

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2011] NZEmpC 153  
ARC 21/11**

IN THE MATTER OF            a challenge to a determination of the  
Employment Relations Authority

AND IN THE MATTER OF a challenge to objection to disclosure

BETWEEN                    ALEX WAITE BROUGHTON  
Plaintiff

AND                            MICROSOFT NEW ZEALAND  
LIMITED  
Defendant

Hearing:            By memoranda of submissions filed on 10 and 21 October 2011

Counsel:            Tony Drake, counsel for plaintiff  
Kirsty McDonald and Adam Weal, counsel for defendant

Judgment:        24 November 2011

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**INTERLOCUTORY JUDGMENT NO 3 OF CHIEF JUDGE G L COLGAN**

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[1]     Between [4] and [10] of the Court's second interlocutory judgment<sup>1</sup> delivered on 10 August 2011, I dealt with the disclosure of documents to which claims of legal professional privilege were made by the defendant. At [9] I required counsel for the defendant to confirm by memorandum into which of two categories these documents dealing with what is known as "Timeline Project Prius" fell.

[2]     The first category consisted of a strategy document sent by Ms Doherty to Ms Nash (Microsoft's Legal Human Resources Director in Singapore) after legal advice had been taken about the documents. In this category they could not, individually or collectively, attract a claim for legal or professional privilege.

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<sup>1</sup> 2011] NZEmpC 102.

[3] The second category consisted of the documents provided to the lawyers for the purpose of obtaining legal advice but in respect of which documents there was another version or versions that was or were subsequently sent to Singapore for human resources advice. The first subset of documents in this second category would be privileged but the latter would not.

[4] On 24 August 2011 the plaintiff applied on notice for an order for stay of execution of the Employment Relations Authority's determination<sup>2</sup> issued on 16 August 2011 dealing with questions of costs in the Authority, at least until the Court can determine Mr Broughton's substantive challenge to the Authority's substantive determination.<sup>3</sup> That application, supported by an affidavit filed by Mr Broughton, is opposed by the defendant. On 22 September 2011 Judge BS Travis minuted the file that if the application for stay was urgent it could be set down before a Judge but otherwise it could await the outcome of the judicial settlement conference chaired by him on Monday 21 November 2011.

[5] By memorandum dated 10 October 2011, counsel for the defendant addressed the directions in the 10 August 2011 interlocutory judgment. The essence of this memorandum is that the defendant asserts that the risk analysis component of the "Timeline Project Prius" document (pp 4 and 5 of the document) is privileged although the remainder of the document is not. The part for which privilege is asserted is said to have been prepared for the purpose of taking legal advice internally and externally although the balance (pp 1, 2, 3 and 6) is human resources and/or strategic in character.

[6] By memorandum dated 21 October 2011, counsel for the plaintiff submitted that the defendant's memorandum did not address the point that the Court directed be clarified. Mr Drake submitted, accordingly, that the Court should assume that there is not another version or versions of the document or documents which were provided to the Court for inspection and that they are, therefore, the same documents that Ms Doherty prepared and sent to Ms Nash.

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<sup>2</sup> [2011] NZERA Auckland 359.

<sup>3</sup> [2011] NZERA Auckland 73.

[7] In essence, Mr Drake submits that the defendant is not entitled to assert privilege in two of six pages of the document: he says that the whole document should be disclosed.

[8] I regret that, because of pressure of other work, I have not been able to finalise this matter before now and, in particular, because the parties were to attempt to resolve this litigation in a judicial settlement conference beginning on 21 November 2011. In these circumstances, I arranged to make available to the parties at the start of that conference a draft copy of this judgment which would not be altered as to result or reasoning when finalised. This would hopefully allow the parties to know of the decision on this question of privilege at the start of the judicial settlement conference.

[9] I conclude that pp 4 and 5 of the “Timeline Project Prius” document are not privileged. They are part of a larger document, the remaining parts of which the defendant agrees are not privileged. To the extent that those pages refer to the plaintiff, they set out a human resources/legal assessment of Mr Broughton’s possible reaction to the implementation of the project and make human resources and practical proposals for dealing with these. They do not seek legal advice about the lawfulness or unlawfulness of an intended strategy. The plaintiff is entitled to have disclosed to him, and to inspect, the “Timeline Project Prius” document in its entirety.

[10] I reserve costs.

GL Colgan  
Chief Judge

Judgment signed at 11.30 am on Thursday 24 November 2011