IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 258
5398115

	BETWEEN	WENDY EDITH ANGELA VOLLMER Applicant
	A N D	THE WOOD LIFE CARE (2007) LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Nicole Ironside, Counsel for Applicant Jeff Goldstein and Linda Ryder, Counsel for Respondent
Submissions Received:	7 and 14 November 2012 for Applicant 12 November 2012 for Respondent
Date of Determination:	26 November 2012

PRELIMINARY ISSUE AS TO THE ADMISSIBILITY OF EVIDENCE

Employment relationship problem

[1] This employment relationship problem is to be the subject of a substantive investigation meeting set down for three days from 27 November 2012. The investigating member is Christine Hickey.

[2] I have been asked to determine, before the commencement of the substantive investigation meeting, the admissibility of correspondence that the respondent says attracts *without prejudice* privilege. The pressure of time means I will not be able to set counsels' submissions out in full but I have read them carefully.

[3] The rationale for the *without prejudice* privilege is to encourage parties to settle their dispute without the need for litigation and without parties being

discouraged that anything said in negotiations may be used against them – *Cutts v Head* [1984] CH 290, 306; [1984] 1 ERNZ 597.

[4] There was discussion in the Employment Court judgment in *Bayliss, Sharr & Hansen v McDonald* [2006] 1 ERNZ about the need for there to be the existence of a dispute as a pre-condition for a claim to *without prejudice* privilege.

[5] There was recognition of a residual discretion to lift privilege if it was necessary and, to fail to do so would be more prejudicial than the disclosure of the otherwise confidential communications – *Jackson v Enterprise Motor Group (North Shore) Limited* [2004] 2 ERNZ 424, paras.[19] and [23]. There was reference in *Bayliss* to Cross on Evidence (8th ed) at para 10.48 that if the making of a statement constituted a cause of action or was an ingredient of one, then the statement was not privileged because it could not be regarded as incidental to the without prejudice discussions aimed at settling a pre-existing litigation or dispute.

The documents before the Authority that are in dispute

[6] The applicant's documents are found in two bundles. One contains annexures A-P referred to in the affidavit of the applicant sworn on 11 October 2012 and runs from pp.1–208. The second bundle contains annexures R-Z also referred to in the affidavit of the applicant and runs from pp.209–376. The first document referred to only by Ms Ironside in her submissions is an email dated 14 August 2012 from Mr Goldstein to Ms Ironside. That is found at p.261 in the bundle. Although the email contains the words *without prejudice* this is not a communication to which privilege would attach. It simply poses a question and on that basis can remain in the bundle.

[7] The second and more controversial series of correspondence is found at pp.276–282. There did not appear to be a p.277. The correspondence commences on 15 August with an email and all correspondence is headed either without prejudice or without prejudice save as to costs. At this time the applicant had raised an unjustified disadvantage grievance. I find that there was a dispute between the parties with the possibility that the outcome of litigation may be affected by any admission made during negotiation over that period and that the documents attract *without prejudice* privilege.

[8] Mr Goldstein in his submissions indicated conditionally he was prepared to waive privilege with respect to the first document in the series at p.276. That is the email of 15 August 2012. The privilege is a joint one and can only be waived by all parties to the communication. I would have been prepared to infer in respect of document 276 that Ms Ironside also waives privilege. The situation is more difficult than that however.

[9] Mr Goldstein is only prepared to consent to waive privilege for the email at p. 276 of the bundle if privilege is waived on the applicant's *without prejudice* letter dated 16 August 2012 at pp. 278 and 279. Ms Ironside will need to consider whether privilege is to be waived on that document. Both documents from pp. 276 to 279 are to remain sealed in the bundle and counsel can discuss this on the morning of the investigation meeting and advise Ms Hickey of their intentions as to waiver of privilege.

[10] The series of communications commencing at page 276 and ending at page 282 attract *without prejudice* privilege. Ms Ironside submits that privilege with respect to the balance of the documents in the series ending at p. 282 should not be maintained. I have considered the various submissions made in this regard. I have already found there was a dispute. The next issue raised is that the making of the statements themselves amount to a cause of action of pre-determination and breach of good faith. The claim before the Authority is one of unjustified dismissal and unjustified disadvantage. Those matters are an element of the claim. I accept Mr Goldstein's submission that this case is distinguishable from the constructive dismissal claim in *Bayliss.* I am not persuaded in this case that it would be more prejudicial to maintain the privilege than it would be to order the disclosure and I do not on that basis.

[11] One of the other matters raised by Ms Ironside is that the final document in the series contained a threat in terms of a *risk of dismissal* if the offer was not accepted. I accept that threats in without prejudice correspondence might be regarded as falling outside of any privilege attached to them. That is because it is difficult to see those as an attempt to settle or resolve a matter. In some cases such as a constructive dismissal claim any pressure at such a time could potentially be a key ingredient of any claim and therefore would not to be protected by *without prejudice* privilege. I am not satisfied in this case that the words used about a risk are such that the letter of

17 September 2012 falls outside of the scope of the *without prejudice* privilege protection and I do not order disclosure on that basis.

[12] In conclusion with respect therefore to the series of communications starting at p. 276 of the bundle through to p. 282 if Ms Ironside agrees to waive that privilege in respect to the applicant's documents 278/279 then 276, 278 and 279 can be made available to Ms Hickey. Otherwise the documents at those page numbers will remain sealed. The correspondence at pp. 280 to 282 of the bundle is to be removed and sealed.

[13] The next document is a letter which is dated 25 September 2012 from Ms Ironside to Ms Ryder. The concerns about that letter are with respect to three sentences that appear on p.362. In respect of the first sentence Mr Goldstein withdraws his objection. There is a concern about the second sentence and the third sentence. Mr Goldstein' concern about the second sentence is more an evidential one. Ordinarily that would not be considered as part of the matters that I am to be ascertaining. However, it seemed to me that the second sentence could be problematic for the member investigating the matter who should not spend unnecessary time dealing with technical arguments. Evidence may have to be given regarding the employer's state of mind if it was intended to be given at all. In all the circumstances the second sentence is to be deleted.

[14] The third sentence which commences; *The employer's initiation of an exit strategy* is a different matter. There is a difficult issue that sometimes arises whether the fact *without prejudice* negotiations have taken place attract privilege or fall outside the scope of privilege. I have found that the content of any negotiations, offers, counteroffers and admissions are privileged but the fact that negotiations took place I find is outside the scope of the privilege that can be claimed. On that basis the third sentence can remain. The only sentence therefore to be deleted on p 362 is the second of those complained of.

[15] The final matter in dispute is paragraph 116 in the applicant's affidavit. The first two sentences refer in the main to an email at p.261 of the bundle that does not attract *without prejudice* privilege. To the extent that the first and/or second sentence may be seen to overstate that email then the email is available for the investigating member to consider. From the end of the second sentence to the end of the paragraph

there is reference to the *without prejudice* series of correspondence at pp. 276 to 282. That part of the paragraph should be deleted.

[16] The member investigating the substantive matter will not be shown a copy of this determination. The bundles of documents and the affidavit of the applicant have already been dealt with in the following way. The two documents at pp. 276, 278 and 279 will be folded over in the investigating member's bundle and stapled and counsel should address the member on those at the start of the meeting as to whether privilege is waived. The documents from 280 to 282 have been removed completely and sealed elsewhere. The second sentence of concern on p.362 of the bundle is blanked over. The parts of the applicants affidavit at para.116 referred to above have been blanked over.

Costs

[17] I reserve the issue of costs and these will no doubt be dealt with after the determination of the substantive matter.

Helen Doyle
Member of the Employment Relations Authority