

**NOTE: This determination  
contains an order  
prohibiting publication of  
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 403  
3147750

BETWEEN VJZ  
Applicant

AND KJT  
Respondent

Member of Authority: Natasha Szeto

Representatives: VJZ in person  
Susan Hornsby-Geluk, counsel for Respondent

Investigation Meeting: On the papers

Submissions and further  
information received: 26 April 2023 from Respondent  
9 May 2023 from Applicant

Date of Determination: 28 July 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] This is a determination on a preliminary matter about whether certain evidence and documents are admissible and should be provided to the Presiding Member who will investigate and determine the substantive employment relationship problem between the parties.

[2] KJT has objected to certain evidence and documents that VJZ has provided to the Authority, which KJT says are privileged as they were made on a “without prejudice” basis.

[3] The background to the employment relationship problem, is that VJZ was previously employed by KJT, a law firm. VJZ started work at the firm in September 2019 and by December 2019 she had received feedback about concerns the firm had.

[4] In late January 2020 KJT initiated discussions and correspondence with VJZ to explore the possibility of mediation. VJZ engaged her own lawyer and a without prejudice meeting was held on 5 February 2020.

[5] Over the week following the meeting, the parties corresponded over a proposed resolution to their employment issues. This culminated in the parties entering into a Record of Settlement (Settlement) which was signed by an MBIE Mediator on 12 February 2020. VJZ's last day of employment with KJT was the same day.

[6] Subsequently, VJZ lodged a Statement of Problem in the Employment Relations Authority, which challenged the validity of the Settlement.

[7] The substantive problem VJZ has asked the Authority to resolve is she claims the Settlement is an illegal contract. She says the Settlement is also an unconscionable contract. VJZ's claim of illegality is made on the basis of five alleged breaches of the Lawyers and Conveyancers Act 2006 and associated Rules (collectively "the LCA"). VJZ's claim of unconscionability is made on the basis of a statement she alleges KJT made during the without prejudice meeting.

[8] The Presiding Member will convene an investigation meeting to hear the substantive claims.

### **The Authority's Investigation**

[9] KJT has raised two preliminary issues. KJT objects to the illegality matter being pursued in the way it is currently set out on the basis the Authority has no jurisdiction to consider matters arising under the LCA (the jurisdiction question).

[10] KJT also objects to without prejudice communications referred to in the Statement of Problem (SOP), and without prejudice documents attached to the SOP being before the Presiding Member of the Authority. KJT asserts privilege over these references in the SOP, and certain aspects of the documents which have been lodged with the Authority (the "without prejudice" question). The parties have been unable to reach agreement about these two issues.

[11] KJT lodged with the Authority, a Memorandum of Counsel and supporting affidavit of one of its Partners on 16 February 2023. VJZ lodged submissions, a supporting affidavit from herself, and a draft brief of evidence on 3 March 2023. Further communications from both parties followed on 7 March 2023.

[12] On 20 April 2023 I convened a Case Management Conference with the parties to confirm the issues to be dealt with in a determination on the preliminary matters. In Directions of the Authority issued on 24 April 2023, I advised the parties it was appropriate for there to be no finding on the jurisdiction question at this stage of the Authority's investigation, leaving the "without prejudice" question to be resolved. Both parties were invited to file further submissions specifically on the "without prejudice" question and I advised I would make a determination on the papers. Further information was lodged by KJT on 26 April 2023, and by VJZ on 9 May 2023.

[13] For the sake of completeness, I record VJZ does not agree that either the jurisdiction question or the "without prejudice" question need to be resolved as preliminary issues. However, the "without prejudice" question needs to be resolved so the Presiding Member of the Authority is not provided with evidence or information which cannot be taken into account for the substantive matter. If privileged information is provided to the Presiding Member, this should only be after a full and proper consideration.

[14] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result. All material provided by the parties has been considered.

## **Issues**

[15] The question for resolution (as originally framed) was:

- (a) Whether certain evidence and documents are privileged or otherwise inadmissible, and in particular whether the following evidence and documents should be before the Presiding Member:

- Evidence of the meeting on 5 February 2020 (reference in SOP 2.62 – 2.69)

- Document M (email from KJT to VJZ dated 10 February 2020)
  - Document N (letter from KJT to VJZ dated 11 February 2020)
  - Document O (email from KJT to VJZ dated 12 February 2020)
- (collectively the ‘without prejudice’ question).

[16] On 26 April 2023, KJT withdrew its objection to paras 1 – 13 of Document N (letter from KJT VJZ dated 11 February 2020) but maintained its objection to the remainder of the letter from paragraphs 14 – 17 which fall under a “without prejudice” heading.

