgment in *Morgan v Wanganui College Board of Trustees No 2*[2]. The judgments considered whether evidence of conversations between the parties legal representatives, which took place on an agreed *without prejudice* basis, was admissible.

[9] The Authority has a statutory discretion in s 160(2) of the Employment Relations Act 2000 (the Act) to take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not. The Court of Appeal in *Morgan* agreed with Chief Judge Colgan in the Employment Court judgment in *Morgan* that the Authority must be guided in the exercise of that

[1] [2014] NZCA 340, [2014] 3 NZLR 713, [2014] ERNZ 80
[2] [2013] ERNZ 255

discretion by settled provisions of the Evidence Act 2006, even though it does not govern proceedings in the Authority[3].

[10] The Court of Appeal referred to s 57(1) of the Evidence Act as supporting the Chief Judge's conclusion which provides:

> *57. Privilege for settlement negotiations or mediation*
>
> *(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 of any communication between that person and any other person who is a part 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.*

[11] In *Morgan* the Court of Appeal agreed with the Chief Judge[4] that the word dispute is not a "term of art" and negotiations or the broader term "difference" will suffice. There must be a situation as the Chief Judge found in *Morgan* where there is a serious problem in the employment relationship. The Court of Appeal added the requirement in *Morgan* that the problem is one that could give rise to litigation, the result of which might be affected by an admission during negotiations[5].

[12] I now turn to whether the parties were in dispute or whether there was a serious problem or problems in the relationship before the conversation on 10 September 2014 took place. The following is information I have taken from the statement of problem and correspondence attached to the statement of problem.

Background against which the claim for privilege is to be considered

[13] From in or about late May/June 2014 and the applicant considered the relationship between her and the interim manager of the respondent strained. The statement of problem records concerns about unreasonable micro-management, directives and demands made on the applicant in undertaking her administrative duties.

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[3] *Morgan v Whanganui College Board of Trustees*, above n 1 at [24]
[4] *Morgan v Whanganui College Board of Trustees*, above n 1 at [17]
[5] *Morgan v Whanganui College Board of Trustees*, above n 1 at [18]

[14] On 15 July 2014, the interim manager wrote to the applicant asking her to attend a meeting with a disciplinary outcome of a warning for attitude issues, not following instructions and not adequately recording sick leave.

[15] On 17 and 20 July 2014, the applicant lodged seven separate written employee complaints for investigation to address concerns over the manner in which the interim manager was engaging with her. These complaints included reference to bullying behaviour and harassment by the interim manager.

[16] On 29 July 2014, there was a further letter from the interim manager to the applicant to attend the disciplinary meeting on a rescheduled date in relation to performance issues being the issues set out at [14] above and an additional issue around confidentiality and communication with staff. Two letters from other staff members were attached. The applicant was encouraged to bring a support person and advised that the meeting was disciplinary in nature.

[17] On 30 July 2014, the applicant advised an intention to take leave of absence on sick leave for workplace stress and accordingly wrote to the Governance Committee (Governance) of the respondent and stated her intention to take leave of absence. The applicant wrote that she had been targeted by the interim manager unfairly and had no choice but to seek legal advice. The letter provided that she did not wish to be contacted and her legal representative would contact the respondent.

[18] By letter dated 5 August 2014, Ms Sharma wrote to the Governance for the attention of Michelle Duggan and advised that she had been instructed by the applicant. Ms Sharma set out the background to the concerns for the applicant in her letter and some other concerns. She suggested a meeting to discuss how matters could be resolved or failing that a mediation.

[19] On 6 August 2014, Ms Duggan sent a letter to the applicant care of Ms Sharma and advised of a proposal to make the administration position redundant and outsource the payroll duties which would mean if implemented the applicant's position would be disestablished. There was a time set in the letter for consultation about the proposal.

[20] On 7 August 2014, Ms Sharma responded to the proposal in a letter to Ms Duggan seeking information and stating the proposal to disestablish the applicant's role was not genuine.

[21] On 18 August 2014, the applicant returned to the respondent's workplace to meet the new Chair of the Governance Group, Cindy Kawana. The applicant noted a new manager had been appointed by the respondent. The applicant resumed her administration duties. The previous interim manager was not present in the workplace.

