

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURĀU ROHE**

[2021] NZERA 136
3113792

BETWEEN MICHAEL TAYLOR
 Applicant

AND WOOP LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Edwin Morrison and Cameron Fraser, counsel for the
 applicant
 Angela Evans, counsel for the respondent

Investigation Meeting: On the papers

Submissions received: 4 March 2021 from the applicant
 24 February and 9 March 2021 from the respondent

Determination: 9 April 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Woop Limited (Woop) seeks an order directing Mr Taylor to amend and re-file his amended statement of problem dated 14 September 2020 to remove material (the material) which discloses part of or relates or refers to privileged discussions between the parties held on 9 July 2020 and subsequent in person and written negotiations.

[2] Mr Taylor says the material does not attract privilege or, if it does, that it is in the interests of justice to set aside any privilege.

The Authority's investigation

[3] By consent this matter is determined on the papers. In determining this matter affidavit evidence of Mr Taylor and Thomas Dietz has been considered as have the parties' statements of problem and reply, the documents attached thereto and the parties' submissions.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Relevant law

[5] Counsel have both referred the Authority to a judgment of the Court of Appeal in *Morgan v Whanganui College Board of Trustees* which established the essential requirements for without prejudice communications to be afforded protection as follows¹:

- (i) The existence of an agreement between the parties that the communication is without prejudice;
- (ii) The existence of at least "negotiations" or a "difference" to warrant the conversation; and
- (iii) That the problem be one "that could give rise to litigation, the result of which might be affected by an admission made during negotiations".

[6] In addition counsel have referred in submissions to exceptions to privilege including the Authority's broad power to take into account such evidence and information as in equity and good conscience it thinks fit.²

Discussion

[7] In circumstances where the parties' intention as to admissibility is clear on the face of the documents at issue there will need to be compelling grounds to dislodge

¹ *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340.

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

the presumption of privilege. Having considered the relevant information and submissions

the Authority is satisfied such grounds do not exist for communications in that category.

Did the parties agree discussions were without prejudice?

[8] Yes. Woop asked Mr Taylor to enter without prejudice discussions. He was provided time to consider the proposal including time to seek advice. Mr Taylor subsequently agreed to enter discussions under the cloak of privilege. The Authority is satisfied his agreement was informed.

[9] Woop's emails to Mr Taylor subsequent to the meeting are clearly marked as without prejudice and the contents of the emails are, the Authority is satisfied, the type which could properly be protected by privilege - they are 'negotiations' between the parties made in the context of performance concerns being raised by Woop along with a settlement offer.

[10] The chain of email communications between the parties in the period 13 to 22 July are headed by Woop "without prejudice". Mr Taylor has not headed his emails in the chain similarly. He says the lack of the heading (or reference to without prejudice in the emails) carves out these communications from any privilege. This is not accepted. The emails are in response to communications for which privilege was asserted and which has been found to be properly protected by privilege. The email chain falls after the parties expressly agreed to enter discussions under that cloak and are a continuation of those discussions. The content of Mr Taylor's emails do not address or seek to revoke or carve out those emails as privileged.

[11] Mr Dietz's invitations to Mr Taylor to enter without prejudice communications and Mr Taylor's agreement do not fall into this category of communication and are not properly afforded privilege.³ Admitting evidence of the fact one party proposed such discussions and the other party responded without reference to the content of the proposed discussions does not compromise the privilege of subsequent discussions.

³ Amended statement of problem 14 September 2020 [2.9] and [2.12].

A qualifying dispute?

[12] Mr Taylor submits that when Woop initiated the without prejudice communications there was no dispute or employment relationship problem between the parties. There is no dispute the 9 July meeting was the first time Woop formally put to Mr Taylor concerns about his performance and that a performance management plan would be put in place if a confidential settlement could not otherwise be negotiated. The statement in reply and affidavit of Mr Dietz detail Woop's growing concerns about Mr Taylor's performance prior to 9 July. Mr Taylor's statement of problem refers to events on 8 July which appear to have alerted him to issues in the employment relationship.

[13] It is clear to the Authority a serious problem had arisen in the employment relationship which needed to be resolved and that the parties agreed their communications should be protected for that purpose.

Could the dispute result in litigation which could be affected by an admission?

[14] Yes. If Mr Taylor did not accept the settlement proposal then Woop would commence a performance management process which could result in disciplinary action. Personal grievance claims could arise from such a set of circumstances which is what occurred.

Exceptions to privilege

(i) *Section 57 Evidence Act 2006*

[15] Mr Taylor says any privilege should be lifted because the material contains a threat and is relevant to his personal grievance of unjustified constructive dismissal. The threat referred to is Woop's characterisation of the performance management process as "not very nice" if Mr Taylor did not accept the settlement proposal and that the settlement offer was made on a "either/or" basis. It is accepted Woop presented

Mr Taylor with a choice and Woop indicated its preference by emphasising a potentially negative aspect of the alternative. It is also accepted this would have added pressure to Mr Taylor's election in what would undoubtedly be a difficult situation. However, in the context of this particular matter and given the parties' clear agreement to enter without prejudice negotiations it is not a communication of a type which would justify admissibility.

(ii) *Equity and good conscience jurisdiction*

[16] Consideration has been given to whether, having found the communications are privileged, the Authority should exercise its equity and good conscience jurisdiction and admit the material.⁴ If this occurred all communications between the parties which Mr Taylor seeks to rely on to support his personal grievances would be before the decision maker for consideration. Those communications span a period of time before and after the material time.

[17] This narrative, with the privilege carve out, indicates an employment relationship problem arose, the parties entered without prejudice discussions in an attempt to resolve that problem, those discussions ended and the employment relationship continued. The gap in the narrative created by without prejudice communications could be said to be artificial and a distortion of the true nature of the parties' communications. Such a gap is not unusual in this jurisdiction given the statutory emphasis on the quick resolution of employment relationship problems.⁵ Having considered those communications individually and in the broader context of Mr Taylor's personal grievance claims I am not satisfied the material is of such weight that I should exercise my discretion and order the material admissible.

Outcome

[18] The parties held discussions on a without prejudice basis the content of which is properly protected by privilege. Mr Taylor is to amend and re-file the amended statement of problem dated 14 September 2020 by removing:

- (a) the heading "*Option to Resign*"

⁴ Employment Relations Act 2000, s 160(2).

⁵ Employment Relations Act 2000, s 101(ab) and s 143(b).

- (b) paragraphs 2.15, 2.16, 2.18, 2.19, 2.20 and 2.21; and
- (c) the attachments labelled MT-2, MT-3, MT-4 and MT-5.

Costs

[19] Woop is entitled to a consideration of costs. The parties are encouraged to resolve the issue of costs between them. If this is not possible Woop should file and serve a costs memorandum within ten working days of the date of determination. Mr Taylor should file any reply memorandum within a further five working days.

Marija Urlich
Member of the Employment Relations Authority