[17] In relation of the Statement of Problem paras 2.62 – 2.69, KJT withdrew its objection to paragraph 2.62 on the basis this simply records a without prejudice meeting took place but maintained its objection to paras 2.63 – 2.69 which relate to the content of the without prejudice meeting.

### **Relevant Background**

[18] VJZ started work at the firm in September 2019. In December 2019, VJZ received feedback from her manager regarding concerns the firm had.

[19] In late January 2020, a different manager at KJT engaged in discussions and correspondence with VJZ to explore the possibility of mediation.

[20] Following a discussion between VJZ and KJT on 28 January 2020, the parties agreed to attend mediation which was scheduled with Mediation Services for 5 February 2020.

[21] KJT created Document K – “Outline of issues for Mediation” (3 February 2020) and sent it to VJZ. The document referred to concerns it had and concluded by saying that KJT wanted to use mediation to openly discuss these concerns.

[22] Around this time, VJZ engaged a very experienced employment lawyer to act for her. On 4 February 2020, VJZ’s lawyer contacted KJT, confirming she had been instructed by VJZ, and suggesting that rather than attending the scheduled mediation on 5 February 2020, the parties have a “without prejudice” meeting at her office.

[23] KJT’s external lawyers confirmed that two of KJT’s managers would attend a meeting on a without prejudice basis as suggested by VJZ’s lawyer. The parties then attended a meeting at VJZ’s lawyer’s offices on 5 February 2020. VJZ’s lawyer

confirmed at the outset of the meeting on 5 February it was without prejudice and KJT confirmed its understanding. VJZ later referred to what happened at that meeting in her Statement of Problem at paragraphs 2.63 – 2.69.

[24] On 10 February 2020, KJT’s external lawyers emailed VJZ’s lawyer with a proposed resolution to employment issues which was further to a proposal made during the without prejudice meeting (Document M – email from KJT to VJZ dated 10 February 2020). This email was headed “Without Prejudice” and VJZ agreed this document was without prejudice.

[25] On 11 February 2020, VJZ’s lawyer responded to KJT in a letter on her firm’s letterhead (Document N). The letter confirmed that VJZ’s lawyer had instructions to respond on VJZ’s behalf. VJZ’s lawyer referred to part of KJT’s correspondence as a “threat” and said that the threat was not subject to privilege.

[26] The letter then summarised the background to the employment relationship and raised a personal grievance in relation to the alleged unjustified actions of KJT.

[27] After paragraph 13, the letter contained a “Without prejudice” heading in bold text, following which there is comment on the 5 February 2020 meeting and a response to a proposed resolution to employment issues arising out of that meeting.

[28] On 12 February 2020, KJT’s external lawyers sent VJZ’s lawyer a further email headed “Without Prejudice” (Document O), setting out revised terms for a proposed resolution to employment issues.

[29] The parties signed a Record of Settlement on 12 February 2020 which was also signed by a Mediator on that day. VJZ’s last day of employment with KJT was the same day.

## **Without prejudice Question**

### *Submissions*

[30] KJT’s submission is without prejudice discussions are “a long standing, important, and frequent feature of attempting to resolve employment relationship issues”.<sup>1</sup> The parties had acknowledged there was an employment relationship problem and had entered into negotiations, expressly on a without prejudice basis, to endeavour

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<sup>1</sup> *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340.

to resolve those issues. In these circumstances, KJT says the parties should be held to this understanding and the meeting of 5 February 2020 (and any resulting written communications which carry on the without prejudice discussions which commenced in that meeting) should be deemed to be privileged and inadmissible.

[31] KJT further submits:

- (a) The without prejudice communications did not contain a threat, it was a fair and reasonable statement of the employer's position and consistent with natural justice requirements;
- (b) Case law does not support that there is a "carve-out" whereby threats are not subject to privilege;
- (c) The email of 10 February (Document M) was not expressed in unconscionable terms, nor was the settlement agreement procured by improper pressure or duress.

[32] VJZ's submission is the privilege resulting from the without prejudice communications did not attach to the communications because there was no evidence of a dispute between the parties that would attract the protection of s 57 of the Evidence Act 2006 (EA 2006).

[33] In the alternative, VJZ submits even if the without prejudice communications were privileged, then the unlawful or unconscionable behaviour of KJT means that it can no longer claim the privilege.