[22] On 21 August 2014, the applicant, through Ms Sharma, wrote an open letter seeking to resolve the applicant's workplace issues and seeking assurance of the applicant's safety in the workplace. Ms Sharma advised that the factors set out in her letter pointed to the applicant having a personal grievance but if the matter could be resolved then it need go no further. A number of issues for resolution were identified including payment of legal fees for a matter that has raised serious employment relationship issues, and a sum of $3000 to be paid for distress caused to the applicant was sought.

[23] By email dated 28 August 2014, the manager wrote to Ms Sharma and advised that:

> *We are very keen to work with you and Katrina towards a positive workplace for all concerned. We are in the process of gathering documentation, seeking information, and advise we will be in a better situation to discuss your resolutions once this has been completed.*

[24] By email dated 9 September 2014, Ms Kirk wrote to Ms Sharma advising that she had hoped to progress the matter by talking to Ms Sharma that day but had some further information to review and hoped to respond the following day.

[25] By email dated 9 September 2014, Ms Sharma acknowledged the email but explained she had a *big timetable that month* so did not want delays. She stated that she was not sure what further information Ms Kirk had been given but that if it affected her client she wanted to see it.

[26] By email of 10 September 2014, Ms Kirk requested a meeting time to discuss the parties' issues.

[27] By email of the same day, Ms Sharma stated that Ms Kirk would be better served to write to her given her schedule. Ms Sharma did indicate that she could make herself available by phone but asked that the purpose of any such call not be to point the finger at her client which would be inappropriate.

[28] On 10 September 2014, the without prejudice telephone conversation then took place.

Submissions on admissibility of the contents of the telephone conversation on 10 September 2014

[29] Ms Sharma submits that the applicant's employment was not in jeopardy prior to the 10 September 2014 telephone call and there was no dispute between the parties on that point with correspondence limited to addressing the relationship going forward. On that basis Ms Sharma submits that communications between the parties prior to 10 September 2014 remained open with a view to dealing with the issues on the basis of a continuing employment relationship.

[30] She further submitted that the issues between the parties did not include any claims about the applicant's performance in undertaking her administrative duties or lack of continuing trust issues and that the absence of forthcoming correspondence by way of response to the applicant's 21 August 2014 letter would further serve to reiterate that.

[31] Ms Sharma submits it was open to the respondent to request, under email correspondence directly before the telephone conversation on 10 September 2014 that communications going forward would be on a *"without prejudice"* basis. Ms Sharma submits that was not apparent to the applicant and the purpose of the respondent's call remained unclear notwithstanding clarification being sought as to the direction it would take.

[32] She submits that the telephone call did not address the issues in earlier correspondence but raised new issues about the applicant which were undisclosed before the telephone call. Ms Sharma submits those new issues could not, at the operative time, amount to a dispute because the respondent had not previously made the applicant aware of any concerns about her performance and the lack of trust in her that would have entitled her to respond accordingly.

[33] Ms Sharma submits that the authorities are clear that the protection of without prejudice conversations is not absolute in the sense that the protected status may be lost if they consist of or include unambiguous impropriety, bad faith or other

egregious conduct – *Morgan*[6] . Ms Sharma submits that the telephone call was not for the purpose of resolving the problem but to escalate it to new heights and that the respondent resorted to the protection of without prejudice to *hide behind the cloak of confidentiality with the motivation of circumventing its good faith obligations and its other lawful employer obligations.*

[34] Ms Kirk submits that the without prejudice discussion did address the matters raised in the letter of 21 August 2014 but in the form of a counter-offer to settle the employment-related issues. Some of the content of the conversation was set out in Ms Sharma's letter dated 11 September 2014 which was sent to Ms Kirk the day after the conversation and then Ms Kirk in a further letter to Ms Sharma dated 19 September 2014 put her view of the discussion. As I have already set out I am satisfied that the discussion was on a *without prejudice* or *off the record* basis.

[35] Ms Kirk refers to the Employment Court judgment in *Morgan* where Chief Judge Colgan stated:

