

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 350/10  
5298835

	BETWEEN	DAVID NEWICK applicant
	AND	WORKING IN LTD first respondent
	AND	WORKING IN VISA LTD second respondent
	AND	SCOTT MATHIESON, third respondent
	AND	HAYLEY ROBERTS, forth respondent
Member of Authority:	James Wilson	
Representatives:	Erin Davies/ D J Neutze for the applicant Michael O'Brien for the respondent	
Submissions received:	12 April 2010 from the applicant 12 April 2010 from the respondents	
Determination:	6 August 2010	

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

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**The employment relationship problem**

[1] In a statement of problem filed on 12 March 2010 Mr Newick seeks a series of determinations from the Authority including:

- a. that the first and/or second respondents' dismissal of him was both procedurally unfair and substantially unjustified;
- b. that he had been subjected by the first and/or second respondents' to a series of unjustifiable actions;

- c. that the first respondent had failed to reward him for his services from 15 June 2009 until 15 December 2009;
- d. that the first and/or second respondents had failed in their obligations to act as fair and reasonable employers and in good faith; and
- e. that the third and fourth respondent's incited, instigated, aided and/or abetted breaches of his employment agreement.

[2] In support of his application Mr Newick filed a series of documents marked "A" to "L". On behalf of the respondents Mr O'Brien has objected to the inclusion of 4 these documents (documents 'I' 'J' 'K' and 'L'.) as being *without prejudice* and therefore inadmissible. He has requested that the Authority consider, as preliminary issues whether these documents are admissible and whether I should consider removing myself from this case given that I have already seen the allegedly *without prejudice* communications.

### **The disputed documents**

[3] Before considering the respective submissions in respect to the admissibility of disputed documents it is necessary to first briefly summarise the contents of those documents.

Document 'I' is a letter from Mr Newick, dated 19 February 2010 to the third and fourth respondents and is marked **without prejudice**. In this letter Mr Newick says:

*I write to seek clarification about my employment and shareholding situation after receiving your e-mail communication to me and the letter that was attached to that e-mail of Wednesday 18 February and after the discussions on 12, 15 and 16 February surrounding my ongoing employment and shareholding.*

The letter then lists a series of issues about which Mr Newick seeks clarification.

Document 'K' is an e-mail from Mr Newick, also to the second and third respondents and dated 24 February 2010 in which he says:

*....after our conversation yesterday I realised that there is quite a bit to sort out before we can consider the next phase and some business critical things that have to be delivered prior to expo...*

...

...

*Yet, with my role already disestablished or being disestablished as at the end of February, I don't know how I will get paid, what I will get paid or what the terms of my engagement are for the interim period prior to any acceptance or otherwise of a new role...*

*I would like to be able to work through with you to help deliver the above and to help shape the COO role and issues such as branding on Tuesday, but I am not in a position to do this without certainty of my income.*

...

...

Document 'J' is headed **Monies owed as at 23/02/10** and although not dated the parties agree that this was delivered by hand by Mr Newick to Mr Scott (the third respondent) on or about 24 February 2010. It was not attached to, and does not refer to, any other correspondence. In this document Mr Newick lists a series of amounts he says are owing to him which total \$112,449.81.

Document 'L' is a letter dated 26 February 2010 from Mr Scott to Mr Newick informing him that:

*...the role of CEO of Working in Visas is now disestablished and despite attempting to create a new role of C00 for you we cannot make that work within the current financial limitations of the business.*

*You have offered to contract back to us over this extremely pressurized time but we have also made a decision that it will be easier for both parties to make a clean and immediate break.*

*However, as a way to create some goodwill we wish to recompense you for the time you worked without earnings.....*

The letter then goes on to outline a series of payments to be made to Mr Newick and continues:

*This payment is made in consideration of:*

*you are agreeing to a full and final settlement of all claims you have, or may have, against the companies, associated entities, its directors, officers and shareholders relating to your employment including its termination;*

...

### **The submissions**

[4] In support of his application, on behalf of the respondents, to have these documents excluded, Mr O'Brien says that the documents are subject to the evidential "without prejudice" rule. He says that the purpose of the rule is to protect all communications which are made in confidence and in connection with an attempt to settle or mediate a dispute. He submits that the communications were made in confidence, made in an ongoing attempt by the parties to settle the dispute and were part of a train of without prejudice communications that Mr Newick started (with his letter, document 'I').

[5] Mr O'Brien cites *Westgate Transport Ltd. v Methanex New Zealand Ltd* (2000) 14 PRNZ 81 where Randerson J. said that... *where an initial list forming part of a series of negotiations is marked "without prejudice", privilege attaches to the rest of the letters in that series.* Mr O'Brien also says that it is a well settled principle in law that the protection of the "without prejudice" privilege is awarded to all statements and all communications that are reasonably incidental to settlement, whether or not the without prejudice communications were expressly marked as 'without prejudice'. In this regard Mr O'Brien cites *D F Hammond Land Holdings Ltd. v. Elders Pastoral Ltd.* (1989) 2 PRNZ 232 where Hardy Boys J said:

*The privilege attached to "without prejudice" communications is based to a large degree on considerations of public policy. It is intended to encourage and facilitate the negotiation and settlement of disputes, by preventing any possible admission of liability being raised against the party making it. This being the purpose of the rule, strict adherence to form is not necessary; for*

*example the use of the words "without prejudice" is not necessary if the intention is clear.*

[6] Mr O'Brien submits that the communications in this instance were made as part of an ongoing course of dealings between the parties which were initially undertaken on a without prejudice basis. (ref. Mr Newick's letter 'I' clearly marked "without prejudice") He also says that the intention of the parties, as set out in the communications clearly moved into "without prejudice" negotiations with Mr Newick's letter of 19 February (document 'I') and the ensuing settlement negotiations should accordingly attract "without prejudice" privilege.