[34] VJZ's position is that Documents M, N, and O are admissible as they are required documents for the Authority to conduct its investigation into the enforceability of the Settlement. VJZ says that the question of admissibility is best reserved for substantive determination because if it is found there has been unconscionable or unlawful conduct, without prejudice privilege will not apply to the communications. VJZ says that if there is an arguable case that unconscionable and/or unlawful conduct has occurred, then the documents should be admissible to allow the Authority to fully investigate the matter.

[35] VJZ further submits that the question of legality is at the heart of the substantive issue for determination by the Authority, and all documents are required for the Authority to determine whether unconscionable conduct occurred. VJZ says that it

would be paradoxical for the primary documents associated with the claim to be found to be inadmissible: the very nature of a s 149 Record of Settlement would effectively preclude any party from ever challenging the enforceability of a Record of Settlement.

*Principles – discussion*

[36] The Authority has broad powers in relation to evidence. It may take into account such evidence and information as in equity and good conscience it thinks fit, whether it is strictly legal evidence or not.<sup>2</sup>

[37] The Authority has jurisdiction to hear matters relating to potential illegality or unconscionability of a Record of Settlement.<sup>3</sup>

[38] The Authority has the power to consider privileged evidence if the circumstances so require. The discretion must be exercised in a principled way, having regard to common law, and principles of the EA 2006.

[39] Settlement discussions and communications made in connection with an attempt to settle or mediate a dispute, and which are intended to be kept confidential, are privileged under s 57 of the EA 2006. This is to motivate parties to negotiate resolution of disputes between themselves through frank discussion, safe in the knowledge that what they say will remain confidential.

[40] A threshold issue is that there must be a serious problem in the employment relationship<sup>4</sup> for the privilege to attach. The EA 2006 uses the word ‘dispute’. The Court of Appeal has recognised that ‘negotiations’ or even ‘difference’ will suffice to attract the privilege, but that ‘argument’ or ‘debate’ may not be enough. The problem must be one which could “give rise to litigation where the result might be affected by something said” by a party or their representative.<sup>5</sup>

[41] If privilege attaches, the without prejudice status applies to subsequent correspondence unless and until a sufficient warning is given that dealings are on an open basis.<sup>6</sup> The use of a “without prejudice” label may assist in determining that a

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<sup>2</sup> Section 160(2) of the Employment Relations Act 2000.

<sup>3</sup> *FMV v TZB* [2021] NZSC 145.

<sup>4</sup> *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340.

<sup>5</sup> Above n 4.

<sup>6</sup> *Gibbs v Windmeyer* [2021] NZHC 2582 at [13].

communication was intended to be privileged but does not of itself make the communication privileged.

[42] The without prejudice protection is founded in a public policy interest in discouraging recourse to litigation and encouraging genuine attempts to settle disputes if parties cannot agree. There is a strong public interest in parties being able to resolve employment relationship problems themselves including recording this in any agreement reached. There will be very limited circumstances in which the protection of the without prejudice privilege will be lost.

### **Analysis**

[43] To determine whether the communications in issue should be provided to the Presiding Member, I need to answer the following:

- (a) Was the meeting on 5 February 2020, and the resulting documentation, subject to without prejudice privilege?
- (b) If so, has the privilege been waived or lost?
- (c) Should the Authority nevertheless direct that privileged communications should be provided to the Presiding Member because they are relevant to the substantive claims, and would assist the Member?

*Was the meeting on 5 February 2020, and the resulting documentation subject to without prejudice privilege?*

[44] The test established by the Court of Appeal in *Morgan v Whanganui College Board of Trustees*<sup>7</sup> requires determination of whether there was a serious problem in the employment relationship that could give rise to litigation, the result of which might be affected by an admission made during the negotiations.

[45] VJZ says there was no dispute between the parties as at the date of the communications because to be consistent with the test in s103A of the Act, KJT must have raised a “serious employment problem” with her, and she must have been given an opportunity to respond.

[46] Looking at the matter objectively, I find VJZ’s claim that there was no serious employment problem as at the date of the without prejudice meeting on 5 February 2020, to be unrealistic. If VJZ was not aware of a serious employment relationship

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<sup>7</sup> *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340.

problem prior to her meeting with KJT on 28 January 2020, then she must have been aware of it from 28 January 2020 when KJT raised with her that the firm wanted to attend mediation. In evidence to the Authority, VJZ described her view of the 28 January 2020 meeting in a way which strongly suggests she knew there was a serious employment relationship problem.

[47] On 3 February 2020, KJT gave VJZ an “Outline of issues for Mediation” (Document K) which referred to its concerns and concluded by saying that KJT wanted to use mediation to openly discuss these concerns.