> *[46]…In addition to agreeing to cloak their discussions with this privilege for advantageous reasons, there were, and must have been known to the parties' representatives to have been, potential disadvantages to doing so. These included, if no resolution was able to be reached, the inability to expose a concession made, a weakness acknowledged, or anything else that was said for the purpose of obtaining a settlement which could not be achieved. That is the situation that Mr Morgan now faces, his legal representative having, on his behalf, agreed to that risk by agreeing to the discussion being "off the record".*
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> *[47] Such discussions are a longstanding, important and frequent feature of attempting to resolve employment relationship disputes. Parties, and especially their representatives, hold such meetings and discussions frequently and much litigation, or potential litigation, is resolved or narrowed in scope by frank exchanges that are "off the record". It is in the broader public interests that such practices be allowed to continue in the safe knowledge that the fact of them, and particularly their contents, will (except in some extraordinary circumstances) not be disclosed to the Authority or the Court subsequently. Such procedures lubricate the machinery of employment dispute resolution. Indeed, the emphasis in the problem resolution provisions in the Employment Relations Act 2000 is supportive of this approach.*
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> *[48] As a matter of public policy and pragmatic employment relations, parties should not be permitted to agree to hold such off the record discussions but to then be able to insist that they are on the record when settlement is not achieved.*

[6] Above n 2 at [57] and [82]

[36] Ms Kirk submits that the fact the discussion on 10 September 2014 was not requested by email is not a requirement for a without prejudice conversation to take place. Further she submits that counsel is not limited to only discussing matter without prejudice or otherwise introduced by the employee's counsel.

[37] Ms Kirk submits that the matters in the letter of 21 August 2014 were addressed in the form of a counterclaim and that the matters raised by Ms Sharma are not exceptions to the without prejudice privilege.

Conclusion on whether the parties were in dispute

[38] A personal grievance had been raised by the applicant and the letter of 21 August 2014 referred to serious employment relationship issues. I accept that the proposal in the letter of 21 August 2014was not discussed during the conversation on 10 September 2014, but there was a different proposal as Ms Kirk put it, a counter offer.

[39] That there was to be a without prejudice discussion and/or its nature was not set out in writing by Ms Kirk before the commencement of the telephone conversation but I accept Ms Kirk's submission that is not a requirement for a without prejudice discussion to be protected by privilege.

[40] Ms Sharma submits that new issues of concern about the employment relationship the respondent had with the applicant were raised for the first time at the discussion on 10 September 2014. There was reference to concerns earlier in two letters from the respondent to the applicant in July 2014 when the applicant had been asked to attend a disciplinary meeting. No disciplinary meeting had taken place as at 10 September 2014 and it was unclear whether one would take place because the period of work related stress leave and the proposed disestablishment of the applicant's position had intervened.

[41] I accept Ms Sharma's submission that the without prejudice discussion did move away from the matters raised in the letter of 21 August 2014 but could be seen to be in the nature of a counter-offer to settle and resolve the issues between the parties which were regarded as serious and had been of an ongoing nature. I do note for completeness that privilege cannot be unilaterally waived by one party to a

conversation in the manner which Ms Sharma suggests in her open letter of 11 September 2014.

[42] I am satisfied that there were serious employment relationship problems in the relationship. There was some risk to the respondent that the applicant could take her grievances further by way of litigation and further that issues raised by the applicant's interim manager about which she was asked to attend a disciplinary meeting about had not been resolved and could still be pursued. Both parties had issues that needed resolution. If the relationship problems were not resolved then they could give rise to litigation the result of that might be affected by what was said by counsel on 10 September 2014. Counsel accepted at the time that what was said on 10 September 2014 was on a without prejudice basis.

[43] I now turn to whether the discussions were, by their nature, unlawful and therefore not attracting the cloak of privilege.

[44] Ms Sharma submits correctly that the without prejudice privilege is not absolute or to be upheld invariably. There will be some circumstances, as Chief Judge Colgan referred to in *Morgan,* where discussions are not in good faith or not for the purpose of genuinely obtaining a resolution of the issues between the parties or otherwise so egregious that it is unconscionable and evidence of those circumstances will be permitted as part of determination of the justification for the parties' actions. Ultimately, as Chief Judge Colgan stated[7], whether there has been conduct that may or may not cause a privilege to be lost will ultimately be a matter for the Authority to determine on the particular facts of the case.

[45] As I am dealing with the matter on the papers I rely on the correspondence which has been attached to the statement of problem read together with the submissions of counsel. On considering the background, it seemed from the applicant's perspective serious issues had arisen with her interactions with the interim manager. There had been a period of stress leave and the raising of unjustified action grievances. The respondent had wanted to have a disciplinary meeting with the applicant to discuss matters which included her performance before the stress leave. That had not occurred. With the applicant returning to the workplace, and the interim

[7] Above n 2 at [60]

manager seemingly not in the work place she wanted to resolve her issues going forward. It appears that there were still issues from the respondent's perspective.