[7] For Mr Newick Mr Neutze also canvases a number of cases. He argues that there is no connection between Mr Newick's letter 'I' of 19 February and the other correspondence and, in particular the respondents letter of 29 February (document "L"). He says that document 'L' provides formal confirmation that Mr Newick's roll was disestablished and goes on to advise him of his redundancy. The letter refers to an agreed rate for work already performed and states that theoretically the respondents owe Mr Newick specific amounts. The letter then sets out a concession which the respondent seeks (because of an alleged inability to pay).

[8] Mr Neutze says the document does not refer to any existing dispute between the parties but appears to have been an attempt to prevent a dispute arising. This, in Mr Neutze's submission, is significant because it refers to the decision in *Bayliss Sharr & Hansen v McDonald* [2006] ERNZ 1058 where Judge Couch, in the Employment Court held that correspondence cannot be "without prejudice" in the absence of an existing dispute between the parties. Judge Couch added that for a disputes to exist there must be significant difference between the expressed views of the parties about a matter concerning them both

[9] Mr Neutze says that it is clear that the "without prejudice" rule does not apply to the disputed documents. He says that with the exception of document 'I' none of the documents is marked "without prejudice". He says that there is no clear intention from any of the disputed documents that they should be treated as without prejudice communications. He goes on to say that although documents 'I' is marked "without prejudice" there is nothing in the document to suggest that it should be treated as

such. He says this is not the commencement of a train of without prejudice discussions but is rather the continuation of an open discussion between the parties. Document 'I', Mr Neutze says, is clearly not an attempt to resolve an existing dispute. Document 'L' is not marked "without prejudice" nor does it refer to any previous without prejudice discussions. There was no dispute between the parties at the time that the letter was written. Although the letter made an offer to settle it does not specify what these claims might be or identify any dispute in existence. The offer can therefore be viewed, according to Mr Neutze, as an attempt to prevent a dispute from arising. He argues that correspondence cannot be protected by the "without prejudice" rule if it was created to prevent a dispute arising (*Bayliss Sharr & Hanson, supra*)

[10] Mr Neutze has also drawn my attention to the comments in *Bayliss* where the Judge held that he would also have reached the same conclusion even if he had found there was a dispute in existence. Judge Couch quoted Colgan J. in *Jackson v Enterprise Motor Group (North Shore) Ltd* [2004] 2 ERNZ 424, saying that there remained a residual jurisdiction to consider evidence of "without prejudice" communications where the effect of excluding it would be more prejudicial than admitting it. Judge Couch in *Bayliss* went on:

*Exercising that jurisdiction, I would adopt the proposition advanced by the authors of "cross on evidence" (8<sup>th</sup> ed.), Wellington, LexisNexis 2005, at para 10.48:*

*if the making of the statement itself constitutes a cause of action, or is an ingredient in one, it is submitted that the statement is not privileged because it cannot be regarded as incidental to "without prejudice" discussions aimed at settling a pre-existing litigation or dispute.*

## **Discussion**

[11] I have carefully considered the parties submissions and have come to the conclusion that the disputed documents should not be excluded from my investigation nor should I stand aside from investigating Mr Newick's employment relationship problem. I have reached this conclusion for the following reasons:

(i) I do not accept the respondents' suggestion that the various disputed documents are part of a trail of correspondence emanating from Mr Newick's letter of 19 February 2010 (document 'I') and therefore covered by the "without prejudice" endorsement on that letter. Document 'J' is simply a statement prepared by Mr Newick of the amounts he believes he is owed by the respondents and the parties agree that it was not attached to any other item of correspondence. Document 'K' is some requests and proposals put forward by Mr Newick as to his ongoing relationship with the respondents -- it does not purport to be a continuation of his letter of 19 February 2010. Document 'L' is not a response to any other previous correspondence other than to reject all of the previously discussed alternatives and disestablish Mr Newick's position. It goes on to make an offer to Mr Newick of the terms of his disengagement.

(ii) On its face document 'L' has the appearance of an offer made to settle a dispute and could, on that basis, attract "without prejudice" privilege despite not being endorsed as such. In reality document 'L' itself creates a dispute which it then seeks to settle. In this respect I agree with Mr Neutze's submission that this circumstance is similar to that in *Bayliss* and the document cannot attract without prejudice privilege.

(iii) Lastly, I am cognisant of Judge Couch's comments in *Bayliss* where he refers to the Court's residual jurisdiction to consider evidence of a "without prejudice" nature. A similar jurisdiction is conferred on the Authority by s.160(2) of the Employment Relations Act 2000 (the Act) which provides that: *...the Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal or not.*

This provision does not give the Authority *carte blanche* to admit "without prejudice" correspondence. However, the fact that document 'L' in itself creates a dispute between the parties (by disestablishing Mr Newick's position) even if I had found that the disputed documents could be said to be "without prejudice" it would be equitable to admit them.

**Determination**

[12] For the reasons set out above, **Mr Newick can introduce the disputed documents 'I' 'J' 'K' and 'L' as part of the evidence in support of his claims against the respondents.** The parties should take note however that the weight to be given to these documents is a matter of evidence and submissions. In particular I do not necessarily accept that Mr Scotts' letter to Mr Newick of 26 February 2010 (document 'L') makes any concession regarding Mr Newick's claims in the Authority

**Next steps**

[13] The parties representatives' should now contact the Authority support officer to arrange a case management conference to arrange a timetable for the Authority's investigation of Mr Newick's employment relationship problem.

**Costs**

[14] Costs are reserved pending the final disposition of this matter.

James Wilson

Member of the Employment Relations Authority