[48] Around this time, VJZ was herself sufficiently concerned about the direction that matters were heading in, that she went to some considerable effort to instruct a lawyer prior to the scheduled mediation meeting on 5 February 2020.

[49] The fact that the meeting changed from a mediation to a without prejudice meeting does not make a material difference to whether there was a serious problem in the employment relationship because as at the date of the without prejudice meeting on 5 February 2020:

- (a) KJT had raised concerns with VJZ.
- (b) Mediation had been proposed, agreed, and scheduled.
- (c) VJZ had engaged a lawyer.
- (d) The issues to be resolved had been recorded in the Outline of issues for Mediation document (Document K).

[50] VJZ was knowledgeable about employment matters. She was also represented by a very experienced employment lawyer. VJZ must have been aware from at least 28 January 2020 there was a dispute or difference between herself and KJT that could result in litigation. The dispute existed at the time the without prejudice discussion was held on 5 February 2020 and continued until settlement of the dispute on 12 February 2020.

[51] The parties had also expressly agreed in their communications that they were on a without prejudice basis. It was VJZ’s proposal (through her lawyer) that the meeting on 5 February 2020 would be held on a without prejudice basis.

[52] Merely asserting that a meeting is held on a without prejudice basis, or labelling documents as “without prejudice” is not determinative of their status. However, based on the information before the Authority about what transpired at the meeting, and particularly that it culminated in a proposed resolution to employment issues, it is clear that both parties proceeded on the basis the meeting was on a without prejudice basis.

[53] Most of the communications that followed the 5 February meeting were specifically marked “without prejudice” including:

- (a) Document M (email from KJT to VJZ dated 10 February 2020).
- (b) Parts of Document N (letter from KJT to VJZ dated 11 February 2020).  
As set out above, KJT has withdrawn its objection to the parts of the letter from paragraphs 1 – 13 not marked “without prejudice”.
- (c) Document O (email from KJT to VJZ dated 12 February 2020).

[54] Documents M, parts of N and O clearly set out a proposed resolution to employment issues. These communications were part of the without prejudice discussions that had been commenced earlier in connection with an attempt to resolve the dispute.

[55] In Document N - VJZ’s 11 February 2020 response letter, VJZ’s lawyer made an explicit demarcation between open and “without prejudice” paragraphs, which suggests that privilege was intended to endure over certain aspects of the communication.

[56] The meeting on 5 February 2020, and the relevant parts of the resulting documentation were therefore subject to without prejudice privilege.

*Has the privilege been waived or lost?*

[57] Having found the communications were privileged, I need to consider whether the privilege has been waived or lost.

[58] As noted, KJT withdrew its objection to paragraphs 1- 13 of Document N. However, KJT has not waived privilege, either expressly or impliedly, over the other communications that are at issue. VJZ cannot unilaterally lift the without prejudice privilege that applies to the 5 February 2020 meeting and Documents M, N and O.

[59] VJZ says that privilege has been lost because KJT's conduct has either been unlawful or unconscionable to such an extent that that it cannot avail itself of the privilege.

[60] VJZ relies on *Morgan*<sup>8</sup> where it was held that an allowed exception to the without prejudice rule is that unlawful conduct can never attract protection. The obstacle VJZ faces is that no unlawful conduct has been admitted or found to date. She therefore asks me to accept there is an arguable case for unlawful or unconscionable conduct.

[61] I am not convinced that 'arguable case' is the correct standard to apply to the admissibility of without prejudice communications, given the strong public policy considerations in maintaining privilege over such communications. I have not been pointed to any authorities that show this threshold has been applied in this context previously.

[62] While the issues are yet to be investigated at the substantive investigation meeting, I note a significant challenge VJZ faces in progressing the unconscionability claim in the way it is set out in the Statement of Problem is that it is based entirely on a statement allegedly made by KJT during the without prejudice discussion on 5 February 2020. All three ingredients that VJZ would need to successfully establish her claim are denied by KJT.

[63] The object of the Act as set out in s 3(a)(vi) of the Act is to reduce the need for judicial intervention. Respecting the without prejudice privilege is consistent with that objective.

[64] The Employment Court has recognised the importance of allowing parties involved in employment disputes to protect the confidentiality of communications intended to resolve the parties' dispute without the intervention of the employment institutions. The Court of Appeal has noted, with approval, the Chief Judge's comments that it is in the broader public interest that such practices should continue.<sup>9</sup>

[65] There is a high threshold for a party to set aside a Record of Settlement that has been certified by an MBIE mediator. Section 149 of the Act is intended to ensure that

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<sup>8</sup> *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340.