[46] It was against that background and an offer to settle, the alleged unjustified action grievances in an open letter that the without prejudice discussions took place. I accept that there was an element of surprise for Ms Sharma in that the proposal was unexpected.

[47] Looking at the matter in the round however, I am not satisfied that the content of the telephone discussion between counsel consisted of unambiguous impropriety or bad faith or other egregious conduct so that the conversation should not be protected from disclosure. I do not find on the information available that it was other than a proposal to attempt to settle matters in dispute between the parties.

[48] I find as the Court of Appeal did in *Morgan* that the parties should be held to their agreement that the conversation proceed on a without prejudice basis. The privilege that would otherwise attach to the without prejudice discussion should not be lifted and should not in the exercise of my discretion be disclosed to the Authority as part of the evidence.

[49] There is to be no oral or documentary evidence about the content of the conversation on 10 September 2014 given to the Authority. If there is evidence to be given about subsequent actions of the applicant then it must not refer to the content of the conversation on 10 September 2014.

Result of that finding

[50] I asked Ms Kirk to identify from the statement of problem and a number of attachments what parts of the statement of problem and what parts of documents she was of the view directly or indirectly reference the matters in the without prejudice discussion. I have reviewed her email of 12 April which was copied to Ms Sharma and I accept that the parts of the statement of problem and/or documents set out thereto should be removed from information that the Member assigned to this matter sees as part of the file.

[51] I have had deleted from paragraph 20 in the statement of problem from the third line starting *"... where essentially in the course"* through to the end of that paragraph. I have also removed all of pages 3 and 4 of the applicant's letter of 11

September 2014 and the part of page 2 in the respondent's letter of 19 September 2014 which is referred to in Ms Kirk's email of 12 April 2016. I have further removed the entire second paragraph at page 1 of the applicant's letter of 23 September 2014. Whilst the next two paragraphs do not reference the content of the without prejudice conversation, as I have found the content of the conversation to be inadmissible, then those two paragraphs have no context and on page 2 of the same letter the second and third paragraphs should be removed.

[52] During the telephone conference that I held with counsel we briefly discussed the other matters and I shall deal with these now.

Are the claims for penalties for breaches of contract and statutory obligations out of time?

[53] Ms Sharma conceded that the penalty claims *would appear to be out of time*. She has reserved the applicant's position to file a further amended statement of problem to address any issues that may arise and is to take instructions about that matter.

Did the applicant provide any information to support a claim of unjustified dismissal?

[54] As I discussed with counsel and given the manner in which this matter came to me, that matter more appropriately falls to the member assigned this matter to determine.

When was the alleged unjustified disadvantage raised and what does the claim encompass?

[55] Ms Sharma has dealt with that matter by referencing the various attachments to the statement of problem. She has referred to letters dated 5 August 2014 and 21 August 2014, on behalf of the applicant and a letter dated 29 September 2014 on behalf of the respondent along with seven employee complaint forms dated 7 July to 21 July 2014 respectively.

[56] For purpose of the statement in reply the respondent should rely on in particular, the letter of 21 August 2014 and earlier letters and complaint forms, if the actions complained of are not referred to in that letter and are not outside of the 90 day period.

Should the Authority direct the applicant to withdraw the statement of problem dated 18 March 2016 and file and serve a statement of problem complying with the determination?

[57] The Authority has removed matters that it has found were privileged. It is more appropriate that the member assigned the file consider that after the statement in reply has been lodged and served.

Is the applicant required to provide information to support her claim for loss of wages?

[58] There was some discussion about this matter. Ms Sharma submits that information be provided by the applicant in her statement of evidence. It may be that provision of that information at an earlier stage could be useful in seeing if matters between the parties could be resolved. However, again I think that is probably more appropriately a matter for discussion by the assigned member when he considers the matter is ready for a telephone conference which I would anticipate would be after the statement in reply has been lodged.

[59] The statement in reply should be lodged and served within 14 days after receipt of this determination.

Costs

[60] Ms Kirk seeks that costs be fixed. It is usual in the Authority to reserve costs until after the substantive matter has been resolved. I appreciate Ms Kirk's concerns that a different Member will be dealing with the substantive matter. However, it is the usual practice in the Authority that the assigned Member would simply refer any submissions in relation to this matter to the Member who dealt with the preliminary matter for view regarding a suitable award for the preliminary issue.

[61] I reserve the costs in this matter until after the substantive matter has been resolved.

Helen Doyle
Member of the Employment Relations Authority