<sup>9</sup> Above n 8 at 27.

the terms of settlement agreements reached by the parties in mediation are final and binding once signed by a mediator. The mediator may sign settlement at the request of the parties but must first explain to the parties that the terms of settlement agreements are final, binding and enforceable and that the settlement itself cannot be challenged. They must also be satisfied the parties affirm their request after this explanation is provided. In addition, an agreed settlement cannot be cancelled under sections 36 to 40 of the Contract and Commercial Law Act 2017 on the basis of misrepresentation, repudiation or breach.

[66] The entire context of the without prejudice discussion and subsequent communication is important. Without prejudice discussions can be robust. Parties have to feel uninhibited to speak freely and frankly in order to understand each other's positions. This must include discussions about steps involved to resolve employment relationship issues.

[67] It is also relevant that VJZ was represented by a very experienced employment lawyer. I am entitled to consider that the parties' representatives would have intervened had there been any demonstrably unlawful or unconscionable behaviour – if not immediately in the 5 February 2020 meeting, then certainly in the communications that followed.

[68] Based on the information before the Authority, there is insufficient evidence to displace the without prejudice privilege, when balanced against the strong public policy interest in the privilege being maintained. The privilege over the communications has therefore not been waived or lost.

*Should the Authority nevertheless direct that privileged communications should be provided to the Presiding Member because they are relevant to the substantive claims, and would assist the Member?*

[69] VJZ submits that removing these documents and statements from the Presiding Member's considerations would render her unconscionability claim nugatory.

[70] This submission does not acknowledge that KJT has now removed its objection to parts of Document N relating to certain issues raised in the without prejudice meeting of 5 February 2020, meaning that VJZ can provide evidence of these issues to the Authority.

[71] Privilege should not be lifted merely to provide context to a claim. There is potentially other non-privileged material available for VJZ to present to the Authority to address the points she wants to make, without using the disputed material.

[72] VJZ submits that not allowing this evidence to be provided to the Presiding Member would preclude any party from ever challenging the enforceability of a Record of Settlement. I do not accept that to be the case.

[73] There must be a very high bar to displace the privilege in without prejudice communications. Carving out an exception that allows privilege to be displaced to pursue claims of illegality or unconscionability of a Record of Settlement would create a chilling effect on parties' willingness to engage in open and frank dialogue to resolve employment relationship problems.

[74] In this case, I am persuaded that the parties had legitimate reasons for discussing their dispute on a confidential, without prejudice basis and that admitting the disputed material is not in the overall interests of justice. To do so would be unnecessary and contrary to the s 3(a)(vi) object of the Act.

### **Orders**

[75] The SOP contains and attaches material which is without prejudice and subject to privilege.

[76] I order that:

- (a) VJZ is to delete paragraphs 2.63 – 2.69 of her Statement of Problem.
- (b) VJZ is to remove Document M (email from KJT to VJZ dated 10 February 2020) from the list of documents at paragraph 4 of the Statement of Problem and remove this attachment from the documents.
- (c) VJZ is to delete / redact paragraphs 14 - 17 under the “Without prejudice” heading from Document N (letter from KJT to VJZ dated 11 February 2020) and attach this redacted document to her Statement of Problem.
- (d) VJZ is to remove Document O (email from KJT to VJZ dated 12 February 2020) from the list of documents at paragraph 4 of the Statement of Problem and remove this attachment from the documents.

- (e) VJZ is then to lodge and serve an amended Statement of Problem with attachments which does not contain privileged material within 14 days of the date of this determination.

[77] The parties may revert to the Authority if there are difficulties with that process.

[78] The conduct of this matter will now be handed back to the Presiding Member for investigation of the remaining issues.

### **Non-publication**

[79] An interim non-publication order was made by the Employment Court<sup>10</sup> for the non-publication of names and identifying details of the parties. The Court concluded it was not appropriate for the issues surrounding non-publication to be explored until the underlying problem between the parties has been investigated.

[80] In January 2023, the Authority confirmed that a non-publication order remained in place for this matter.

[81] Accordingly, the interim non-publication order remains in place for this matter pursuant to clause 10 of Schedule 2 of the Act. Either party may apply to the Authority on reasonable notice for any modification of this interim order.

### **Costs**

[82] Costs are reserved and will be dealt with, if necessary, along with the determination of costs for the substantive determination.

Natasha Szeto  
Member of the Employment Relations Authority

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<sup>10</sup> *ABC v DEF* [2021] NZEmpC 208.